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WORKPLACE RELATIONS & SAFETY bulletin

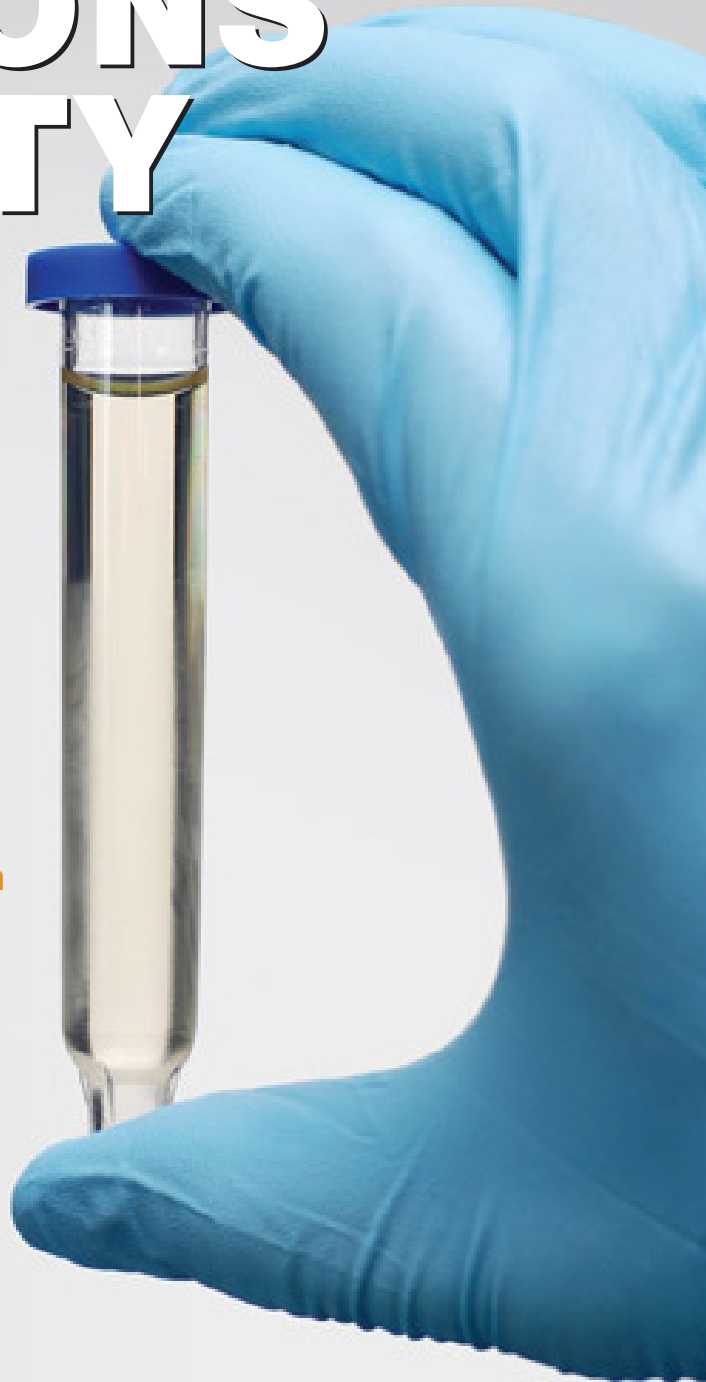
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will justify the termination or suspension
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– are you up to date?

and more...



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Superannuation reforms – are you up to date?



Natalie Gullifer | Partner, Financial Services

There are many reforms on the agenda for superannuation in Australia, some of which will affect superannuation providers, but many of which also will affect employers directly. It's important for employers to be broadly aware of what is proposed.

In this edition of the Bulletin, we bring you a feature on superannuation by Natalie Gullifer from our Financial Services team.

Natalie looks at a number of the proposed superannuation reforms, as well as some other recent developments, including:

- MySuper;
- SuperStream;
- Super Guarantee increase from 9% to 12%; and
- Super news in brief.

MySuper

“MySuper” is the government’s plan for a new, simple and cost-effective superannuation product. It will replace existing default fund arrangements where an employee does not make their own choice of a superannuation fund.¹

Timing

From 1 October 2013, all employers will generally be *required* to make contributions to a fund that offers a MySuper product for employees who have not made a choice of fund. There will be significant financial consequences for employers who do not do meet their Superannuation Guarantee (SG) requirements in this regard.

Most existing superannuation funds are starting to make plans to offer a MySuper product by 1 July 2013, so in many cases no change to an employer’s default fund arrangements will be necessary. However, employers will need to check and make sure that their current default fund or funds will remain appropriate after 1 October 2013. It is intended that APRA will maintain a list of

funds which have a MySuper product.

Enterprise agreements and modern awards

If an employer makes contributions to a fund that is nominated under an enterprise agreement or another industrial instrument that is exempt from the choice of fund requirements,² it is not yet clear what rules will apply. The government has simply said that transitional arrangements will be developed.

Fair Work Australia will review the default superannuation funds in modern awards to ensure that they offer a MySuper product. If not, the implication from the current announcements is that the relevant fund will be deleted from the modern award and replaced with another superannuation fund which does offer a MySuper product. In that case, employers would need to be aware of the changes and make sure that default SG contributions are re-directed as required to the new fund.

Exemptions and exceptions

There will be exemptions for employers who make contributions to defined benefit funds for employees with defined benefit entitlements.

Although the original idea was that there would be one MySuper product available in each fund, some flexibility has been agreed for employers who want to negotiate particular arrangements with a superannuation provider, as follows.

- As an exception to a superannuation fund’s standard set of fees for its MySuper product, employers will be able to negotiate with the fund’s trustee to obtain a discounted administration fee for their employees. This flexibility recognises that there may be administrative efficiencies in dealing with some employers that warrant a lower administration fee.
- As an exception to a fund’s standard MySuper product, an authorised fund trustee will have some flexibility to offer employers who employ more than 500 employees a MySuper product that is tailored to the needs of the particular workforce – for example, in terms of investment strategy, insurance cover and member services. The details are still to come.

SuperStream

“SuperStream” is the government’s name for a broad-ranging suite of reforms designed to enhance the so-called “back office” of superannuation.³

There is a significant interface between employers and superannuation funds in the remittance of contributions, as the first step in the back office process, and quite a number of the detailed reforms will affect employers’ processes for paying superannuation contributions. These will affect both payroll payment processes and employee reporting processes.

Superannuation reforms – are you up to date? continued...

New data and eCommerce standards

Broadly, the reforms will involve the adoption of data and e-commerce standards which are intended to result in more automated processing of contributions, including the following.

- Superannuation funds will receive information from employers about employees in a standard electronic format.
- Employers will send contributions to superannuation funds in a standard electronic format.
- Employees will have contribution payments allocated to their superannuation fund accounts more quickly.

Timing

In terms of timing for the new processes to become compulsory, the government has recognised a distinction between “large and medium” and “small” employers (the terms of which are still to be defined).

For large and medium employers, the data standards and use of e-commerce will become optional from July 2013, and compulsory from July 2014. For small employers, it is proposed that the requirements will become compulsory from July 2015, but this is subject to further consultation on the impact of the changes.

Improved employee communication

A final aspect of the SuperStream proposals of interest to employers involves the communication of regular information to employees on their employer’s superannuation contributions. Under the present law, the government has stated that employees do not always receive “good or timely information” on their employer’s contributions.

Under a package of reforms related to SuperStream but badged as “Securing Super”, the government plans to legislate to improve the information that employees receive, as follows.

- From 1 July 2012, employers will be required to report on payslips an “expected payment on or before” date, in addition to reporting an employee’s entitlements to superannuation which have accrued during the pay period.

The “expected payment on or before” date may be the date on which quarterly SG contributions are due, or another date which may be required under a workplace agreement or award.

- From 1 July 2013, employer payslip reporting will also need to report actual contributions paid (rather than just accrued contributions), including the details of the fund to which the contributions have been paid.

To complete the flow of information to employees and allow them to verify the contribution information received from employers, superannuation funds will then issue employees with regular statements on whether they have received any superannuation contributions for the relevant period.

Increase in SG from 9% to 12%

Historic legislation was introduced into Parliament on 2 November 2011 to increase the level of Superannuation Guarantee (SG) contributions from 9% to 12%.⁴

In addition to increasing the level of SG contributions to 12%, the Bill also proposes to remove the age limit on SG contributions (presently, SG is not required for an employee who is aged 70 or more).

Each of these measures is intended to commence on 1 July 2013.

The following table indicates the schedule of increases in the level of SG contributions each year, starting with a 0.25% increase on 1 July 2013 and reaching the 12% level by 1 July 2019.

| Year | Charge percentage |
|---------------------------------------|-------------------|
| Year starting on 1 July 2013 | 9.25 |
| Year starting on 1 July 2014 | 9.5 |
| Year starting on 1 July 2015 | 10 |
| Year starting on 1 July 2016 | 10.5 |
| Year starting on 1 July 2017 | 11 |
| Year starting on 1 July 2018 | 11.5 |
| Year starting on or after 1 July 2019 | 12 |

To avoid a “Superannuation Guarantee Shortfall”, employers must make superannuation contributions by the required time each quarter, calculated at the correct charge percentage multiplied by each employee’s ordinary time earnings.

If the legislation is passed, employers will need to make sure that their payroll systems are configured to remit the increased contributions to each employee’s superannuation fund. Any implications for employment agreements and remuneration packages will also need to be considered.

Employers who contribute to defined benefit superannuation funds may need to seek particular advice about the implications for them.

Bottom line for employers

Employers should be aware that by 1 October 2013, Superannuation Guarantee contributions can generally only go to a “MySuper” product or to a fund specifically chosen by the employee. All existing arrangements will need to be checked around mid-2013 to ensure that compliance with the new rules is on track.

Employers should also get prepared for new processes and employee communication requirements (starting as early as 1 July 2012 under the SuperStream reforms) and start thinking about how the increased level of Superannuation Guarantee contributions will affect remuneration packages from 1 July 2013.

1 The government’s proposals in relation to MySuper are set out in the “Stronger Super Information Pack” dated 21 September 2011. The first Bill containing the “core provisions” in relation to MySuper was introduced into Parliament on 3 November 2011: *Superannuation Legislation Amendment (MySuper Core Provisions) Bill 2011*.

2 Under section 32C(6) of the *Superannuation Guarantee (Administration) Act 1992*, there is an exemption from the choice of fund requirements for certain types of agreements.

3 The government’s proposals in relation to Stronger Super are set out in the “Stronger Super Information Pack” dated 21 September 2011.

4 The *Superannuation Guarantee (Administration) Amendment Bill 2011* passed the House of Representatives on 23 November 2011, and is now before the Senate.

Super news in brief



Following are some ‘odds and ends’ in relation to recent developments affecting employers in connection with superannuation obligations.

Directors to be personally liable for unpaid SG

Proposals have recently been considered in Parliament to make company directors personally liable if the company has not paid Superannuation Guarantee (SG) contributions for its employees. This is intended to guard against “phoenix company” activities, where such companies build up debt, become insolvent, liquidate their debts and then continue the business through a new company that will eventually go through the same process. According to a Parliamentary report,¹ millions of dollars of employees’ superannuation is lost every year through this practice.

Legislation was introduced, but the relevant aspects have been deferred, pending further consideration as to how phoenix operators can be better targeted and whether the defences in the proposed legislation should be expanded (for example, to try and ensure that innocent directors acting in good faith would not be caught up in the new provisions).

SG legislation High Court challenge fails

A High Court decision² has confirmed that the SG legislation is constitutionally valid as a tax. This ends a long-running background debate about the validity of the SG regime. Roy Morgan Research had made an appeal to the High Court arguing that the *Superannuation Guarantee (Administration) Act*

1992 and the *Superannuation Guarantee Charge Act 1992* were unconstitutional. It argued that the superannuation guarantee charge, which is imposed on an employer who fails to provide to all employees a prescribed minimum level of superannuation, was not a tax as it was not imposed for ‘public purposes’ but rather conferred a ‘private and direct benefit’ on employees of those employers who pay the charge.

However, the High Court held that the superannuation guarantee charge is a tax and, accordingly, Roy Morgan Research’s constitutional challenge failed.

Employers may not breach duty of good faith in ceasing defined benefit superannuation arrangements

In a recent NSW Supreme Court case involving Kimberly-Clark Australia,³ (the employer) the court effectively gave its blessing to a proposal developed between the employer and the trustee of the employer’s corporate superannuation fund to close the fund’s defined benefit division and reclassify all existing employee members with defined benefits into another division providing accumulation-style benefits.

The employer had proposed an uplift in each employee’s defined benefits upon the compulsory reclassification, with the remaining surplus monies in the defined benefit division to

be used to fund a “contribution holiday” for the employer in respect of accumulation members. The employer’s proposal would not fully compensate the employees for the loss of their defined benefits into the future, but the employer had pressed the trustee to agree to the proposal as the employer’s other option was more drastic, being to simply wind-up the fund entirely.

The court found that the employer’s obligation to exercise its powers honestly and good faith would not prevent the employer from using its power under the fund’s trust deed to dissolve the fund, even if the purpose of that action was to improve its own financial position. It was relevant that the reclassification proposal would not destroy the defined benefit members’ rights in the superannuation fund, as the members would receive at least the entitlements that they would receive upon fund dissolution. The case indicates that an employer may use its powers to end defined benefit funds.

¹ House of Representatives Standing Committee on Economics “Advisory report on the Tax Laws Amendment (2011 Measures No. 8) Bill and the Pay As You Go Withholding Non-compliance Tax Bill 2011”, November 2011.

² *Roy Morgan Research Pty Ltd v FCT & Anor* [2011] HCA 35.

³ *KCA Super Pty Limited as trustee of the superannuation fund known as ‘KCA Super’* (No 2) [2011] NSWSC 1301.



#? * @!

Everybody does it, I swear!

Kyle Sandilands does it. Gordon Ramsay would probably lose the power of speech without it. Our former Prime Minister, Kevin Rudd, even dropped the s-word on national television. But, *where the bloody hell are you* supposed to draw the line between robust and inappropriate language in the workplace? And, in what circumstances may swearing justify disciplinary action, or even dismissal, for misconduct?

The answer depends on a range of factors, including the context in which the language is used, to whom it is directed, whether swearing is generally tolerated in the workplace and the existence of any policies or procedures prohibiting bad language.

Is it offensive?

First, it is important to acknowledge that societal standards about what is obscene or indecent are constantly changing. For example, while words like “damn” and “bum” may have raised eyebrows in previous decades, they are commonly used without offence in the Australian context today.

By contemporary standards, words like “sh*t” and “fu*k” may also be acceptable in the public arena, as Magistrate Helipern of the NSW Local Court has explained:

*“The word fu*k is extremely common place now and has lost much of its punch... In court I am regularly confronted by witnesses who seem physically unable to speak without using the word in every sentence ... I have had witnesses who when asked their name answer ‘John fu*king Smith’. ... In short, one would have to live in an excessively cloistered existence not to come into regular contact with the word and not to have become somewhat immune to its suggested previously legally offensive status.”¹*

Despite certain words gaining acceptance in the public arena, they may still cause offence in the workplace depending on how they are used. Context is critical. For example, there is a relevant difference between muttering “fu*k” as opposed to telling a colleague to “fu*k off”, or calling them a “fu*kwit”.

This was highlighted by Commissioner Kenner of the Western Australian Industrial Relations Commission in the case of *Leahy v. Liquor, Hospitality and*

Miscellaneous Union.² In that case, Leahy, a union organizer, called a junior employee an “arse-licker” for sitting next to a senior union official during an offsite conference. Unsurprisingly, the Commissioner found that it was inappropriate for a senior employee to address a junior employee in that manner. The Commissioner also noted that “[h]ow words and language are used and to whom it is addressed and in what setting can be critical as to meaning and effect”.

Context was also crucially important in *Webster v Mercury Colleges Pty Ltd*.³ In that case, an ESL teacher sacked for delivering a lesson about the word “fu*k”, was found to have been unfairly dismissed. Although Senior Deputy President Drake held that Mr Webster’s use of “profanity” during a classroom lesson gave rise to a valid reason for the dismissal, in weighing up whether the dismissal was harsh, unjust or unreasonable, she also took into account the relevant circumstances, including the age of the students and the context in which the word “fu*k” was taught.

Is it tolerated?

Where there is a culture of swearing in a particular workplace, the employer must tread more carefully in its disciplinary response to bad language.

For example, in *Dalziel v Bilfinger Berger Services (Australia) Pty Limited*,⁴ Fair Work Australia reinstated a construction worker who was unfairly dismissed for swearing at his project manager. Commissioner Smith held that the employee’s language – which included the words “fu*k” and “fu*king” – did not give rise to a valid reason for the dismissal because, as one witness aptly put it, “it’s a construction site mate. Swearing is everyday language”. The circumstances giving rise to the heated discussion, which related to safety concerns, were also considered relevant.

Is it against company policy?

Employers with policies about conduct and behaviour will have a stronger basis for dismissing an employee for swearing, even if low-level swearing is sometimes tolerated. In *Leadbetter v Qantas Airways Limited*⁵ the employer, Qantas, conceded that there was a culture of swearing in its workplace. Nonetheless, the AIRC agreed that the employee went beyond the bounds of acceptability when he addressed a colleague as a “fu*king pommie c***”. The AIRC held that “The language as used was directed personally to an individual and was demonstratively abusive [and]... also in direct violation of the Qantas Standards of Conduct”, therefore giving rise to a valid reason for the dismissal.

Bottom line for employers

Workplace swearing is problematic because it gives rise to legal risks, such as bullying, harassment and unlawful discrimination. It is also important to remember that, in any organisation, different employees will have different views about what is and is not acceptable language. For these reasons, employers should have policies about appropriate standards of conduct which are sufficiently broad to capture swearing and other offensive language. In order to be effective, employers should also enforce those policies consistently to ensure that an intolerable culture of workplace swearing is not allowed to develop.

1 *Police v Butler* [2003] NSWLC 2 as cited by Leaver, “Swear like a Victorian” 2011 ALTLJ 36(3).

2 [2009] WAIR 00580.

3 [2011] FWA 1807.

4 [2010] FWA 1129.

5 [2009] AIRC 131.



Access to unfair dismissal remedies for managerial employees

To access remedies for unfair dismissal under the *Fair Work Act 2009* (Cth) (**Act**), an employee must be either earning less than the statutory cap (currently \$118,100 excluding superannuation) or be “covered” by a modern award or enterprise agreement.

There has been some confusion about whether managerial employees who earn more than the statutory cap are covered by modern awards. Managerial employees’ job descriptions and the tasks they perform will often fit within particular classifications under an award. However, two recent cases with different outcomes have emphasised the importance of a close reading of the award in question, and that the test for coverage is the “principal purpose” of the employee’s employment.

Gray v Hamilton James Bruce¹

Facts

Michelle Gray (**Gray**) was the General Manager of the Brisbane office of a national recruitment company, with an annual salary of about \$160,000. She was responsible for:

- checking financial performance against targets, and initiating and guiding staff action to improve performance;
- authorising business-related expenses up to \$1000;
- coaching, training, mentoring, counselling and disciplining staff;
- business development, including assisting with bids, tenders and pitches for work; and
- office management.

After her employment was terminated, Gray applied to Fair Work Australia (**FWA**) for an unfair dismissal remedy. Her application was dismissed by Senior Deputy President Kaufman on the basis that she did not have statutory protection from unfair dismissal, specifically, that she was not covered by

the *Clerks—Private Sector Award 2010* (**Clerks Award**). Gray then appealed to the Full Bench of FWA.

Decision

The Full Bench held that SDP Kaufman had been correct in applying the “principal purpose test”. This test requires a comparison of what the employee was principally employed to do, against the terms of the relevant award.

In applying the test, the Full Bench held that a reference to the Diploma in Front Line Management in the Level 5 classification of the Clerks Award did not imply that all “managers” would be covered. The Full Bench noted SDP Kaufman’s finding that, in any event, Gray’s functions went significantly above and beyond those of a Level 5 classification.



Access to unfair dismissal remedies for managerial employees continued...

Cubillo v North Australian Aboriginal Family Violence Legal Service²

Facts

In this case, Commissioner Deegan was asked to decide whether Ms Cubillo (**Cubillo**), Chief Executive Officer of the North Australian Aboriginal Family Violence Legal Service (**Employer**) was covered by the *Social, Community, Home Care and Disability Services Industry Award (SS Award)* at the time of her termination, and therefore “protected from unfair dismissal” under the Act.

It was the Employer’s case that the “principal purpose” of Cubillo’s employment was a managerial one, and therefore, according to prior cases, that should be the end of the matter. It also submitted that:

- Cubillo did not have a “hands on” or “direct” involvement in the scope of work as contemplated by the SS Award; and
- express provisions in Cubillo’s employment contract concerning hours of work and redundancy indicated that she was not covered by the SS Award.

It was Cubillo’s case that the fact that she exercised managerial responsibility

did not disentitle her to the protection of the SS Award. Cubillo argued that:

- the coverage clause of the SS Award evidenced a clear intention to cover all employees employed in the community services sector in the classifications listed in the SS Award’s schedules;
- several of the SS Award’s classifications expressly required the exercise of managerial responsibility;
- the Employer’s arguments based on her employment contract had no relevance because parties could not “contract out” of the SS Award; and
- that fact that the level 8 (the highest) classification envisages broad direction from “senior officers” does not mean she was not covered, since the term “officers” was intended to mean a board of directors and/or a chairperson.

Decision

Commissioner Deegan stated that in order to determine whether Cubillo was covered by the SS Award, it was necessary to analyse the terms of the SS Award and undertake an analysis of her role and duties. The Commissioner stated that with “*some awards it is clear that management roles are excluded. In this award, however, management roles are clearly included*”.

Noting that the employment contract was of little assistance in determining Cubillo’s Award status, Commissioner Deegan instead turned to the history of the making of the SS Award, the upshot of which being that no exclusion for senior managers had been approved in respect of this award.

As a result, Commissioner Deegan found that “*the history surrounding the making of this modern award indicates that it was intended to cover managerial positions in the social and community services sector of the type occupied by the Applicant*”. Cubillo was therefore found to be covered.

Bottom line for employers

It is important to know whether modern awards cover your employees. The test for coverage is whether an employee is engaged wholly or principally in work that falls within the coverage, definition and interpretation clauses of a relevant modern award. Every award differs, and needs to be considered on its own terms.

1 [2011] FWA 6884.

2 [2011] FWA 6818.



Employee or independent contractor?

(If it looks like a duck, swims like a duck, and quacks like a duck....)

In recent years, the issue of whether an individual is considered an employee or independent contractor has increasingly come to the attention of courts and tribunals. In our Winter 2011 Bulletin, we reported on the decision in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*¹ (**On Call**). Since then, there have been further significant decisions issued by the courts.

In each case, it is clear that the courts will look beyond the terms of any contractual agreement to the actual substance of the relationship between the parties in order to determine whether an individual is an employee or a contractor. However, the test of whether an individual is an employee works both ways. This is reflected in the Victorian Court of Appeal decision in *Elazac Pty Ltd v Shirreff*² (**Elazac**), which overturned a ruling where \$900,000 was awarded to an injured electrician after finding that he was, in fact, an independent contractor.

The Court held that the “most significant feature” of the case was the electrician’s employment of his own workers. Further, the electrician considered himself to be self-employed and everything he did in the course of his work suggested that this was so. For example, he could determine who he employed and where they worked; he provided services for more than one company; and the companies for whom he performed work did not deduct taxation from his pay, nor provide him with any form of leave.

By contrast, in another recent case,³ Justice Perram of the Federal Court found that five former sales agents of the US-incorporated Combined Insurance Company of Australia (**Combined**) were employees, despite the fact that the agents operated under written contracts which stated specifically that they were independent contractors.

The agents worked for commissions and issued Combined with tax invoices for services provided. However, they were solely contracted to and trained by Combined, and were under the company’s “practical control”.

Combined claimed that the agents were not employees because they had signed contracts stating that they were independent contractors. In finding

that all five agents were employees, not independent contractors, Justice Perram emphasised that the issue of whether to characterise a person as an employee or independent contractor is fundamentally rooted in the difference between a person who serves his employer in the employer’s business and a person who carries on a trade or business of his own. That difference is determined, not just by the terms of any contractual agreement, but also by considering the true nature of the relationship that exists between the two parties.

A number of non-exhaustive factors (called “indicia”) have been developed over time to shed light on the nature of that relationship, including:

- whether tax is deducted and holiday pay or long service leave or superannuation paid;
- whether sub-contracting is permitted;
- whether the person engaged employs employees and/or conducts his business in partnership;
- whether tools are supplied;
- the extent of control or the right to control the individual; and
- whether the contractor has goodwill in the business.

Bottom line for employers

As shown by the On Call and Combined decisions, the task of distinguishing between employees and independent contractors is far from being an exact science. Yet making the correct distinction is critical in light of the liabilities an employer can potentially face as a result.

These liabilities include:

- (a) vicarious liability for negligence;
- (b) liability for breaches of duty of care; and

- (c) back-payment of wages and leave entitlements.

The crux of the distinction lies in a holistic analysis of the true nature of the relationship. While contractual descriptions and control are still critical, it is important to be aware that these are not the only relevant factors to consider when seeking to engage in a contractor relationship, and that substance will prevail over form.

In other words, the court will always look at the true nature of the relationship, rather than the terms of any contract, in deciding whether a person is an employee or contractor. As Justice Gray eloquently stated in determining whether truck drivers who supplied their own vehicles were contractors or employees:⁴ “*The parties cannot create something which has every feature of a rooster but call it a duck and insist that everybody else recognise it as a duck.*”

As the case of Elazac shows, the test can work both ways. In situations where the contractor

- employs employees;
- ensures his tax and financial documentation discloses the operation of a business;
- is able to determine who to employ;
- works for other organisations; and
- controls how the relevant work is performed,⁵

this will strongly point to the existence of a contractor relationship.

1 [2011] FCA 366. See our Winter 2011 Workplace Relations and Safety Bulletin at 1-2 for an overview.

2 [2011] VSCA 405.

3 [2011] FCA 1204.

4 *Re Porter: ex parte TWU (1989)*, 34 IR 179 at 184.

5 *Ibid* at [36].

industrial relations

TERMINATED

SUSPENDED

Only “exceptional circumstances” will justify the termination or suspension of protected industrial action

Despite the recent high profile decision to terminate industrial action at Qantas, Fair Work Australia (FWA) has, in another case, made it clear that protected industrial action will only be suspended or terminated where it is proved that the industrial action will result in “exceptional harm” to the affected industry or national economy.¹

The facts

Following a breakdown in talks over a new enterprise agreement, workers at Toyota’s Altona plant took protected industrial action in the form of a 24 hour strike and voted to conduct three further 24-hour strikes in weekly intervals during September 2011, as well as an overtime ban.

Toyota brought an application under section 424 of the *Fair Work Act 2009* (Cth) (**FW Act**) seeking a two-month suspension of the industrial action. This section provides that FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement if it is satisfied that the industrial action is threatening the health, safety or welfare of a significant part of the population, or would cause significant damage to the Australian economy or an important part of it.

In support of its application, Toyota argued that the stoppages would:

- cause major production delays which in turn would cause significant economic loss;
- damage the company’s reputation and lead to a loss of customers;
- cause economic harm to Toyota’s suppliers and their employees; and
- cause Toyota Head Office to lose confidence in the Australian entity which would jeopardise potential capital investments in the future.

Decision

Commissioner Roe declined to order a suspension of the protected action, finding that Toyota had failed to establish that the action would:

- damage the health, safety or welfare of the population; or
- cause significant damage to Toyota, its suppliers, or the wider automotive industry.

The Commissioner considered the expression “significant damage” within the FW Act and found that it should be interpreted as harm that is above and beyond the sort of loss, inconvenience or delay that is a common consequence of industrial action.

While the Commissioner acknowledged that the industrial action, if taken, would likely cause Toyota and its suppliers significant economic loss, he found that the “degree and nature of the harm” to Toyota, its suppliers and the automotive industry was not exceptional enough to justify the order.

The Commissioner found that if the planned action was to involve lengthy stoppages over prolonged periods “significant harm” to the automotive industry would be more easily established. However, he was not satisfied that four days of lost production and an overtime ban would cause harm to the economy that could be considered sufficiently outside the usual consequences of industrial action.


Bottom line for employers

This case demonstrates the high benchmark for employers seeking to have industrial action terminated or suspended. Employers must establish that the nature of the threatened harm is “exceptional” before termination or suspension orders will be granted – economic loss or delay will not be sufficient if it can be considered an ordinary consequence of industrial action.

The dramatic and highly publicised Qantas decision provides an example of the exceptional circumstances required. In that case an order of termination was granted only after the significant harm of the grounding of the Qantas fleet would have on the aviation and tourism industries – estimated as contributing 2.6% to the GDP – was successfully established.

This decision reminds employers that they can not expect FWA to make termination or suspension orders against employees unless they can prove the harm threatened will result in “exceptional” damage to the economy – an onerous standard to meet.

¹ *Toyota Motor Corporation Australia Limited v AMWU and CEPU* [2011] FWA 6268.



Take it or leave it! Differing views on the pre-payment of annual leave

Two recent cases have considered the legality of the pre-payment of statutory leave entitlements, with conflicting outcomes.

Fair Work Australia approach

In the case of *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti*,¹ Senior Deputy President O'Callaghan's decision to refuse the approval of an enterprise agreement (**Agreement**) was appealed to the Full Bench of Fair Work Australia (**FWA**).

The clause that concerned Senior Deputy President O'Callaghan incorporated annual leave entitlements into the hourly rate of pay, while allowing employees to take annual leave which would be unpaid. Senior Deputy President O'Callaghan found that the Agreement excluded an entitlement under the National Employment Standards (**NES**) because it amounted to cashing out leave in a way that did not comply with sections 92 and 93 of the **Fair Work Act 2009** (Cth) (**FW Act**).

Mr Warren, the employer bargaining representative of Hull-Moody, and Mr Sidotti, the employee representative, argued that the Agreement contained an original, but lawful, approach to paying annual leave entitlements and did not contravene the NES. They submitted that Senior Deputy President O'Callaghan had applied a traditional (but not mandatory) requirement that payment and leave must be taken at the same time, however, there was no such prescription or preclusion in the FW Act provided the benefit of leave was still granted.

Mr Warren and Mr Sidotti submitted that the arrangements in the Agreement did not amount to "cashing out", as it merely allowed Hull-Moody to pay employees in advance and in full for a period of annual leave that they would be required to take.

The FWA Full Bench found in favour of Mr Warren and Mr Sidotti, agreeing that the clause did not amount to the cashing out of annual leave because the payments would be distributed with regular wages and would not extinguish the leave entitlement under the NES. The Full Bench found that there was no obligation to make an annual leave payment at a particular time, and that it was not up to FWA to dictate how an employer conducted their leave arrangements. Accordingly, the appeal was granted.

Federal Court approach

In the case of *Constructions Forestry Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd*² the Federal Court was asked to consider whether an additional payment of 1.5 hours per week in lieu of paid personal leave amounted to an unlawful "cashing out" in breach of the FW Act.

Jeld-Wen paid one of its employees, Mr de Thierry, an additional 1.5 hours' pay each week, in accordance with a term of his pre-reform Australian Workplace Agreement (**Agreement**). The Agreement provided that this additional payment was in satisfaction of Mr de Thierry's full entitlement to paid personal leave, but that "absences will be without pay as the payment is made each week".

Contrary to the FWA decision, Justice Gray found that the additional weekly payment did amount to a "cashing out" of personal leave, in circumstances where none of the cashing out provisions in the FW Act were satisfied. His Honour therefore held that Jeld-Wen could not substitute a monetary payment, whether in weekly parts or otherwise, for Mr de Thierry's entitlement to take paid personal leave. The relevant clause of the Agreement was therefore found to be unenforceable.

Despite his Honour's findings, the application brought against Jeld-Wen was ultimately dismissed as Mr de Thierry had not sought to take any personal leave during the relevant period and, therefore, Jeld-Wen had not failed to make him a payment in respect of such leave. Accordingly, while the cashing out clause in the Agreement was found to be unenforceable, Jeld-Wen had not actually contravened the FW Act.

Bottom line for employers

Although the FWA case related to a pre-payment of annual leave and the Federal Court case related to a pre-payment of personal leave, the general law relating to the "cashing out" of NES leave entitlements is a common theme in these two cases, with very different outcomes.

According to FWA, in certain circumstances an enterprise agreement can allow for employees to have an annual leave entitlement incorporated into their hourly rate of pay and for the employees to then take unpaid leave. Conversely, Justice Gray's decision raises the possibility that employers who follow the FWA Full Bench decision may be exposed to possible breaches of the FW Act, if any payments are made in lieu of either annual leave or personal leave, other than in strict accordance with the cashing out provisions in the FW Act.

Accordingly, any payments in lieu of statutory leave entitlements made other than at the time when the leave is taken should be treated with extreme caution by employers.

1 [2011] FWA 6709.

2 [2012] FCA 45.

anti-discrimination



Employment contracts: follow procedure but don't be “unkind”

A recent Victorian Civil and Administrative Tribunal (VCAT) decision¹ has highlighted that an employer must take an employee's personal circumstances into consideration when enforcing the terms of the employee's contract of employment.

The facts

Mr Capes was employed by Nissan in April 2005 as a senior engineer in the company's Parts and Accessories Group. As a result of a restructure, which included merging the Parts and Accessories Group and the Services and Accessories Group, Mr Capes was provided with a new employment contract in April 2009 for the role of senior engineer in the newly merged group.

Mr Capes' new role demanded 100% adherence to the new roster times of 7am to 7pm. In his previous role as a senior engineer in the Parts and Accessories Group, Mr Capes had worked from 8.30am to 5.00pm.

Mr Capes has two disabled children. He claimed that he required flexible working hours in order to care for his children.

After failing to adhere to his roster on numerous occasions, Nissan issued Mr Capes with a performance development plan in March 2010. Mr Capes subsequently did not attend work from 1 April 2010 until 3 June 2010 for reasons of ill health caused by anxiety as a result of the performance management process. Mr Capes alleged that the performance plan had been a guise by Nissan to “get rid of him”.

When Mr Capes returned from leave in early June, he lodged a complaint against Nissan for unlawful

discrimination. He also claimed that his role had been made redundant by the restructure, which led him to leave his employment with Nissan. He requested a severance payment and notice to be worked out or paid on the basis that he had been made redundant.

Decision

VCAT found that Mr Capes did not resign due to discrimination by Nissan, but because he considered that his position had been made redundant and his new position was unsuitable. VCAT did not rule on the redundancy issue itself, and noted that Mr Capes was pursuing a redundancy claim in another forum. However, VCAT did agree that, although Nissan had good reason to institute the performance development plan and had been following internal procedures, it had acted harshly in its treatment of Mr Capes.

VCAT found Nissan's insistence on 100% compliance with the roster troubling, particularly given Mr Capes had made it clear that due to his family responsibilities, he could not guarantee strict compliance. It also noted that there was no evidence to suggest any other employees were expected to have 100% compliance with the roster.

VCAT Senior Member Megay was concerned that Nissan's HR department had made no suggestions to Mr Capes about how he might structure his hours

of work despite Nissan claiming to have a reasonably flexible attitude to work time, commenting that “*whilst this might not have been unlawful, it was certainly unkind*”.

VCAT ultimately found that Nissan had breached section 9 of the *Victorian Equal Opportunity Act 1995* by unreasonably refusing to accommodate Mr Capes' parental and carer responsibilities and was therefore liable to compensate Mr Capes' for his pain and suffering.

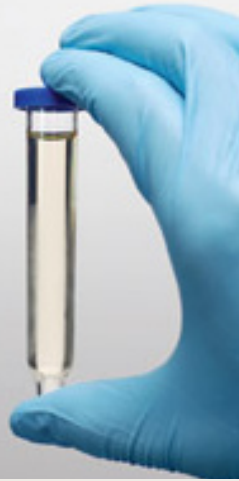
However, Mr Capes was not entitled to damages for lost earnings, as any loss of earnings flowed from his resignation and decision to pursue a redundancy claim, as opposed to discrimination by Nissan.

Bottom line for employers

- A “one size fits all” approach to the operation of contractual terms may not always be appropriate. Employers must take an employee's personal circumstances into consideration when disciplining them for non-compliance with their employment contract.
- Technical compliance with internal procedures will not protect an employer from a finding that it has acted harshly against an employee.

¹ *Capes v Nissan Motor Co. (Australia) Pty Ltd* [2011] VCAT 1162

Drugs and alcohol in the workplace: An update



The introduction of mandatory random drug and alcohol testing was recently characterised by the Full Bench of Fair Work Australia as a “reasonable employer instruction”, in the context of occupational health and safety issues surrounding drug and alcohol use in the construction industry.¹

The decision follows the 2009 decision *Caltex Australia Limited v Australian Institute of Marine and Power Engineers, The Sydney Branch; The Australian Workers’ Union*² where Fair Work Australia held that the introduction of random drug and alcohol testing at a refinery was justifiable, due to the “potentially hazardous nature of the work” and the “unique set of safety and environmental risks.”

The decision does not mean that compulsory drug and alcohol testing will be acceptable in all workplaces. Testing regimes are more likely to be permitted in industries where the consequences of an employee being under the influence of drugs and alcohol while at work pose a significant risk to workplace safety.

The *Occupational Health and Safety Act 2004* (Vic), requires employers to take positive steps to provide and maintain a safe working environment. Therefore, compulsory drug and alcohol testing is likely to be permitted in workplaces where an employer can demonstrate that it is a workplace safety issue.

Once such a policy has been implemented, it is important that it is followed. In *Daley v GWA Group t/a Dux Hot Water*,³ a trades assistant was dismissed after a random test showed his blood alcohol level to be almost four times the prescribed 0.02 limit. The policy provided for dismissal as a consequence of returning three positive tests. FWA therefore held that dismissal after one positive result was not in line with the policy and ordered the reinstatement of the trades assistant.

Drug and alcohol testing

In a recent decision, Fair Work Australia upheld a mining company’s right to take urine samples from employees to screen for drug and alcohol use, despite objections from a union.⁴

The union claimed urine testing for drug use was a breach of privacy and returned misleading results. The union argued that actual impairment from THC, the psychoactive compound in cannabis, lasted for hours rather than days, however, urine testing detected THC days after use when the user was no longer impaired. The union submitted that saliva testing was the appropriate form of test.

FWA ruled that an employer was not obliged to switch from urine tests to saliva tests, finding that it was “eminently reasonable” for the employer to continue conducting urine tests. The tribunal held that there were “compelling rational reasons for regarding saliva testing as less effective than urine testing” and, given the “onerous health and safety obligations faced by mining companies”, it was reasonable to require employees to undertake the more reliable form of testing.

In a similar case⁵ the NSW Industrial Commission held that it was appropriate to require contract truck drivers to undertake random urine tests. The Transport Workers Union opposed urine sampling, arguing that testing through saliva swabs, was less intrusive and more convenient. The Commission noted that while neither method of testing produces completely reliable data

for detecting drug related impairment, urine testing was the most appropriate way for a transport company to test its drivers for alcohol and drug impairment.

Bottom line for employers

Employers who want to introduce drug and alcohol testing in their workplaces will need to ensure that any policy for drug and alcohol testing:

- (a) is written in clear and understandable terms, setting out the employer’s expectations and the employee’s obligations;
- (b) includes appropriate safeguards to prevent the potential for victimisation by ensuring that the methods for selecting individuals for testing are fair, reasonable and non-discriminatory;
- (c) protects employee’s privacy;
- (d) provides for fair and reasonable treatment of employees who are alleged to have breached the drug and alcohol policy; and
- (e) is used as a prevention and rehabilitation tool, rather than a sanction.

1 *Wagstaff Piling Pty Ltd and Another v Construction, Forestry, Mining and Energy Union* [2011] FWAFB 6892 (7 October 2011).

2 [2009] FWA 424 (19 October 2009).

3 [2011] FWA 6993 (13 October 2011).

4 *CFMEU v HWE Mining Pty Limited* [2011] FWA 8288 (20 November 2011).

5 *Holcim (Australia) Pty Limited v Transport Workers’ Union of New South Wales* [2010] NSWIRComm 1068 (23 December 2010).

occupational health & safety

Striking a balance with flexible working arrangements



All Australian health and safety legislation requires employers to provide a workplace that is, as far as reasonably practicable, safe and without risks to employees' health. This duty may extend to employees working from home.

A recent workers' compensation case has highlighted practical issues for employers in relation to employees working from home.

Potential Liability

It is accepted that employees working from home can successfully make workers' compensation claims. In the Victorian Supreme Court case of *Van Oosterom*,¹ an insurance agent working from home was held to be acting "within the course of his employment" and was eligible to bring a workers' compensation claim for an injury he suffered while working at home.

Further, in a recent case, Telstra was found to be liable for injuries sustained by an employee as a result of falling while working at home.²

Telstra employee Dale Hargreaves had an agreement with Telstra to work two days from home each week. Telstra provided computers, cabling and

other equipment to her in her home to facilitate this arrangement. In August and October 2006, Ms Hargreaves injured her shoulder after falling down the stairs in her home while taking a break from work. The injury from the second fall required surgery and Ms Hargreaves later developed depression and anxiety, for which she also claimed compensation.

Telstra denied liability on the basis that the injuries did not arise out of, or in the course of, Ms Hargreaves' employment.

The Administrative Appeals Tribunal disagreed with Telstra and found that the incapacity and impairment Ms Hargreaves suffered as a result of her injuries was sustained in the course of her employment. The injuries were therefore compensable under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Telstra was ordered to pay compensation for medical expenses and lost income.

Bottom line for employers

This case highlights that injuries occurring at home while an employee is working will fall within the scope of the workers compensation system. However, employers should take steps to reduce the likelihood of injuries occurring.

Employers must be clear about working from home arrangements to ensure that all work related activities are carried out in accordance with relevant workplace health and safety requirements.

Employers who have employees working from home should have a "Working From Home Policy" which clearly sets the obligations, requirements and expectations regarding the arrangement.

¹ *Van Oosterom v Australian Metropolitan Life Assurance Co Ltd* [1960] VR 507.

² *Hargreaves v Telstra Corporation Limited* [2011] AATA 417.

OHS harmonisation – the state of the nation

Hopes for the commencement of nationally harmonised health and safety laws on 1 January 2012 have been dashed.

Only New South Wales, Queensland, the Australian Capital Territory, the Northern Territory and the Commonwealth have passed the model laws with a commencement date of 1 January 2012.

Victoria, Western Australia and Tasmania have indicated that the harmonised laws are unlikely to commence until 2013.

The South Australian Parliament has adjourned debate on the passage of the model Work, Health and Safety Bill until 14 February 2012.

The "staged" introduction of the harmonised legislation will provide challenges for businesses, particularly those that operate in a jurisdiction where the legislation has not commenced, but supply products arising from that business into a jurisdiction that is operating under the harmonised laws.

The *Work Health and Safety Act 2011* places broad upstream duties on designers, manufacturers and suppliers. Businesses that operate in this way are advised to

determine if any of these "upstream" duties will apply to their operations.

In preparation for the commencement in those States that have passed the legislation, Safe Work Australia has published the following Codes of Practice:

- Confined Spaces
- Managing the Work Environment and Facilities
- How to Manage and Control Asbestos in the Workplace
- Managing Noise and Preventing Hearing Loss at Work
- Work Health and Safety Consultation, Cooperation and Coordination
- How to Manage Work Health and Safety Risks
- Managing the Risk of Falls at Workplaces

If your business is affected by these upstream duties, or for any advice about the application of the new laws and transitional arrangements please contact one of our Workplace Relations and Safety team.

In the Safety Zone



This segment is designed to show the human faces behind workplace safety, as well as giving some insight into the role of health and safety professionals. In the Safety Zone this quarter is Varni Petrovic, HSE Engineer, Health, Safety & Environment, AU/NZ / Asia Pacific with Vestas Australian Wind Technology P/L.



Vestas is a multinational corporation that designs, manufactures, sells and constructs wind turbines to generate renewable energy. Vestas employs over 23,000 employees worldwide and has a presence in 67 countries.

A typical day in the office would include: a wide range of activities such as engaging stakeholders (operations, management, and contractors), providing advice on safe systems of work or continually improving Vestas HSE systems. Other days include producing reports, incident trend analysis, progress updates and from time to time incident investigations. There is never a dull moment!

My most memorable safety moment: there are too many to mention but the one that stands out most is when I saw group of employees at an underperforming site take control of their safety and turn it around within months. They went through a self-actualisation process and started to realise what safety was really about. It was great to see individuals and teams take ownership of their health and safety responsibilities and change things for the better.

My name is... **Varni Petrovic**

My title is... **HSE Engineer, Health, Safety & Environment, AU/NZ / Asia Pacific**

I work for... **Vestas Australian Wind Technology P/L**

My greatest achievement in safety so far has been: developing and delivering behavioural safety programs that have changed the mindset of employees towards health, safety and environment. Over time I have enjoyed seeing individuals and companies adopt safety as an inner core value which has driven incident rates down. At Vestas, we believe that "people are the most critical factor in a safety effort" and recognise that positive attitudes towards health, safety and environment will lead us to a state of zero harm.

The most valuable lesson I have learned about being a safety professional: is to listen and engage the workforce at all levels when designing policy and making decisions. The workforce knowledge and experience is a priceless asset within any organisation. During my university days, my lecturers would always tell me that "I have two ears and one mouth and that I should use them in that ratio". The other most valuable lesson I have learned is understanding the commercial side of the business.

If I could send one message about safety to the Vestas Board it would be: to continue maintaining a high level of management commitment to health, safety and environment, as well as a state of constant vigilance. These are essential ingredients if we are to realise our vision of "Zero Injuries". Keep up the "Safety First" focus!

When I am not at work, I most enjoy: spending time with my fiancé, playing sports, socialising with friends and visiting a winery or two when time permits.

I am passionate about safety because: for an organisation to completely fulfil the essence of its safety culture it must remain a full time practice. You can't switch your safety consciousness off when you leave work and then turn it back on once you return to work – safety is a way of life! The challenge of creating a set of enduring values and attitudes regarding safety that are shared by every member at every level of an organisation is what drives me. And it is this challenge that keeps me passionate.

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