BUSINESS BRIEFS

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CHANGES TO THE FAIR WORK ACT – HOW IS YOUR BUSINESS AFFECTED

In June this year, the Federal Parliament passed legislation which amends the *Fair Work Act 2009* ('the Act').

Whilst some amendments commenced operation in July this year, other amendments will not commence operation until 1 January 2014. Amendments to the Act have been made in the following areas:-

- Family Friendly Arrangements;
- Flexible Rosters;
- Consent Arbitration;
- Bullying Reforms;
- Unlawful Termination;
- Right of Entry;
- Registered Organisation; and
- Conferences.

It is vital for all employers to note the wide-reaching amendments which have been made to the Act.

We recommend ensuring compliance with the new regime before it comes into effect, by reviewing and if necessary, updating policies and procedures, particularly in respect of bullying and paid parental leave.

For more information regarding the changes to the Act and how these may affect your Business, or if you require assistance in redrafting your employment contracts in light of these amendments, contact our Commercial Department on (07) 4775 6100.

BANKRUPTCY AND INSOLVENCY

Small to medium size corporate insolvencies have again dominated the latest ASIC insolvency statistics in relation to external administration.
85% had assets of $100,000.00 or less; 81% had less than 20 employees and 43% had liabilities of $250,000.00 or less.
The report also outlined the top 3 alleged misconducts as insolvent trading; obligation to keep financial records and directors and officeholders failure to fulfil their duties.

If you want to ensure that you are meeting your corporate obligations or just need some assistance managing your Business, Contact our Commercial Department on (07) 4775 6100.

UNFAIR DISMISSAL AND REDUNDANCY

There have been a number of recent decisions in these areas of late which highlight an employer's obligations to their employees.

A redundancy may be defined as a situation where an employer no longer requires work performed, through no fault of the employee. In reality it is the position which is redundant, not the individual employee. Labelling something a redundancy, does not make it one.

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Two recent examples of 'sham redundancies' which gave rise to Unfair Dismissal actions are:-

- A university Professor who was dismissed after a falling out with the Head of School. The University argued that the Professor was dismissed as her department was operating at a loss. The Court found that there was a lack of connection between the financial situation of the department and the 'redundancy' and ordered the Professor to be reinstated; and

- A finance manager who was moved into a different position as part of an internal restructure of the Bank due to changing economic and business conditions. The Court held that the internal reorganisation in effect made the finance manager redundant and entitled him to a redundancy payout.

If you terminate an employee under the guise of a 'redundancy' and a Court later holds that it was a 'sham redundancy' you expose yourself and your Business to liability.

In order to protect yourself and your Business we recommend the following action:-

- avoid 'sham redundancies';
- ensure that all consultations with employees are well documented, particularly if they involve redeployment;
- be able to demonstrate that attempts to consult employees in respect of redeployment have been made; and
- keep in mind the general protections in favour of employees under the *Fair Work Act 2009*;
- contact the Commercial Department on (07) 4775 6100 to find out how to improve your Business practices and better protect your Business.

CHANGES TO DIRECTORS' LIABILITY – REVIEW YOUR OBLIGATIONS NOW!

In order to promote consistent practice on a national level, the *Directors' Liability Reform Amendment Act 2012* ('the Act') was passed by the Queensland Parliament on 16 October, 2013. The amendments primarily address the imposition of personal liability on the directors of a company with the majority of provisions Act commencing on 1 November, 2013.

A legislative audit revealed that prior to the commencement of the Act, 3,800 executive officer liability offence provisions existed spread across 80 different Acts.

The Act removes certain provisions which impose executive liability across a number of Acts, however, more significantly it redefines the parameters of the standard of executive liability.

Whilst the Act has been introduced with a view to reduce the 'red tape' and regulatory burden placed upon Queensland Businesses, it remains to be seen whether the new approach will do the same in respect of directors.

Due to the redefinition of the standard of executive liability and the range of provisions which have been amended we consider that this is the perfect time for all directors and officeholders to review their obligations.

If you would like to find out whether any of these amendments directly affect you as a director or executive officer or simply think it's time to review your obligations contact the Commercial Department on (07) 4775 6100.

SEVEN DEADLY SINS

With Christmas rapidly approaching (and hopefully a well deserved break) make sure you avoid committing the seven deadly sins of employers in relation to Christmas leave:-

1. Failing to give requisite notice of the intention to close down over the Christmas period;
2. Failing to provide written notice of the closure and the requirement of employees to take paid annual leave;
3. Terminating an employee with notice inclusive of pre termination approved annual leave;

AUDIT OF FRANCHISORS

The Australian Competition and Consumer Commission ('ACCC') will be conducting an audit to ascertain whether franchisors are complying with the Franchising Code of Conduct ('the Code')

The ACCC will be targeting industries which are generating a disproportionate number of complaints, namely the take-away food and health and fitness industries.

Since the introduction of the Code in 1998, the ACCC has taken successful court action against more than 20 franchisors and obtained court enforceable undertakings from more than 10 franchisors. The basis for these actions has primarily been due to unconscionable conduct, misleading or deceptive conduct and contraventions of the Code.

If you would like further information regarding the obligations of franchisors or wish to discuss referring your issue to the ACCC contact our Commercial Department on (07) 4775 6100.

4. Unreasonably requiring an employee to work on a public holiday;
5. Inappropriately disciplining an employee for refusing to work on a public holiday;
6. Underpaying employees for public holidays; and
7. Failing to pay leave loading on annual leave entitlements.

To ensure you avoid committing any of the deadly sins (and ensure you stay on Santa's 'Nice List') contact our Commercial Department on (07) 4775 6100.

EMPLOYMENT LAW – MYTH BUSTERS

Many employees and employers are uncertain of their rights and obligations, in many cases their understanding of these rights and obligations are a result of previous work place practices or inaccurate social advice.

Here are the real facts on five of the most common employment law misconceptions.

1. **An award does not apply if the employee is paid above the award rate**

False. Generally the provisions of the award will still apply. In all circumstances the entitlements concerning hours of work, holidays, termination, overtime etc will still apply.

2. **Annual leave does not accrue for employees working a long roster which comprises long breaks**

False. All employees are entitled to a minimum of four weeks annual leave. Shift workers are entitled to five weeks annual leave.

3. **Annual leave may always be cashed out**

False. Annual leave may only be cashed out pursuant to the *Fair Work Act 2009* ('the Act'). The Act states that annual leave may be cashed out in accordance with a modern award or enterprise agreement, however a balance of four weeks annual leave must remain.

Most annual awards do not contain any such provision. An agreement or award free employee may agree with their employer to cash out annual leave, but again, the balance of four weeks must remain.

4. **Casual employees are always casual if that is what they are called and how they are paid**

False. Even if the employment contract of an employee states that they are a casual and they receive casual loading they may be deemed to be a permanent employee.

If the employee works regular systematic hours and there is an expectation of ongoing employment they may be deemed to be a permanent employee.

5. **The length of notice an employee is required to give is the same as their pay period**

False. There is no correlation between the frequency of remuneration and requisite notice period. The notice period should be determined with reference to the National Employment Standards and the relevant award.

If you would like more information on any of these myths, or have any other enquiry regarding your rights or obligations, contact our Commercial Department on (07) 4775 6100.

CHANGES TO WORKERS' COMPENSATION – WHAT DOES THIS MEAN FOR EMPLOYERS?

The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2003* ('the Act') was passed on 29 October, 2013. The Act makes numerous changes to the *Workers' Compensation and Rehabilitation Act 2003* which benefit employers.

Amendments include:-

- employers may request that a prospective worker disclose any pre-existing injury or
- medical condition which they believe or suspect would be aggravated by the duties inherent to the position for which the potential worker applied;
- any prospective worker who provides false or misleading disclosure will not be entitled to receive compensation or to seek damages in relation to any aggravation of that injury or condition;
- employers may access a prospective worker's claims history for the purposes of considering and selecting the person for employment;
- in respect of psychological or psychiatric injuries, compensation is only payable where the worker's employment is the major significant contributing factor;
- the introduction of a 5% permanent impairment threshold in order to access common law damages; and
- any worker whom lodges a common law claim for damages faces a mandatory referral to an accredited return to work program.

We urge employers to bear in mind the risks associated with obtaining and using a prospective worker's claims history, such as the risk of breaching discrimination and general protection laws when assessing suitability for employment.

If you would like more information about the new Worker's Compensation legislation, contact our Commercial Departments on (07) 4775 6100.

UNCOLLECTED GOODS

Changes to the law dealing with uncollected goods have come into effect recently, which amend the existing practices both in respect of residential matters and commercial matters.

The amendments reflect the position that goods left behind by a tenant constitute an 'involuntary bailment' rather than being viewed as merely an aspect of the tenant/landlord relationship.

The amendments have been enacted with a view to achieving a situation whereby uncollected goods pay be disposed of in a manner which is equitable to both the bailee and the bailor.

Whilst the terminology used to refer to individual parties has changed, the most significant change is that the amendments introduce and define different classes of goods, based upon the value of the same.

The manner in which the goods may be dealt with varies dependent upon their value category.

Although the new provisions are more onerous than the previous law, the amendments allow more flexibility to suit specific circumstances

If you would like further information regarding these amendments or require specific advice in respect of uncollected goods contact our Commercial Department on (07) 4775 6100.

PROTECTING CUSTOMER DETAILS AND CONFIDENTIAL INFORMATION

In Australia there are two categories of enforceable and protectable interests; good will, inclusive of customer and staff relationships; and confidential information.

These interests are usually protected undercover of a contract of employment. However, they may be dealt with outside such a contract and take the form of independent deeds, contracts or agreements.

Restraint of trade clauses are usually adopted to protect the goodwill of a business. Primarily such clauses will be utilised in order to prevent an employee from competing with a previous employers business.

Australian Courts will usually enforce these provisions where the restraint is reasonable to protect an employer's legitimate business interests. Restraints are more likely to be accepted as reasonable if they prohibit competition within a defined geographic location and for a specific duration which are connected to the employers business. Unlimited time restrictions are almost always held to be unreasonable.

In respect of confidential information, there is a distinction between trade secrets of a business and the general knowledge and skills which are gained and developed in connection with an employee's employment.

Trade secrets are protected by Australian legislation and may never be disclosed. However, a confidentiality agreement or deed would be required to protect the general knowledge gained.

If you want to make sure your Business' information is adequately protected, contact our Commercial Department on (07) 4775 6100.

AVOID GETTING HIT WITH CAPITAL GAINS TAX ON THE FAMILY HOME

Generally when you purchase a residence as your primary place of residence or main residence you effectively and legitimately avoid the requirement to pay capital gains tax on the premises.

However, the recent case of *Re Keep and FCT* demonstrates the importance of maintaining proper records so that you may substantiate that the premises is in fact your primary place of residence, in the event that the ATO conducts an audit.

In this case the taxpayer relied upon the following documents to support their argument that they were living in the new home:-

- Water rates notice (which was addressed to the previous address rather than the property in dispute);
- Council rates notice (which the tribunal noted did little to substantiate the claim); and
- Statements from friends and relatives (which were attached little weight by the Tribunal as they did not attend the hearing).

Documentary evidence which may have swayed the tribunal include but are not limited to:-

- Driver's Licence displaying new address;
- Evidence of postal redirection;
- New address reflected on the electoral roll;
- Gas, electricity, rates notices etc displaying new address; and
- Address provided on taxation return.

If you would like further information regarding the steps you may take in order to ensure that you are in possession of substantial documentary evidence which supports your primary place of residence, contact the Commercial Department on (07) 4775 6100.

On behalf of the entire The Brad Robins Legal Centre team, we wish you and your family a very merry Christmas and a happy New Year and don't forget to look out for the next edition of The Brad Robins Legal Centre Business Briefs in the New Year.