Ashurst

Employment Law Update

Recent developments in managing employees in Australia

July 2024

Outpacing change

Recent legislative and case law developments have provided Australian employers with guidance in navigating numerous complex workplace challenges.

In this publication, we highlight several important developments that employers should keep in mind in order to ensure legal compliance and best practice.

These developments range from managing redundancies and enforcing post-employment restraints to managing the introduction of the right to disconnect and conducting trauma-informed workplace investigations.

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Managing employee wellbeing: Right to disconnect, reasonable additional hours and psychosocial risks

Authors: Stephen Woodbury (Partner) and Isabella Wilson (Lawyer)

In brief:

- In Australia, there has been continued consideration of work/life balance and flexible working, with a particular focus on the incoming right to disconnect and the existing right to refuse to work unreasonable additional hours.
- This focus has intersected with the recent expansion of work health and safety laws to address psychosocial risks in the workplace, by requiring employers to eliminate psychosocial risks in the workplace, or if that is not possible, to minimise those risks so far as is reasonably practicable.

Lessons for employers:

- Employers should consider a wholistic response to the issues presented by the legislative obligations concerning the right to disconnect, the working of additional hours and managing psychosocial risks, especially where they may attract a multi-regulator approach. This may include:
  - Reviewing existing arrangements, and if necessary, amending employment contracts, policies and training materials to account for the new right to disconnect.
  - Ensuring that existing time recording systems are accurately capturing employee time and attendance data, including the hours *actually* worked by employees.
  - Proactively considering psychological health risk factors arising from the organisation (including existing work patterns and arrangements), and implementing control measures to eliminate or minimise these risks, so far as is reasonably practicable.

Unpacking the new 'right to disconnect' laws

The *Fair Work Amendment (Closing Loopholes No. 2) Act 2024* (Cth) inserted into the *Fair Work Act 2009* (Cth) provisions for a new workplace right colloquially known as the "right to disconnect". The provisions, which will apply from 26 August 2024 (and from 26 August 2025 for small businesses), allow an employee to refuse to monitor, read or respond to contact, or attempted contact, from their employer or a third party outside of hours unless the refusal is considered to be unreasonable.

Unreasonableness is to be assessed by considering:

1. The reason for the contact or attempted contact;
2. How the contact was made and the level of disruption caused to the employee;
3. The extent to which the employee is provided additional compensation for remaining available after hours (at the time the contact was made) or for working additional hours outside of ordinary hours (generally);
4. The nature of the employee's role and level of responsibility; and
5. The nature of the employee's personal circumstances (including family and caring responsibilities).

If there is a dispute between the employee and the employer regarding out of hours contact, such that the employer contends the refusal is unreasonable and the employee disagrees then the Fair Work Commission may deal with an application to resolve the dispute. The FWC will have powers to issue 'stop' orders that may apply to the employee (to stop refusing contact) or the employer (to stop taking certain actions).

The provisions may have a less significant impact for managerial and professional employees depending on their customary work patterns, seniority and remuneration. For other employees, including those in lower paid or junior roles, the right may be a source of disputation in the workplace and could pose practical issues for employers seeking to cover unexpected circumstances, such as surges in work or sick leave relief at short notice. In a hybrid-working world where many employees enjoy flexible working arrangements, it could be difficult to assess what is considered "outside of the employee's working hours".

Reasonable additional hours

The notion of reasonable additional hours is related to, and intersects with, the new right to disconnect, in that both concern the right of employers to request or require employees to perform work additional to or outside their ordinary work hours.

The present enactment of the concept of reasonable additional hours is in section 62 of the FW Act. This provides that an employer must not require a full-time employee to work more than 38 hours per week unless the additional hours are reasonable. Similarly, for a part-time employee, the limit is the lesser of 38 hours and the employee's ordinary hours of work in a week. The employee may refuse to work additional hours (beyond those described above) if they are unreasonable.

However, the concept of what is reasonable is elusive, especially at management levels, and in particular industries, such as professional services and financial services. Some guidance may be provided by a matter currently before the Federal Court of Australia concerning reasonable additional hours. The case involves the National Australia Bank and relates to a claim by the Finance Sector Union that employees were allegedly required to work in excess of 50 hours per week in order to get their work done. The Bank has denied the allegations and said that the union has failed to prove that the work asked of the relevant employees was unreasonable or that the extra work was ever required by the Bank.

The outcome of this case will be of significant interest and may impact many employers at management levels, and in particular industries, such as professional services and financial services.

More recently, Westpac has announced that it will require salaried workers earning between $90,000 to $140,000 a year (referred to as "packaged" staff) to record their hours by completing time sheets. According to a spokeswoman, the rationale behind the requirement is to allow Westpac to have "a clearer picture of how and when [their employees] work", which will "further strengthen Westpac's pay reconciliation process". Westpac had previously required time sheets for "unpackaged" staff, who are paid loadings and other entitlements separately up to $90,000 a year. Westpac's extension of this requirement to senior employees under industrial instruments has highlighted a broader cultural change in the banking and finance sector following concerns that large amounts of unpaid overtime mean employees' pay risks dipping below minimum hourly rates. Earlier this year, the Commonwealth Bank was fined $10.3 million by the Federal Court for not ensuring through regular pay reconciliations that salaried staff were paid more than the minimum enterprise agreement requirements.

Accurate time and attendance data is often critical to ensuring legal compliance with numerous payment obligations, particularly in the context of an employer's record keeping obligations under the FW Act. These obligations require employers to keep time and wages records for 7 years, including records regarding the number of overtime hours worked by an employee during the day and when the employee started and finished the overtime hours.

WHS considerations

Another area in which additional work hours has come into focus, this time indirectly, includes the expansion of WHS laws to address work-related psychosocial hazards and risk factors. Psychosocial risks may include stress, fatigue, and burnout, which can be harmful to the health of workers and compromise their wellbeing beyond the workplace.

In this context, many jurisdictions in Australia have recently updated their WHS regulations to expressly require employers to eliminate psychosocial risks in the workplace or, if that is not possible, to minimise those risks so far as is reasonably practicable. The focus on minimising, if not eliminating, psychosocial risk from the workplace is one which will, in and of itself, require employers to have regard to their workplace practices, the working demands on employees, and the pressures which arise from work practices.

What does this mean for employers?

Employers should:

1. Consider existing arrangements, and if necessary, amend employment contracts to clearly state that position descriptions and annualised remuneration packages respectively contemplate and compensate for monitoring, reading and responding to work-related contacts outside contracted working hours;
2. Review and update policies concerning working hours and provision of support for working beyond 38 hours per week or where outside-hours contact is necessary or required. This could include time off in lieu or financial compensation (such as an 'availability allowance');
3. Conduct training for supervisors within the organisation and compile guidelines as to how to manage a refusal to undertake duties, taking into consideration the nature of the employee's role and responsibilities and whether the employee is compensated to remain available beyond ordinary work hours;
4. Proactively consider psychological health risk factors arising from the organisation (including existing work patterns and arrangements), including:
   a. internal and external work requirements of roles;
   b. the extent to which these requirements may be considered reasonable and able to be met within a 38 hour working week; and
   c. what number of hours per week might be required to meet the requirements of the role;
5. Engage with workers about how to manage risk factors, including by ensuring that workers have an opportunity to discuss or provide feedback about their concerns and conducting conversations with workers about areas of their work which may lead to work-related stress, including demands, support, relationships, the role and changes within a person's job;
6. Listen to workers' concerns and feedback and identify control measures which can be implemented to eliminate risks to psychological health and safety, or where that is not reasonably practicable, minimise those risks, so far as is reasonably practicable. For example, where workload issues have been identified, review resourcing levels to ensure that there is an ability to properly manage the risks of overwork and fatigue;
7. Consider whether existing time recording systems are accurately capturing the hours *actually* worked by employees (as opposed to hours solely spent on "client work", for example); and
8. Review and align internal and external support mechanisms for employees concerning workload and related issues.

Redundancy and redeployment: Federal Court of Australia clarifies employer obligations regarding redeployment into roles filled by contractors

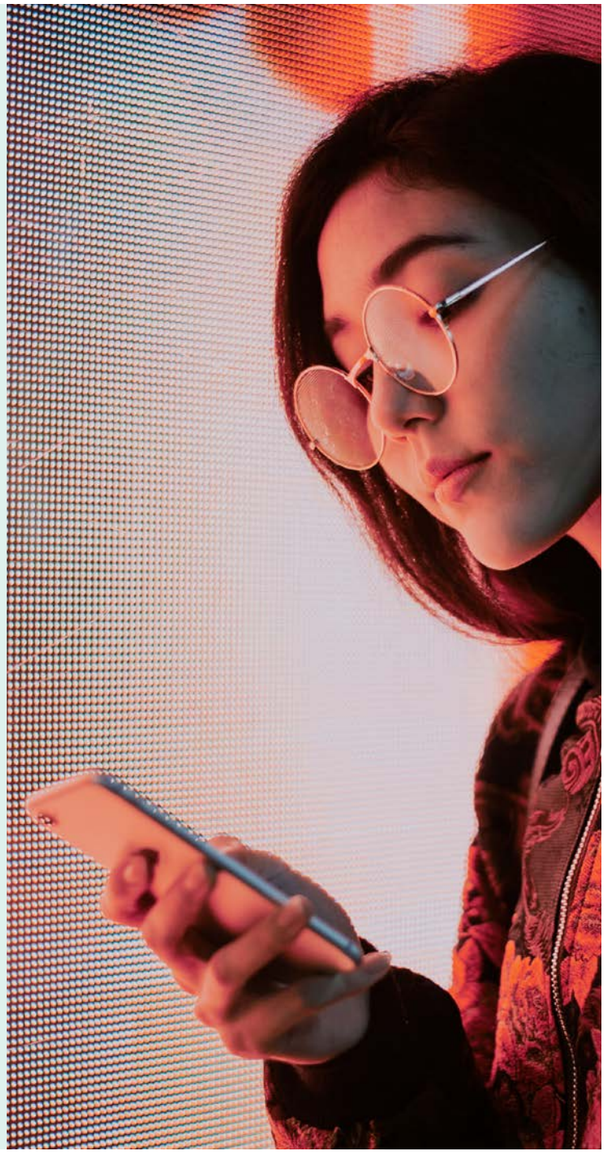
Authors: Stephen Woodbury (Partner) and Nikita Summers (Lawyer)

In brief:

- A recent decision of the Federal Court of Australia considered the extent of an employer's redeployment obligations in the context of the exemption of dismissals on the ground of genuine redundancy from unfair dismissal claims. Employers will not have the benefit of the exemption if it was reasonable in all of the circumstances to redeploy an employee to an alternative role within the employer's enterprise or that of an associated entity.
- The Court found that it would have been reasonable in all of the circumstances for the employer to redeploy the employees to roles that were performed by contractors. As the employer did not take this step, the dismissals were not "genuine redundancies" and the unfair dismissal claims could proceed.
- Alternative roles are not limited to roles that are currently available, but also to roles that are about to become available, and consideration may need to be given to whether contractor roles ought continue or whether the work undertaken by contractors ought be undertaken by employees who would otherwise be retrenched.
- On 13 May 2024, the employer filed a special leave application seeking to overturn the Full Federal Court's decision, asking the High Court to consider the meaning of "genuine" redundancies and the extent of FWC powers to determine how employers might avoid job losses. We will provide an update when the outcome of the special leave application is known.

Lessons for employers:

- Consider all reasonable options when determining redeployment, including terminating third party contracts and potentially varying business models reliant on labour hire or contractor workforces to open up redeployment opportunities.
- Consider whether an employee can be retrained to be redeployed to another position.



How this issue arose

An employer hired the majority of workers at an underground mine in New South Wales. The employer also engaged contractors to provide services, including work it had outsourced to one contractor in respect of servicing, inspection, auditing, and rectification of the Mine's conveyor system.

In May 2020, during the COVID-19 pandemic, the Mine reduced its operations, including by reducing contractor-employed workers by forty percent and direct employees by ninety percent. This followed suggestions from workforce representatives to decrease reliance on contractors and instead have the work performed directly by the employer's existing employees.

Twenty-two former employees of the employer were made 'redundant' and subsequently brought unfair dismissal claims against the employer. The employer argued the dismissals were genuine redundancies and, as a result, that the employees were not able to make unfair dismissal claims. The employees argued their dismissals were not cases of genuine redundancy on the basis that they could have been reasonably redeployed to perform work undertaken by contractors at the Mine.

The matter was heard at first instance by the Fair Work Commission, and was then appealed by the employer to a Full Bench of the FWC and ultimately to the Federal Court.

Federal Court Decision

The Federal Court dismissed the employer's appeal, finding (amongst other things) that the FWC did not err in deciding that the dismissals were not cases of genuine redundancy, as it would have been reasonable in all of the circumstances to displace contractors in order to create positions for the redundant employees to be redeployed to.

The Court held that section 385(d) of the FW Act provides a protection for employers, in that an employee will be unable to make an unfair dismissal claim where there has been a "case of genuine redundancy." Section 389(2) of the FW Act then qualifies this immunity, as it requires an assessment of whether it "would have been reasonable in all [of] the circumstances" to redeploy the employee.

The Court rejected the employer's submission that the term "redeploy" means to deploy to another position that was vacant or available, and held that the term "redeployment" was not constrained in this way. The Court emphasised that the legislature would not have used the qualifying phrase "in all [of] the circumstances" if there were circumstances not intended to be covered.

The Court considered hypothetical scenarios that could be covered by section 389(2) of the FW Act. For example, instances where an employer dismisses an employee on operational grounds, where that employee could be redeployed to a position that would soon become available because a contract the employer has with a third party to perform the work is soon to expire.

The Court further held that the assessment of what "would be reasonable in all [of] the circumstances" in relation to an employer redeploying employees was for the FWC to decide, and this was what occurred in the decision by the FWC at first instance. In this decision, the Commissioner found that rearranging the work model by terminating the third-party contractual arrangement and creating positions for the respondents "would have been reasonable in all [of] the circumstances".

The decision squarely puts employers on notice that, if not overturned by the High Court, the FWC will have the ability to examine all alternatives for the purpose of assessing whether it is reasonable to redeploy a person whose position is selected for redundancy, including the termination of contractor arrangements and the reduction in the use of labour hire employees.

Best practice in workplace investigations: Lessons from the Lehrmann decision and other recent proceedings

Authors: Stephen Woodbury (Partner), Andrea Motbey (Counsel) and Isabella Wilson (Lawyer)

In brief:

- Employers are increasingly required to investigate and respond to complaints relating to workplace sexual harassment and assault. In these matters, factual scenarios can be complex, complainants and other participants may be suffering the effects of trauma and evidence may be difficult to obtain and assess.
- Justice Lee's decision in the *Lehrmann* defamation proceedings (currently under appeal), and two other recent Federal Court cases, provide guidance about how evidence and witness accounts can be assessed when there are vulnerable and traumatised witnesses, gaps or inconsistencies in evidence and imprecise memories of conversations.
- While these proceedings were not brought under workplace laws, they highlight ways in which a balanced and trauma-informed approach to workplace investigations can be adopted to assist investigators to conduct workplace investigations and make findings.

Lessons for employers:

When conducting workplace investigations and making findings, employers should remember that:

a. Where witnesses are impacted by trauma, investigators should take the impact of trauma into account throughout the investigation process, including when assessing any perceived deficiencies in the witness' evidence;

b. The evidence of witnesses should be recorded in their own words; and

c. Witnesses should not be pressured to provide verbatim recollections of events, where a gist account is how they would ordinarily give their evidence.

The Briginshaw principle, trauma awareness and findings of fact: *Lehrmann v Network Ten Pty Ltd (Trial Judgment)* [2024] FCA 369

Sexual harassment complaints often involve a complainant's account of the alleged conduct, a denial of the conduct by the respondent, and little or no independent corroborating evidence.

In such circumstances, the investigator in making findings may need to rely on the complainant's account to a far greater extent than they might otherwise in workplace investigations about other conduct, such as bullying.

A trauma informed approach to assessing evidence may overcome previously held views that unexplained irregularities or discrepancies in a witness' evidence meant their evidence could not be relied upon, or even that they were being untruthful, and complaints could not be substantiated.

In this context, the *Lehrmann* decision sets out a judicial approach to fact finding, in which findings of fact are made using the *Briginshaw* principle, and demonstrates how trauma can be taken into account.

The Briginshaw principle

When weighing evidence in a workplace investigation and making factual findings, there are two key principles to bear in mind:

1. A fact finder must consider whether or not, on the balance of probabilities, an event actually occurred; that is, whether it is more likely than not to have happened as alleged. Where the evidence does not "tip the scales" in favour of a particular fact being established, then it is not proven.
2. In accordance with Justice Dixon's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, in determining whether a matter is proved to the investigator's "reasonable satisfaction", an investigator will take into account the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description and the gravity of the consequences flowing from a particular finding. If an allegation is serious, and may lead to serious consequences for the employee (such as termination of employment), then the evidence relied upon needs to be of proportionately higher probative value.

Justice Lee relied upon Sir Owen Dixon in *Briginshaw v Briginshaw* when he explained that, "when the law requires proof of any fact, the tribunal of fact must feel an actual persuasion of its occurrence or existence before it can be found".

In applying the *Briginshaw* principle, Justice Lee observed that:

1. "Reasonable satisfaction" that a matter is proved is not attained independently of the nature and the consequence of the fact to be proved;
2. Reasonable satisfaction should not be produced by indirect inferences alone;
3. Where a matter involves allegations of sexual assault (including rape), it needs to be approached with caution with "weight being given to the presumption of innocence and exactness of proof expected"; and
4. A finding of sexual assault would be seriously damaging to reputation and this consequence properly gives pause before making it.

These factors are likely to be considered by an investigator during the investigation process so they can ensure that appropriate questions are put to interviewees, and evidence gathered, to enable them to make a finding to their reasonable satisfaction about whether allegations have been substantiated.

Impact of trauma on memory

The impacts of trauma on witnesses, and notions of what makes a witness "reliable" or "credible", can complicate the process of fact finding to a reasonable standard of satisfaction in accordance with the *Briginshaw* principle.

Justice Lee explained that there are a number of factors that are to be taken into account when making findings as to reliability, which include the mental state of the witness, the specific trauma and how that impacts on their memory. Justice Lee rejected the assertion that victims of sexual assault act in a particular way; rather, each person will react differently and it is not unexpected that there is confusion about how they should respond to the trauma, and this must be taken into account when making findings.

In considering the evidence, Justice Lee placed weight on the contemporaneous evidence as it "casts light on the relevant issues" and is "a far surer guide as to what happened than ex post facto accounts or rationalisations, or unverifiable assertions as to what people 'felt'".

The parties in the *Lehrmann* case submitted to the court a set of agreed facts about the impact of trauma and alcohol on memory, which Justice Lee extracted in his decision and considered in assessing the evidence in the case. They are a useful resource for investigators to consider when eliciting and evaluating the evidence of a witness in the course of a workplace investigation, particularly where there are gaps in memory or inconsistencies, and where intoxication may be a factor.

Particularly in relation to the impact of trauma, it was relevantly agreed by the parties that:

1. Trauma has a severe impact on memory by splintering and fragmenting memories, such that semantic or meaning elements become separated from emotion, which can interfere with the timespan that memories require to consolidate and become permanent;
2. Memory can change and be subject to reconsolidation effects and, as such, changes in what the person reports as their "memory" of an event can be expected;
3. Inconsistencies in reporting following a traumatic event are often observed and explicable through underlying theories of trauma and memory function;
4. In understanding the account of an alleged "survivor", a person must consider how that account was elicited, taking into account:
    a. the skill and attitudes towards the person by the relevant investigators;
    b. the time elapsed between the traumatic event and the formal interview; and
    c. the psychological/emotional state of the person being interviewed at the time of interview;
5. Despite the belief that the emergence of inconsistencies across interviews is a sign of lying (people "can't keep their story straight"), the literature on memory, impacts of trauma and the dynamic between interviewee and the interviewer must be considered; and
6. Multiple interviews are typically necessary to construct a clear narrative of events, however, the consequence of these multiple interviews is that there may be patterns of inconsistency or omissions especially early in the interview process (which need to be carefully evaluated but are not in and of themselves indicative of deception or accuracy).

For a complete list of agreed facts regarding the impact of trauma, see paragraph 117 of the judgment here.

To the extent that these propositions were relevant, Justice Lee bore them in mind in assessing the impact of any counterintuitive behaviour after the alleged assault, on the complainant's credit.

This case serves as an important reminder to investigators to remain aware of the impact of trauma on a witness, and highlights that:

1. Weighing evidence and making findings of credibility when there is sensitive or traumatic subject matter may be a particularly difficult exercise;
2. Great care needs to be taken in evaluating and weighing the evidence of witnesses whose accounts may be impacted by trauma;
3. These considerations are relevant to determining the appropriate person to conduct an investigation of this nature; and
4. A trauma informed investigation approach will lead to more robust findings and minimise the impact of the investigation on participants.

Cultural awareness in workplace investigations: *Munkara v Santos NA Barossa Pty Ltd* (No 3) [2024] FCA 9

The Federal Court of Australia has provided further assistance to investigators considering witness evidence in the case of *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9. This case highlights some cultural sensitivities an investigator or fact finder should take into account when extracting evidence from a witness and making findings.

This case concerned three Aboriginal applicants from the Tiwi Islands, who sought to prevent the respondent constructing an underwater pipeline. The witnesses had varying levels of English proficiency and some witnesses had hearing difficulties.

Having regard to these considerations, Justice Charlesworth observed that:

1. Witness testimonies were more impactful where witnesses were invited to explain concepts in their own words and in their own time (rather than by a quick succession of closed questions requiring a yes or no answer);
2. Where individual witnesses hesitated before answering a question, an adverse inference was not drawn; and
3. No adverse inference was drawn from non-responsive answers or outward demeanour.

Although these observations were not made in an employment context, the case provides useful commentary that may assist investigators in conducting workplace investigations which involve vulnerable participants.

Gist memory vs verbatim memory: *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381

Another recent case has provided guidance about how to consider evidence of conversations based on memory. Justice Jackman's observations in *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 provide useful guidance for investigators when addressing the form in which evidence of conversations should be given by witnesses.

Justice Jackman remarked that people routinely remember only the gist of conversations, and perhaps also a particularly striking or important word or phrase which was used, rather than having a verbatim memory of the conversation.

In an investigation context, investigators should ensure that the evidence they are recording from a witness accurately reflects the difference between verbatim memory and "gist" memory.

Applying this, investigators should consider these principles when collecting and testing evidence from witnesses which concerns their recollection of a conversation:

1. The form of the evidence should correspond to the nature of the actual memory the witness has of the conversation;
2. If the witness remembers only the gist or substance of what was said, and not the precise words, then the evidence should be given in indirect speech;
3. If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks to indicate they are verbatim quotes;
4. If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech, and evidence given in direct speech should not be prefaced by the phrase that the conversation occurred "in the words to the following effect"; and
5. Evidence of a witness who claims to remember the exact words of a conversation, but who is later found to have exaggerated the nature and quality of their memory, may result in an adverse finding about their credibility.

Employment restraints: Employer awarded damages of just $100 for employment contract breaches by competing employees

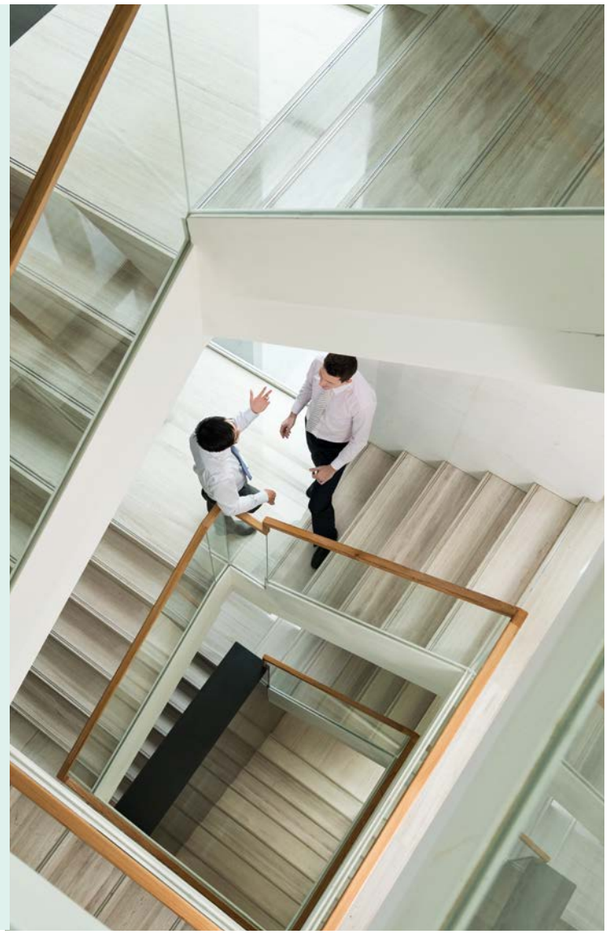
Authors: Jennie Mansfield (Partner) and Andrea Motbey (Counsel)

In brief:

- A recent decision of the Supreme Court of NSW is a reminder that contracts of employment should be clearly drafted if they are intended to protect incorporated members within group structures.
- Two members of a group of companies commenced proceedings against three former employees. The employees were employed by one group company, which provided their services to another group company which engaged with external customers. The employees resigned after soliciting a customer of the group to move its contracts to their new employer.
- The employees were found to have breached their employment contracts, but the employer obtained damages for breach of contract of just $100 against each employee because it did not suffer any loss, and the employment contract did not protect the group entity that contracted with customers and suffered the loss.

Lessons for employers:

- Employers operating within a group structure with a separate employing entity should consider whether contracts of employment provide sufficient protection for all relevant group members.
- Employers should consider whether the drafting of their employment contracts is sufficiently clear for group entities to obtain the benefit of provisions such as those covering confidential information, conflict of interest and post-employment restraints.



How this arose

A company provided consulting services to its customers (the **consulting company**) using employees provided to it by another member of the same group of companies (the **employer company**).

Three employees of the employer company were performing duties in connection with the consulting company's contracts with one of its largest customers. The contracts were due to expire and the consulting company expected to renew or obtain new contracts to continue the work.

The three employees resigned from their employment and commenced employment with a new business (**new consulting company**), which one of them had established, and tendered for two contracts the consulting company was performing (and was successfully awarded one tender).

Outcome of the Supreme Court proceedings

The consulting company and the employer company commenced legal proceedings against the three individuals for breach of their contractual duties, fiduciary duties and statutory duties under the *Corporations Act 2001* (Cth). They claimed that, but for the defendants' breaches, the consulting company would have been awarded the two contracts. The employer company conceded that it had not suffered any loss arising from the alleged conduct.

The Court found that, during their employment, the employees did not act in the consulting company's interests. The employees intended to move as a group to the new consulting company and engaged in communications and conduct designed to entice the customer. The employees also withheld information about the customer from the consulting company, and took information from the consulting company to use at the new consulting company.

Breach of contract claim

The employment contracts of the three employees specified that the employer company was the employing entity, and noted that the employer company is part of a group, including the consulting company, and the employment of all staff for the entities in the group is administered through the employer company (**Employment Administration Clause**).

The contracts required that the employees not, during the employment, be engaged directly or indirectly in any capacity with trade businesses or occupations other than with the group, except with express written consent (**Sole Employment Clause**).

The consulting company and the employer company contended that the employer company contracted with each employee as agent for a disclosed principal, being the consulting company, with the result that the consulting company was in fact the employer and the true counterparty to each contract. They relied on the principle that, where one party contracts with an agent for a disclosed principal, the contract is formed between the first party and the principal, and the agent 'drops out'.

The Court rejected this contention, relying on the High Court of Australia decision in *CFMEU v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, which found that where the parties have comprehensively committed the terms of their relationship to a written contract, the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under the contract.

The Court found that the language in the contracts identified the employer company as the employer with the contract expressly conferring certain rights and obligations on the employer company. It also found that the Employment Administration Clause did not amount to a statement that the employer company was agent for the consulting company, but was consistent with an intragroup administrative arrangement, and noted consistent with that arrangement, the salaries of employees were paid by the employer company.

In the alternative, the consulting company and the employer company argued that the consulting company was entitled to enforce the promises in each employment contract on the basis that the promises were held on trust for it by the employer company. The Court was not satisfied that the employer company and the consulting company established circumstances that would be a basis for imputation of a trust.

The Court found that the employer company was entitled to nominal damages of $100 against each former employee on the basis that only the employer company could enforce the employment contracts and the employer company had suffered no loss as a result of the breach of the Sole Employment Clause and breach by the employees of their implied obligation to the employer company of fidelity and good faith.

Other claims

The employer company and the consulting company were successful in other claims for breach of fiduciary obligations by all three employees, breach of confidentiality agreement by two employees and breach of *Corporations Act* duties by one employee (held to also be an officer of the consulting company) to exercise his powers and duties in good faith and in the interests of the consulting company and for a proper purpose, and to not use his position to seek to gain an advantage for himself or for the new consulting company or to cause detriment to the consulting company.

Contacts

Jennie Mansfield
Partner – Employment
T +61 2 9258 6400
M +61 408 122 432
jennie.mansfield@ashurst.com

Julia Sutherland
Partner – Employment
T +61 8 9366 8732
M +61 438 566 300
julia.sutherland@ashurst.com

Peter McNulty
Partner – Employment
T +61 2 6234 4037
M +61 421 403 842
peter.mcnulty@ashurst.com

Jane Harvey
Partner – Employment
T +61 3 9679 3054
M +61 404 287 001
jane.harvey@ashurst.com

Tamara Lutvey
Partner – Employment
T +61 7 3259 7334
M +61 409 612 050
tamara.lutvey@ashurst.com

Andrea Motbey
Counsel – Employment
T +61 2 9258 6773
M +61 478 274 348
andrea.motbey@ashurst.com

Ashurst Australia

Brisbane	
James Hall	T +61 7 3259 7088
Ian Humphreys	T +61 7 3259 7180
Tamara Lutvey	T +61 7 3259 7334
Canberra	
Peter McNulty	T +61 2 6234 4037
Elissa Speight	T +61 2 6234 4096
Melbourne	
Jane Harvey	T +61 3 9679 3054
Jon Lovell	T +61 3 9679 3559
Perth	
Julia Sutherland	T +61 8 9366 8732
Kirsten Scott	T +61 8 9366 8010
Sydney	
Lea Constantine	T +61 2 9258 6446
Talia Firth	T +61 2 9258 5640
Jennie Mansfield	T +61 2 9258 6400
Scarlet Reid	T +61 2 9258 6088
Trent Sebbens	T +61 2 9258 6313
Kathy Srdanovic	T +61 2 9258 6171
Stephen Woodbury	T +61 2 9258 6444

Ashurst Asia

Beijing	
Patrick Phua	T +86 10 5936 2888
Hong Kong	
James Comber	T +852 2846 8916
Port Moresby	
Derek Wood	T +675 309 2006
Shanghai	
Michael Sheng	T +86 21 6263 1818
Singapore	
Karen Mitra	T +65 6602 9179
Tokyo	
Kensuke Inoue	T +81 3 5405 6223
Jakarta	
Norman Ibnuaji	T +62 212 996 9280

Ashurst Europe

Frankfurt	
Dr Andreas Mauroschat	T +49 69 97 11 28 19
London	
Crowley Woodford	T +44 20 7859 1463
Ruth Buchanan	T +44 20 7859 2820
Madrid	
Cristina Grande	T +34 91 364 9422
Paris	
Muriel Pariente	T +33 1 53 53 54 75

Ashurst

Brisbane
Level 38 Riverside Centre
123 Eagle Street
Brisbane QLD 4000
T +61 7 3259 7000
F +61 7 3259 7111

Canberra
Level 9, Civic Quarter
68 Northbourne Avenue
Canberra ACT 2601
T +61 2 6234 4000
F +61 2 6234 4111

Melbourne
Level 16
80 Collins Street
Melbourne VIC 3000
T +61 3 9679 3000
F +61 3 9679 3111

Perth
Level 10 Brookfield Place
123 St Georges Terrace
Perth WA 6000
T +61 8 9366 8000
F +61 8 9366 8111

Sydney
Level 11
5 Martin Place
Sydney NSW 2000
T +61 2 9258 6000
F +61 2 9258 6999

ashurst.com

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