

# IR Bulletin

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## Editorial

Industrial relations and employment law in Australia is in something of a hiatus at present. The Federal Government has moved to amend the *Workplace Relations Act 1996* to introduce a fairness test for workplace agreements, the ALP has announced its industrial relations policy (see our May 2007 *Industrial Relations & Employment Alerts* at [www.bdw.com](http://www.bdw.com) under Publications), and the Federal election looms some time later this year.

In the meantime, life goes on. In this Bulletin we deal with a variety of important themes which will continue whatever the future legislative path may be. These include post-employment restraints in executive employment contracts, personal liability of an employee for misleading conduct, duties of good faith and confidence in an employment contract and liability of a union under the *Trade Practices Act 1974* in certain boycott situations.

We also deal with some current issues under the *Workplace Relations Act 1996* concerning validity of bargaining periods and secret ballots, unfair dismissals for operational reasons and union rights of entry.

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# Injunction to enforce restraint of trade

The Supreme Court of New South Wales issued an interlocutory injunction to stop a former employee of a security company from working for a rival company, enticing away customers and employees, or using or disclosing his former employer's confidential information: *Brink's Australia Pty Ltd v Kane* [2007] NSWSC 62 (25 January 2007).

## Background

Brink's is a security company which provides secure transport of cash and valuables (cash logistics services). Mr Kane was employed as a business development executive.

Mr Kane's service agreement contained a restraint of trade clause that prevented him from enticing away clients or employees of the company or performing substantially similar functions at another company. The restraint applied for three months after the termination of his employment. Mr Kane was also obliged not to divulge the company's confidential information.

When Mr Kane left his employment and went to work for another security company, Brink's brought an interlocutory application to enforce the restraint of trade agreement and prevent the disclosure of confidential information.

## The hearing

Since this was an interlocutory application, the relevant test for the Court was whether there was a serious question to be tried and whether the balance of convenience favoured granting an injunction until the final hearing of the matter.

The hearing was confined to affidavit evidence and there was no cross examination of witnesses.

Justice McDougall found that there was a significant body of evidence that during the last six weeks of his employment Mr Kane undertook a number of activities that were inconsistent with the express and implied obligations that he owed to Brink's. For example, before leaving

the company Mr Kane sent an email to Brink's cash logistics clients notifying them that he was going to work in a similar industry in a national role and that he would contact them in the future. There was also evidence that Mr Kane sought to entice employees of Brink's to move to his new employer. His Honour noted that much of this evidence was not contradicted.

Justice McDougall held that there was a serious question to be tried in relation to each of the following issues:

- That Mr Kane, in his role as business development manager, was the "human face" of Brink's cash logistics business.
- That Mr Kane, if not restrained, would perform substantially similar functions for his new employer. Mr Kane gave evidence that the functions he was going to perform with his new employer were different to those that he had performed for Brink's. However, this evidence was contradicted by emails between Mr Kane and his new employer.
- That Brink's and Mr Kane's new employer were in competition. There was evidence that both companies offered cash logistics services, although Brink's used armoured vehicles, and the new employer used non-armoured vehicles.
- That Mr Kane had disclosed confidential information of Brink's by providing a customer list and pricing information to his new employer. Mr Kane argued that the customer list was not confidential information and relied on evidence that Brink's had included client names in its publicly available promotional material. Justice McDougall held

## Lessons for employers

- Restraints of trade may be valid where they are reasonably necessary to prevent disclosure of confidential information gained by a former employee in the course of their employment or the exploitation of customer relationships built up by a former employee in the course of their employment.
- Customer lists and pricing information are likely to constitute confidential information if they are treated in a confidential manner within the business.
- The court may grant an interlocutory injunction where there is a serious question to be tried and the balance of convenience favours the granting of the injunction.

that such material was a long way removed from the customer list and there was clear authority that a customer list may be confidential. Mr Kane also argued that certain pricing information that he had provided to his new employer was not confidential since each customer would know the price it was paying for Brink's services.

- That Mr Kane would seek to entice customers away from Brink's unless restrained, and in doing so use confidential information that came to him in the course of and for the purposes of his employment with Brink's.

After balancing all relevant considerations, his Honour made orders enforcing the restraint of trade and preventing Mr Kane from working for his new employer for three months or until further order of the court.

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# The importance of providing proper particulars of allegations of misconduct

*In McAleer v The University of Western Australia [2007] FCA 52 (2 February 2007) Justice Siopis of the Federal Court of Australia dealt with a certified agreement requiring the provision of detailed particulars of allegations of misconduct.*

## Background

The University of Western Australia was party to a certified agreement under the *Workplace Relations Act 1996* known as the University of Western Australia Academic Staff Agreement 2004 (the 2004 Agreement), applicable to academic staff of the University.

A tenured university professor was advised by the University in December 2005 of allegations of sexual harassment being made against him. The allegations were initially considered by the University's Sexual Harassment Review Panel (SHRP), at which time the professor's solicitors complained to the University about the absence of particularity of the allegations made against the professor.

During the investigation by the SHRP, the professor was provided with affidavits of two complainants alleging conduct by the professor which occurred over the course of a number of years. The SHRP upheld the allegations against the professor and recommended that the University take further action in respect of its findings.

On 6 January 2006, the professor was advised that the allegations comprised breaches of the University's policy and that the professor was suspended without pay pending the investigation of the allegations under Schedule D of the 2004 Agreement.

Under Schedule D, a Misconduct Committee was established to investigate the allegations. Schedule D also specified that allegations of

## Lessons for employers

- Particulars of allegations against an employee must be provided in sufficient detail to enable the employee to understand the precise nature of the allegations so they can properly respond to the allegations.
- Employers should be aware of provisions in any applicable workplace agreement dealing with the provision of proper particulars. Failure to provide particulars in accordance with a workplace agreement exposes an employer to a court action for breach of the workplace agreement. In the event of a breach, a court may impose a penalty and grant an injunction restraining an employer from terminating the employment of the employee or taking other disciplinary action.





misconduct should be notified in writing and in “sufficient detail to enable the employee to understand the precise nature of the allegation(s), and to properly consider and respond to them.”

In March 2006, the University sent the professor’s solicitors a document which linked each of the allegations to numbered paragraphs in the two complainants’ affidavits which had been provided to him during the course of the SHRP investigation.

The Misconduct Committee determined it would receive the complainants’ affidavits but that it could not compel the deponents to give evidence.

In March 2006, the professor commenced proceedings in the Federal Court seeking a declaration relating to the proper interpretation of Schedule D and a declaration that the University had breached the 2004 Agreement.

In its filed defence, the University admitted it had breached the 2004 Agreement in relation to its obligation under Schedule D to give proper particulars of the allegations to the professor.

## Decision

The Federal Court found that the failure of the University to respond adequately to requests for proper particulars constituted a single breach of Schedule D of the 2004 Agreement.

Justice Siopis said that “it is a fundamental element of procedural fairness that a party should know the case which has been made against him or her, so that the person may have a fair opportunity to defend himself or herself”. Accordingly, the failure of the University to provide adequate particulars was a serious breach which was aggravated by the continued failure to provide particulars and a penalty of \$20,000 was imposed.

The Court made a declaration that the allegations of serious misconduct made against the professor as set out in the University’s letter dated 6 January 2006 were to be dealt with in accordance with Schedule D of the 2004 Agreement.

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# Bargaining periods and secret ballot orders – when will they be invalid?

The decision in *Liquor Hospitality and Miscellaneous Union – Western Australian Branch v CSBP Limited* [2007] AIRC 112 (16 February 2007) concerned an application for a protected action ballot order in relation to employees of CSBP Limited.

## Facts

A pre-reform certified agreement governing the employment of CSBP's employees in Western Australia nominally expired on 30 September 2006. The LHMU, the AMWU and the CEPU were all parties to that certified agreement.

In April 2006, negotiations commenced for a replacement agreement. Although there were protracted negotiations, no agreement was concluded between CSBP and the three unions. On 30 January 2007, the LHMU filed a notice to initiate a bargaining period. The AMWU and the CEPU submitted applications for protected action ballot orders with regard to separate bargaining periods that each had initiated with CSBP. The orders sought by the AMWU and CEPU were granted by Senior Deputy President Drake on 6 February 2007.

On 8 February 2007, the LHMU filed an application for a protected action ballot order.

## Decision

### Valid initiation of the bargaining period?

CSBP argued that the *Workplace Relations Act 1996* does not authorise a union to initiate a bargaining period in which other unions are named as negotiating parties and that, accordingly, the notice served by the LHMU did not validly initiate a bargaining period. Vice President Lawler did not agree. In any event, he found that even if CSBP's interpretation was correct, and the AMWU and the CEPU were not negotiating parties to the particular bargaining period initiated by the LHMU, the mere fact that the

notice incorrectly named parties as negotiating parties to the proceedings did not render the notice invalid.

### The validity of the ballot order

The LHMU's application for a ballot order did not include two employees at CSBP's regional depots who were members of the LHMU and who were to be covered by the proposed workplace agreement between CSBP and the LHMU. These members were excluded from participation in the ballot. The LHMU sought to amend the application to include them. CSBP argued that because the ballot order was invalid in the first place, it could not be amended.

Vice President Lawler rejected CSBP's argument. He found nothing in the Act which prohibited the filing of an application which incorrectly identified "relevant employees". Accordingly, pursuant to his power under the Act to allow amendment of documents relating to a proceeding, Vice President Lawler allowed the LHMU to amend its application to reflect the full scope of employees to be balloted.

### A genuine attempt to reach agreement?

Vice President Lawler found that:

- there had been a lengthy negotiation process underway since April 2006;
- the LHMU had evinced a preference throughout the negotiations to reach agreement with CSBP without taking protected action; and
- the LHMU had legitimate reasons after the failed negotiations to believe that it was unlikely to reach an agreement without protected action.

## Lessons for employers

Depending on the circumstances:

- A notice to initiate a bargaining period will not be rendered invalid by a mere error in the naming of negotiating parties to the proposed collective agreement.
- An application for a protected action ballot order will not be rendered invalid by a mere error in the scope of relevant employees who will participate in the ballot.
- A negotiating party may genuinely be trying to reach agreement notwithstanding the fact that it withdraws concessions or renews offers previously made. The negotiating party's position does not need to continually move "in the same direction".

In response to CSBP's arguments that the LHMU had "gone back" on issues upon which it had previously agreed, Vice President Lawler stated that genuinely trying to reach agreement does not necessarily mean that there must be "movement in the same direction" by a negotiating party. A party can withdraw or renew offers at various stages in the negotiation process.

Vice President Lawler concluded that the LHMU was not acting in bad faith and had genuinely been trying to reach an agreement with CSBP. Accordingly, Vice President Lawler determined that a ballot order should be issued and that an attendance ballot would be the most appropriate form of ballot.

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# Commission clarifies when terminations occur for operational reasons

A Full Bench of the Australian Industrial Relations Commission has found that employers do not need to consider re-deploying employees faced with termination of employment on redundancy grounds in order to take advantage of the “operational requirements” exemption to the unfair dismissal laws: *Village Cinemas v Carter* [2007] AIRC FB 35 (15 January 2007). Since this decision, a number of other decisions of the Commission have tested further the scope of the exemption. Two decisions in particular, *Cruickshank v Priceline Pty Ltd* [2007] AIRC 292 (17 April 2007) and *Owens v Whyalla Aged Care Incorporated* [2007] AIRC 245 (12 April 2007) highlight the reach of the exemption.

## Background

Section 643(8) of the *Workplace Relations Act 1996* provides that an employee is prevented from pursuing a claim that his or her dismissal was harsh, unjust or unreasonable if the employee's employment was terminated for genuine operational reasons, or for reasons that include genuine operational reasons. Various decisions of single members of the Commission during 2006 suggested that an employer needed to make an attempt to redeploy employees whose employment was terminated for genuine operational reasons before the employer could rely on the exemption in section 643(8) of the Act: see the December 2006 *IR Bulletin*, pp 8 and 9 at [www.bdw.com](http://www.bdw.com) under Publications. A Full Bench has now found this to be an incorrect approach.

## The facts in Village Cinemas

Mr Carter was the General Manager at the Village Cinema at Doncaster. His employment was terminated on redundancy grounds when Village closed the Doncaster cinema. Mr Carter's claim for unfair dismissal was resisted by Village on the basis that his termination of employment occurred for genuine operational reasons.

At the initial hearing, Village indicated that it did not have a position equivalent to general manager to offer Mr Carter. Mr Carter stated that

he was prepared to take long service leave and wait to see if an alternative position became available. He also stated that he would have accepted a position of lower status had one been offered. The Commission took these matters into account in determining that Mr Carter's employment had not been terminated for genuine operational reasons.

## The decision of the Full Bench in Village Cinemas

On appeal, Village argued that the closure of the Doncaster cinema resulted in there being no position available for a general manager. The termination of employment therefore occurred for genuine operational reasons.

Mr Carter argued that the closure of the cinema merely created the circumstances which provided a justification for the termination of his employment. He argued that the reason for the termination was the refusal by Village to allow him to take long service leave and, additionally, the failure by Village to redeploy or attempt to redeploy him to another position.

The Full Bench found in favour of Village. In doing so it examined the expression “genuine operational reasons” in section 643(8) of the Act. In construing the term, the Full Bench stated that the expression “should be given its natural meaning taking

## Lessons for employers

- An employer need not explore redeployment opportunities in order to take advantage of the exception in section 643(8) of the *Workplace Relations Act*. However, termination must occur for genuine operational reasons in order to take advantage of the exception. An employer should pay particular attention to ensuring it can prove that the operational reasons for termination are genuine and not a sham.
- It will be difficult to convince the Commission that cases involving termination of employment for misconduct should be regarded as terminations for genuine operational reasons.
- The decision in *Priceline* should not be regarded as meaning that employers will always be able to terminate the employment of employees because of the high cost of their labour. An important factor in the *Priceline* case was the financial difficulties faced by the company which led to the restructure. Furthermore, an employer who terminates the employment of any employee because of the cost of wages in circumstances where the employee is covered by an industrial instrument may contravene the freedom of association provisions contained in the *Workplace Relations Act 1996*.

into account the context in which the words are used". The context is that where termination occurs for genuine operational reasons, an application for relief from termination of employment cannot be made. The Full Bench also pointed out that the operational reason in question need only be a ground or cause for the termination of employment to occur, and that it need not be something that demands or brings about an obligation to terminate employment.

On the question of whether there might be an obligation to redeploy, the Full Bench stated that "the termination of employment of the particular employee does not have to be an unavoidable consequence of the operational reason for the limitation in section 643(8) to operate. Consequently, whether the employer could have done something other than terminating the employee's employment will generally be irrelevant in deciding whether the termination was for genuine operational reasons, or reasons that include genuine operational reasons."

On the question of Village's refusal to allow Mr Carter to take long service leave, the Full Bench said that such a refusal "did not convert what was otherwise termination of employment of a particular employee for genuine operational reasons into one that was not for such reasons".

The *Village* decision is the first decision of a Full Bench dealing with the operational requirements exemption. It provides welcome guidance on how the exemption in section 643(8) of the Act should operate.

While it seems that employers will not be required to undertake a redeployment exercise to take advantage of the exception, it should not be forgotten that any termination must occur for *genuine* operational reasons in order to take advantage of the exception. The *Village* decision may lead to the Commission paying closer attention to this element of the exception. Prudent employers ought to pay particular attention to ensuring they can prove, if necessary,

the operational reasons resulting in termination of employment are genuine and not a sham.

### **Cruickshank v Priceline Pty Ltd**

Mr Cruickshank was employed by Priceline Pty Ltd as a space planner. A new organisational structure was implemented within Priceline leading to 32 positions being declared redundant in 2006.

There were four space planner positions within Priceline. Two of the space planners earned considerably less than the other two. Mr Cruickshank was one of the higher earning space planners and was selected for redundancy on this basis. Following the termination of his employment, Mr Cruickshank saw his job advertised.

### **Was the termination of employment a sham?**

Mr Cruickshank argued that the termination of his employment was a "sham" on the basis that he was being replaced by another employee performing the same duties. He argued that the real reason for his termination was cost reduction, and not a restructure within Priceline.

Priceline argued that the termination of Mr Cruickshank's employment fell within the operational requirements exemption to the unfair dismissal laws set out in sections 643(8) and 643(9) of the *Workplace Relations Act 1996*. Priceline argued that termination arose out of a restructure which occurred because of financial difficulties affecting the company.



## The decision

Commissioner Eames accepted that Priceline terminated Mr Cruickshank's employment for operational reasons within the meaning of section 643(8) of the Act. In arriving at this finding, the Commission:

- took account of and applied the decision of the Full Bench in *Village* in which the Commission held that an operational reason need only be a ground or cause for the termination of employment. The Commission considered that the termination of Mr Cruickshank fell within the test set out in the *Village* case;
- considered that the termination of employment was not a sham, but rather resulted from a decision by Priceline to reorganise its business;
- considered other decisions of the Commission involving companies in financial difficulty and noted that terminations of employment are logical responses to operational issues and constitute genuine operational reasons; and
- noted the place of managerial prerogative when making decisions to terminate the employment of employees from companies in financial difficulty.

## Owens v Whyalla Aged Care

Ms Owens was employed as the Manager of Community Services and reported directly to the CEO. It was alleged Ms Owens bullied and harassed other staff members, one of whom subsequently resigned from employment. Following an investigation into the allegations, Whyalla Aged Care (WAC) found the allegations of bullying proven. WAC considered whether Ms Owens could be employed in another position and, finding that a position was not available, terminated the employment of Ms Owens.

### Was the termination for operational reasons?

WAC argued that Ms Owens employment was terminated for genuine operational reasons. WAC's argument was that:

- Ms Owens' role within WAC was strategically important;
- the loss of one employee because of Ms Owens' conduct and the potential loss of other employees was a genuine operational consideration; and
- it had considered whether Ms Owens was able to be placed in an alternative position within WAC but it was not able to find such a position.

On this basis, WAC submitted that the termination occurred for genuine operational reasons and that Ms Owens was prevented from pursuing a claim for unfair

dismissal because of the operation of section 643(8) of the Act.

Ms Owens' position was that the exemption in section 643(8) of the Act only applied to redundancy situations where the employer no longer required the job to be performed by anyone else as a result of changes to the requirements of the business.

## The decision

In extensive reasons for the decision, Commissioner Lewin found that WAC could not rely on the operational requirements exemption in section 643 of the Act. Commissioner Lewin held, on the facts of the case, that:

- the structure of the organisation had not changed, only the identity of the person within the structure had changed;
- the resignation or potential resignation of employees was not a reason for the termination of employment, but a consequence of the bullying behaviour;
- whether WAC could have done something other than terminating the employment (for example, re-deploying the employee) is irrelevant when determining whether the termination occurred for genuine operational reasons; and
- the true and genuine reason for the termination was misconduct comprised of bullying behaviour.

In the course of his reasons, Commissioner Lewin considered what is meant by the term "genuine" operational reasons. He found that it means "real, true and authentic". He also noted that if WAC's argument was to be successful, almost any termination for misconduct would be beyond the jurisdiction of the Commission.

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In the course of his reasons, Commissioner Lewin considered what is meant by the term "genuine" operational reasons. He found that it means "real, true and authentic".

# Can an employee be personally liable for workplace mistakes?

The High Court was recently called upon to determine whether an employee can be personally liable for his or her misleading or deceptive conduct during the course of employment: *Houghton and Another v Arms* [2006] HCA 59 (13 December 2006).

The respondent, Simon Arms, operated a website that directly marketed wine. He engaged WSA Online Ltd, of which the appellants, Mr Houghton and Mr Student, were employees, to assist with the website design and operation.

During the course of this engagement, the two employees recommended to Mr Arms an e-banking product as suitable for his business and Mr Arms acted on this advice. However, five days prior to the website launch, Mr Arms was informed by WSA that the use of the recommended e-banking product was more complicated than had been represented. As a result, Mr Arms had to change the structure of his business to that of a retailer which resulted in a financial loss over the first 12 months of trading.

Proceedings were commenced by Mr Arms in the Federal Court against WSA and the two employees alleging that they had engaged in misleading and deceptive conduct. At first instance, the Federal Court of

Australia found WSA liable but the claims against the two employees were dismissed as no independent trading or commercial interest could be imputed to them. On appeal, the Full Court of the Federal Court held both employees liable for the amount assessed against WSA pursuant to section 9 of the *Fair Trading Act 1999* (Vic), which was \$58,331.

Section 9(1) of the *Fair Trading Act* provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. It broadly replicates section 52 of the *Trade Practice Act 1974* (Cth).

The two employees appealed to the High Court claiming that section 9 of the *Fair Trading Act* did not apply as the word "person" in that section did not apply to them as employees. The two employees also contended that they were not "for themselves" acting "in" trade or commerce as distinct from acting in the trade or commerce of WSA.

The High Court dismissed the appeal. At the time the representations were made, the two employees' conduct was in the course of trade and commerce. Even though they were employees acting in the course of their employment, they were personally liable pursuant to section 9 of the *Fair Trading Act* as the reference to "person" in section 9(1) is not limited to persons as principals. It was irrelevant that the two employees were not themselves proprietors acting in pursuit of their own independent business.

In determining that the two employees were liable pursuant to the *Fair Trading Act*, the High Court examined the aim and purpose of the legislation. The *Fair*

## Lessons for employers

- The acts of an employee might be considered both a corporate act and the act of the individual as an employee.
- For the purposes of the various State and Territory fair trading legislation, individual employees can be held personally liable for misleading or deceptive conduct.

*Trading Act*, which was modelled on the *Trade Practices Act*, was designed to continue the application to individuals and partnerships of prohibitions upon misleading or deceptive practices. The main purpose of the *Fair Trading Act* includes the promotion and encouragement of "fair trading practices". To read down the word "person" in section 9(1) so as to exclude employees would not promote that object.

It was also important that Mr Arms was engaged in trade and commerce and enlisted WSA to provide services and advice for the purpose of his business. It did not matter that the two employees were not the business proprietors of WSA or that their activities were not of "their" trade or commerce. The two employees were engaged in conduct in the course of trade or commerce and were within the ambit of the *Fair Trading Act*.

This decision is of relevance in each State and Territory as fair trading legislation is common.

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# Duties of good faith and confidence in employment contracts?

The Supreme Court of New South Wales has held that common law duties of good faith and trust and confidence can be implied into an employment contract: *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* [2007] NSWSC 104 (19 February 2007).

## Facts

The case concerned Mr Russell, a choir master, whose employment with the Roman Catholic Church was terminated in 2003 as the result of a Church investigation into offences allegedly committed by Mr Russell. Mr Russell did not have a written contract of employment nor any written instrument detailing the terms and conditions of his employment with the Church.

In February 2003, Mr Russell was reinstated after successfully arguing in the NSW Industrial Relations Commission that he had been unfairly dismissed.

## Claim in the NSW Supreme Court

In February 2005, Mr Russell sought damages in the Supreme Court of New South Wales alleging breach by the Church of terms he claimed were implied into his contract of employment, namely:

- that the Church would act in good faith towards Mr Russell in and about the administration of his contract of employment; and
- that the Church would not conduct itself (without reasonable and proper cause) in a manner likely to destroy or seriously damage the relationship of confidence and trust between it and Mr Russell.

## Findings of the Court

Justice Rothman said it would be drawing too long a bow to suggest that the duties of good faith and trust and confidence were already

recognised as part of the general law relating to contracts of employment in Australia. However, he went on to consider whether in this case these terms should be implied.

## Good faith

The Court concluded that given the circumstances of this case, there being no terms and conditions of employment expressly agreed, the duty of good faith should be implied into the contract of employment between Mr Russell and the Church.

The Court concluded that, once a duty of good faith has been implied into a contract of employment, the rights and duties of the employee and employer must be exercised:

- honestly and reasonably;
- with prudence, caution and diligence; and
- with due care to avoid or minimise adverse consequences to the other party that are inconsistent with the agreed common purpose and expectations of the parties to the contract.

## Trust and confidence

The Court found that an employee must have confidence in his or her employer, and trust the capacity of the employer to give direction and conduct operations in a manner which will allow the employee to carry out the work safely and without harm. Likewise, an employer must have trust and confidence in the actions of its employees as these actions bind the employer.

## Lessons for employers

- Courts may be prepared to imply duties of good faith and mutual trust and confidence into contracts of employment.
- When taking steps that have a significant impact on an employee, an employer should consider:
  - whether the actions and decisions are being taken or made in good faith, considering the nature of the relationship with the employee; and
  - whether the actions and decisions are likely to break the trust and confidence that the employee places in the employer in carrying out work for the employer.

The Court concluded that, given this mutual trust and confidence that must exist in an employment relationship, a duty of trust and confidence is "essential to the contract of employment". This duty did not apply to the right to terminate, but rather in respect of conduct leading up to dismissal.

### Breach and damages

Having established that the duties should be implied into Mr Russell's contract of employment and the content of these duties, the Court considered the question

of whether the duties had been breached, and if so, what damages should be awarded.

Whilst the Court accepted that the Church had breached the duties having regard to its investigation of the allegations against Mr Russell, the Court did not identify any damage. This was particularly so given the earlier decision by the Commission to reinstate Mr Russell, which effectively mitigated his loss.

One novel head of damages claimed by Mr Russell was for the (substantial) cost of his unfair dismissal proceedings in the NSW

Industrial Relations Commission. The Court found, however, that allowing costs of proceedings in the Commission as a head of damages would be inconsistent with the intent of the *Industrial Relations Act 1996* (NSW) that the Commission be a no costs jurisdiction.

The circumstances in which duties of good faith and mutual trust and confidence may be implied generally into contracts of employment in Australia is yet to be considered by the High Court of Australia.

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## Termination of employment outside of Australia – do the unfair dismissal laws operate?

The Australian Industrial Relations Commission has considered the operation of section 641 of the *Workplace Relations Act 1996* which extends the termination of employment provisions to Australian-based employees even though they may have been employed outside of Australia when termination of employment took place or the termination was effected by the employer at some location outside Australia: *Noble v Barrack (Ngiugini) Limited* [2007] AIRC 195 (12 March 2007).

Mr Noble had been employed at the Porgera Goldmine in the Enga Province of Papua New Guinea. The employer, Barrack, is registered under the laws of Papua New Guinea and is not a registered foreign entity in Australia. Mr Noble claimed that the termination of his employment was harsh, unjust or unreasonable or was for a prohibited reason.

Commissioner Raffaelli concluded that the Commission did not have jurisdiction to deal with the application. He found that section 641 of the *Workplace Relations Act* brought within range an Australian-based employee who is an employee of a foreign corporation where the employee is employed outside

of Australia at the time of the termination or where the termination decision occurred outside of Australia. He considered that they did not, however, displace the requirement that the employee's primary place of work must be in Australia.

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### Lessons for employers

- To be within the unfair dismissal jurisdiction the employee must be Australian-based but some aspects of the employment or its termination may have non-Australian dimensions.



# Trade practices accessory liability – can it apply to unions?

In a case involving the Australian Competition and Consumer Commission and IPM Operation and Maintenance Loy Yang Pty Ltd, the Federal Court of Australia was asked to consider whether a union can be held liable as an accessory to contravention of the restrictive trade practices provisions of the *Trade Practices Act 1974* (Cth): *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd* [2006] FCA 1777 (19 December 2006), *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 2)* [2007] FCA 11 (16 January 2007) and *Australian Competition and Consumer Commission v IPM Operation and Maintenance Loy Yang Pty Ltd (No 3)* [2007] FCA 144 (9 March 2007).

## Background

The ACCC alleged that IPM and the CEPU (Electrical Trades Union) were parties to a contract, arrangement or understanding which contravened sections 45E(3) and 45EA of the *Trade Practices Act*.

It was alleged the contract included a provision that IPM would not engage any electrical contractor to perform work at the Loy Yang B power station in Victoria unless the contractor had entered into an agreement with the CEPU which was certified under the *Workplace Relations Act 1996* (Cth).

Section 45E of the *Trade Practices Act* prohibits a person who customarily acquires goods and services from a supplier from entering into a contract, arrangement or understanding with a union for the purpose of preventing or hindering the person from continuing to deal with the supplier.

Prior to August 2001, DJN Electrical and Instrumentation Pty Ltd supplied services to IPM at Loy Yang B as an electrical contractor. DJN did not have a certified agreement with the CEPU. In July 2001, the service agreement between DJN and IPM was due to expire. IPM sought to renew the agreement subject to price. However, in August 2001, DJN was advised that IPM would no longer utilise its services as DJN had declined to enter into a certified agreement with the CEPU.

IPM and the ACCC agreed on terms of settlement for the resolution of proceedings against IPM, which included an admission by IPM that it had contravened sections 45E(3) and 45EA of the *Trade Practices Act*. The CEPU contested the allegations against it.

Sections 45E and 45EA of the *Trade Practices Act* impose liability on a person who enters into a prohibited arrangement with a union. However, neither section imposes a liability on the union. Sections 76(1) and 80(1) of the Act contain accessory liability provisions. Accordingly, the claim against the CEPU was bought under these sections, seeking penalties and an injunction.

The CEPU argued that sections 45E and 45EA made the union a principal to the contravention but did not impose liability on it and therefore the CEPU could not be liable under sections 76 and 80 of the *Trade Practices Act* as an accessory to the alleged contraventions of sections 45E(3) and 45EA.

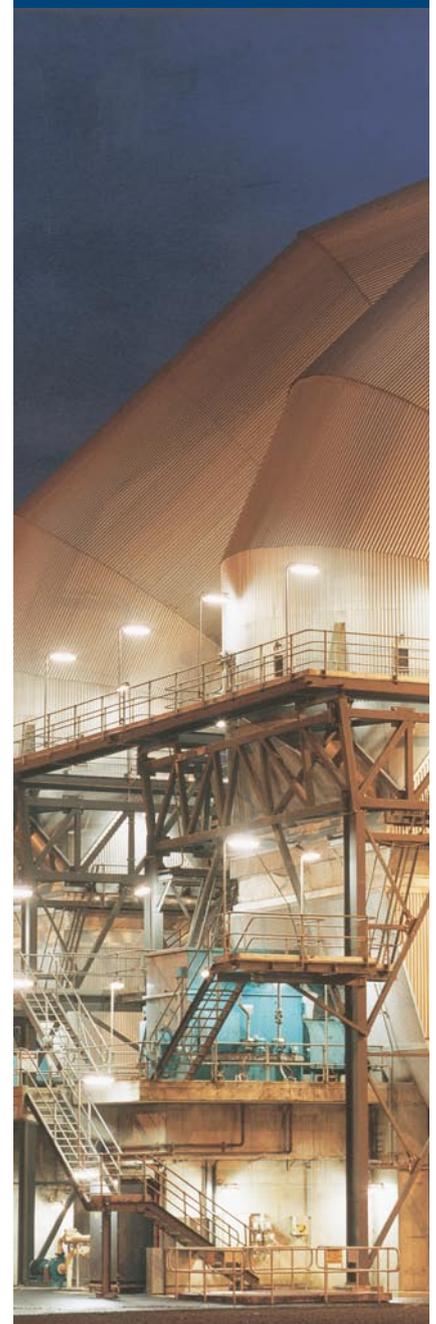
## Decision

The Court (Justice Young) found that:

- section 45E applied because IPM was accustomed to acquire services from electrical contractors to carry out work at Loy Yang B;
- IPM and the CEPU made a contract that contained a restrictive provision that IPM would not engage an electrical contractor to perform

## Lessons for employers

- Employers must ensure that contracts, arrangements or understandings with unions do not contain provisions that contravene the *Trade Practices Act*.
- Employers should not agree to provisions that require contractors to have particular industrial arrangements, such as an agreement with a specific union.



work at Loy Yang B unless the contractor had a current certified agreement with the CEPU;

- the restrictive provision was included in the contract for the purpose of preventing or hindering IPM from acquiring or continuing to acquire services from an electrical contractor at Loy Yang B unless the contractor had a current certified agreement with the CEPU; and
- IPM contravened section 45E of the *Trade Practices Act*.

The Court also found that the CEPU was not excluded from accessorial liability under sections 76(1) and 80(1) of the *Trade Practices Act* in relation to contraventions of sections 45E and 45EA.

In making its decision, the Court noted that sections 76(1) and 80(1) catch accessorial conduct of a kind which includes persons who are directly or indirectly knowingly concerned in, or a party to, a contravention. The application of accessorial liability to persons who are parties to a contravention indicates the legislature intended that accessorial liability would attach to parties to a contract which contravenes the principal provision.

The Court issued an injunction against the CEPU, and imposed a penalty of \$125,000 on the union.

ACCC and IPM made a joint submission that a single pecuniary penalty should be imposed on IPM and that the appropriate amount was \$120,000. This penalty was imposed by the Court even though it was only slightly less than the penalty imposed on the CEPU (which had instigated the breaches), on the basis IPM was the party principal rather than an accessory, and engaged in two separate contraventions of the *Trade Practices Act*, under sections 45E and 45EA.

The Court also took into account, in IPM's favour, the fact that IPM ceased to enforce the contract with the CEPU immediately upon being advised by the ACCC that the conduct may contravene the *Trade Practices Act*, its readiness to admit the contraventions and the absence of any previous contraventions.

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# Union rights of entry clarified

The Full Bench of the Australian Industrial Relations Commission has confirmed its power to order employers to notify workers that a union is visiting the workplace to investigate a suspected breach of an industrial instrument. It also emphasised that right of entry provisions under the *Workplace Relations Act 1996* should be interpreted in a reasonable, common sense way: *Australian Taxation Office [2007] AIRCFB 36* (17 January 2007). The union subsequently made an application for orders to enforce general rights of entry. The application was refused but the decision is significant because it clarifies the law on union rights of entry: *ASU and Australian Taxation Office [2007] AIRC 253* (30 March 2007).

## Full Bench Decision

In 2006, the Australian Services Union (ASU) obtained orders from the Australian Industrial Relations Commission regarding visits to two ATO offices in Queensland. The ASU claims included that the ATO failed to notify employees of a union official's visit to investigate a suspected breach of an agreement and that the ATO placed tighter restrictions on the official's movements than were permitted. The orders by Senior Deputy President Lacy included that the ASU official was permitted to approach individual employees at their work points to invite them to meet with him for an interview to assist him in his investigation. The ATO was ordered to notify all employees at the premises of the official's entry and that employees had the ATO's permission to meet with the official.

The ATO was granted leave to appeal and the Full Bench of the Commission quashed the earlier order. The Full Bench held that it could make an order:

- that the ASU official give at least 24 hours notice of entry for the purpose of investigating suspected breaches and interview employees in the room designated by the ATO for that purpose for a maximum of 30 minutes;
- that employees be made aware of the presence of the union official on the premises;
- for the arrangement of the interviews in a manner consistent with the protection of the ATO's legitimate interests.

Ultimately, however, no orders were made on the basis that the ATO undertook to notify employees by email and facilitate that employees who wished to attend an interview with the ASU official be released from their duties.

## VP Lawler's decision

The ASU subsequently sought orders to apply generally in relation to the exercise of rights of entry to all ATO offices. Vice President Lawler considered that the Act permitted orders that can operate beyond a particular exercise of a right of entry, but that this was not a proper case to make the orders sought by the ASU. The application was refused because the orders sought were variously considered to be unnecessary, not appropriate, beyond the jurisdiction of the Commission, inconsistent with the Act, or insignificant. Vice President Lawler also found that the ATO was not seeking to prevent the ASU from exercising its rights under the Act. In his decision, Vice President Lawler made the following points:

- It is reasonable for an employer to request that interviews be conducted in a particular room or area of the premises and/or that a particular route is taken to reach that room or area.
- An employer may escort an official during an inspection provided the presence or conduct of the escort does not inhibit workers from giving responsive answers to questions when properly asked by the official.
- It is reasonable to schedule interviews in a way that avoids

## Lessons for employers

- The right of entry provisions under the *Workplace Relations Act* are intended to establish a framework that balances union rights of entry with the rights of employers to conduct their business without undue interference or harassment. They should be construed in a common sense way to give effect to this purpose.
- In considering whether an employer's request regarding union right of entry is reasonable, the Commission is required to take into account all of the circumstances of the case and to consider the legitimate interests of the employer as well as the interests of the employees and union. The public interest in the observance of industrial laws is also a relevant consideration.
- Union right of entry protocols drafted by employers should be consistent with the provisions of the Act.

unnecessary disruption to an employer's business.

- The right to inspect work regarding a suspected breach cannot be invoked to further the purpose of general discussion with employees. Further, an inspection conducted for the sole or predominant purpose of soliciting interviews to assist in an investigation of a breach is not a bona fide inspection of work.
- An employer must not unreasonably seek to limit or terminate an inspection that has been properly undertaken. What is a reasonable length of time will depend on the circumstances of the particular inspection and the context of the breaches to which it relates.

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# Federal Court ends NSW IRC Inquiry into Tristar

After several rounds in a battle over the power of the New South Wales Industrial Relations Commission to conduct an inquiry in the post-Work Choices environment, Tristar has obtained an injunction to stop the NSW Commission from proceeding: *Tristar Steering and Suspension Limited v Industrial Relations Commission of New South Wales* [2007] FCAFC 50 (13 April 2007). On the same day, a decision of a Full Bench of the Australian Industrial Relations Commission has reversed the decision to terminate Tristar's certified agreement, opening the way for industrial issues at Tristar to be resolved in the Federal arena: *AWU and AMWV v Tristar Steering and Suspension Australia Ltd* [2007] AIRCFB 273 (13 April 2007).

## Injunction granted to Tristar to stop NSW IRC inquiry

On 9 February 2007, the NSW Minister for Industrial Relations directed the NSW Industrial Relations Commission to undertake an inquiry into an ongoing dispute between Tristar and the AMWU and AWU. The dispute involves allegations that Tristar is keeping employees at work, despite having no work for them to do, to avoid paying their substantial redundancy entitlements.

The NSW Commission rejected Tristar's jurisdictional argument that the *Workplace Relations Act 1996* now ousts the power of the NSW Commission to inquire into industrial matters.

Tristar then commenced proceedings before the Full Court of the Federal Court seeking injunctions to restrain the NSW Commission from conducting the inquiry. Tristar continued to argue that the NSW Commission did not have jurisdiction to conduct the inquiry because section 16 of the *Workplace Relations Act* says the federal legislation applies to the exclusion of State or Territory industrial laws "so far as they would otherwise apply in relation to an employee or employer".

Under the Constitution, a State law is invalid to the extent that it is inconsistent with a valid federal law. Inconsistency will arise where the federal statute shows an intention to exclusively regulate a particular

subject matter and the State law intrudes within that area.

The Full Federal Court rejected the interpretation of the NSW Commission about the power to hold an inquiry, finding that the words "in relation to" in section 16 do not only exclude laws that regulate the rights and obligations of employers and employees.

The Full Court held that the *Workplace Relations Act* clearly intended to cover the field of relations between constitutional corporations and their employees. Therefore, subject to limited exceptions not relevant to these proceedings, the NSW Commission no longer has power to perform any function in relation to any constitutional corporation or its employees or potential employees. The Federal Court declared that the Commission had no jurisdiction to conduct the inquiry and granted a permanent injunction restraining the NSW Commission from proceeding any further.

## Decision to terminate the Tristar certified agreement reversed

On the same day, a Full Bench of the Australian Industrial Relations Commission upheld the unions' appeal against Senior Deputy President Marsh's decision to terminate the Tristar certified agreement on 29 January 2007. The Full Bench held that Senior Deputy President Marsh made an error when she failed to consider alleged

## Lessons for employers

- The State Industrial Relations Commissions has no power to conduct inquiries into relations between constitutional corporations and their employees. In fact, except for some specific exclusions, the State Commissions do not have jurisdiction to perform any functions in relation to constitutional corporations or their employees, even if those functions do not affect the rights and obligations of employers and employees.
- The Australian Industrial Relations Commission will consider alleged breaches of a certified agreement when determining whether terminating the agreement will be contrary to the public interest.

breaches of the agreement by Tristar as a factor in determining whether the termination was contrary to the public interest. The Full Bench will hear further submissions from the parties before deciding whether the agreement should be terminated.

The Office of Workplace Services also continues its separate investigations into Tristar's alleged breaches of the *Workplace Relations Act*.

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# Failure to negotiate a replacement certified agreement – breach of the certified agreement?

The Federal Court of Australia has considered whether the failure of an employer to negotiate a replacement collective agreement constituted a breach of the existing collective agreement: *Australian Meat Industry Employees Union (WA Branch) v Woolworths Limited* [2007] FCA 389 (21 March 2007).

The Australasian Meat Industry Employees' Union (WA Branch) (AMIEU) alleged that the conduct of Woolworths Limited in failing to negotiate a replacement certified agreement contravened the *Workplace Relations Act 1996* by breaching the Woolworths Limited Western Australian Supermarkets and the Australasian Meat Industry Employees' Union Agreement 2002.

The 2002 Agreement relevantly provided as follows in clause 1.3.2: "The parties to this Agreement agree that negotiations to renew this Agreement will commence two months prior to its expiration" and "should negotiations not achieve agreement, the wages and conditions of employment shall continue as at the date of expiration". The 2002 Agreement had a nominal expiry date of 15 December 2005.

During the second half of 2005, Woolworths decided, for a number of operational reasons, that it would negotiate a collective agreement with the Shop, Distributive and Allied Employees Association (SDA) that would replace the 2002 Agreement and the Woolworths Limited

(WA) Agreement 2004 being an agreement between Woolworths and the SDA. An agreement was subsequently reached with the SDA which purported to include provision for the terms and conditions of employment for meat room staff employed by Woolworths' supermarkets. This agreement was certified on 20 February 2006.

The AMIEU sought an order that Woolworths had breached the terms of the replacement agreement and that to the extent that the replacement agreement purports to bind its members or those eligible to be members it is void.

Justice Nicholson held that, given the statutory context, the 2002 Agreement could not be taken to have expired until it had passed its nominal expiry date *and been replaced by another certified agreement*. Accordingly, the earliest date upon which an obligation under clause 1.3.2 of the 2002 Agreement could have arisen was 20 December 2005 being two months prior to the date of certification of the replacement agreement.

Justice Nicholson also found that by filing and serving a notice of

## Lessons for employers

- When negotiating workplace agreements, employers should carefully consider what commitments are made in respect of re-negotiation of the workplace agreement keeping in mind that circumstances and industrial strategies may change and that any commitment to a renewed collective agreement may be considered an anti-AWA provision and, therefore, prohibited content.
- A workplace agreement may not have expired until after it has reached its nominal expiry date and been replaced by another workplace agreement but this will be a matter of construction in the particular case. Additionally, the statutory context has altered significantly since the circumstances involved in this matter arose.

initiation of bargaining period prior to the nominal expiry date of the 2002 Agreement, the AMIEU invoked a statutory framework for making a certified agreement so that the obligations under clause 1.3.2 of the 2002 Agreement were nugatory or inoperative.

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