

# NEWSLETTER

JUNE 2011

## Employment & Industrial Relations Newsletter

### Cornwalls' E&IR Team News

We are pleased to announce the return of Louise Houlihan from maternity leave. Louise is a Partner and the Head of our Employment & Industrial Relations team. For those of you who do not know Louise, she is experienced in advising and representing clients in various employment matters including industrial disputes, enterprise bargaining, wrongful and unfair dismissals, OHS and discrimination.

This month our team also welcomed Tonia Sakkas, who has been appointed to the role of Senior Associate. Tonia comes to us from Macpherson & Kelley, and specialises in employment and industrial relations. Aside from the law, Tonia's interests include travel and food!

Also, Jane O'Brien has accepted a role within the E&IR team. Jane, who has an interest in taxation law, is also assisting our Revenue Law group.

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### Cornwalls' E&IR Alerts

This month the E&IR team issued three important alerts that employers should make themselves aware of:

- [the first alert](#) concerned the passing of the *Equal Opportunity Amendment Bill 2011*, which amends the *Equal Opportunity Act 2010* (Vic) (commencing 1 August 2011);
- [the second](#) was in respect to Fair Work Australia's decision to vary the General Retail Industry Award 2010, to allow for greater flexibility in minimum shifts for student casuals. The Shop, Distribution and Allied Employees Association (SDA) later lodged an appeal against the decision, as reported in our [third alert](#).

Please click the highlighted areas to view these alerts on our website.

### **Independent contractors: are you paying the correct amount of workers' compensation insurance?**

Did you know that in certain circumstances, you may be required to take out workers' compensation insurance for your contractors? The laws vary from state to state.

In Victoria, a principal is required to take out workers' compensation insurance on behalf of its contractors if those contractors are deemed to be 'workers' for the purposes of the *Accident Compensation Act 1985* (Vic) (**Act**).

Recent amendments to the Act, which will commence on 1 July 2011, streamline the process for determining whether a contractor is a 'worker' under the Act.

The amendments have the effect of capturing payments made to contractors who work solely or predominantly for the same principal. This is so regardless of whether the contractor is a sole proprietor, partnership, company or trust.

The amendments introduce a new section 8, which replaces the former sections 8 and 9, and deems a contractor to be a 'worker' if all of the following conditions are fulfilled:



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1. the provision of services by the contractor is not ancillary to the provision of materials or equipment by the contractor; and
2. the contractor performs at least 80% of the services under the contract; and
3. the gross income derived by the contractor from the principal is at least 80% of the contractor's gross income earned from services of the same class provided under the contract.

It is important to note, however, that WorkSafe maintains an overriding discretion to determine that a contractor is carrying on an independent trade or business and is thus not a 'worker' for the purposes of the Act.

It is also important to familiarise yourself with the new requirements and reassess your engagements with contractors to ensure you are paying workers' compensation insurance when required. If a principal

fails to provide cover for a contractor who is then deemed to be a 'worker', WorkSafe may seek:

- to recover up to double the insurance premium that should have been paid;
- to impose a penalty for failure to have an appropriate insurance policy in place; and
- reimbursement of the full cost of claims made by uninsured workers.

## Employers shouldn't take 'planking' lying down

Society has seen many fleeting crazes – yoyos, slap-bands, Pokémon cards, the Macarena – the list is endless. But with the exception of the crazy frog ringtone, no passing trend has posed such a potential threat to the health and wellbeing of its followers as that of the current fad sweeping our nation – 'planking'.

### What is planking?

Planking is the act of lying face down with arms to the sides of the body in unusual public places; the position is then photographed and shared with others on social networking websites. The fad began in Australia when National Rugby League player (and planking trailblazer) David 'Wolfman' Williams planked after scoring a try during a televised rugby match in March 2007. The craze has since grown rapidly in popularity, with people planking on everything from tables and chairs to police vehicles. However, the dangers inherent in planking were highlighted when Acton Beale, a 20-year-old man from Brisbane, tragically plummeted to his death in May after reportedly planking on the railing of a seventh-floor apartment balcony.

## Concerns for employers

Planking has also become a growing concern for employers. Eight Woolworths employees in three separate states were recently sacked for planking in the workplace. The employees planked on milk crates, 2 metre high shelves, trolleys, display units and even on a meat grinding machine. A spokeswoman for Woolworths claimed the employees had put themselves and customers at risk, and their actions were 'a direct contradiction of [Woolworths] safety and health policy'.

Similarly, two workers were sacked from the Santos plant in Whyalla after planking on top of the plant's 60 metre high smokestacks. Their actions were viewed as extremely dangerous and they were immediately dismissed from the plant. McDonald's has also dealt with 'planksters' after several employees were photographed planking on a counter at one of its restaurants, in breach of the company's workplace health and safety rules. An investigation into the matter has been launched and a spokeswoman has stressed McDonald's commitment to workplace safety.

## Take caution when dealing with 'planksters'

While some planking is clearly dangerous and potentially fatal in the absence of caution and care, the measures taken by employers to outlaw the activity in the workplace might be viewed as overly severe. The influential planking lobby might deem the immediate sacking of staff members for planking-related offences as an unfair dismissal of these employees. A dismissal will be classed as 'unfair' if it is 'harsh, unjust or unreasonable' and lacks both substantive and procedural fairness. The factors taken into account in determining the fairness of any dismissal will be:



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- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees) and whether the person was notified of that reason and given an opportunity to respond;
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal.

It may be argued that employers who immediately dismiss employees based on 'planking-grounds' might fall short of the proper procedures underpinning a fair and just dismissal of the offending employees. While certain planking may be a clear contravention of a company's

health and safety rules, there may be more constructive means by which employers can effectively discipline such behaviour.

Through more extensive training and education, employers will better inform their staff of the occupational health and safety rules and expectations placed upon them. This should deter them from ever engaging in dangerous activities like planking. Much like Boy George, so too will the planking craze fade into oblivion – but while it yields its influence over the Australian workforce, employers should face this issue with their heads held high... and bodies upright.

## Penalty a clear message to company directors

Dennis Richter, the sole director of Aussie Junk Pty Ltd (in liquidation), has been ordered to personally pay \$72,000 for underpaying workers at his former Canberra-based recycling company.

The director admitted to underpaying ten employees a total of \$259,315. Some were paid as little as \$50 cash-in-hand for nine-hour Sunday shifts. The director also admitted to terminating the employment of three workers after they made complaints to the Fair Work Ombudsman.

By virtue of the director's admissions, it was accepted that he was 'involved in' the contraventions. Although this decision was made under the 'accessorial liability' provisions in the *Workplace Relations Act 1996 (WR Act)*, similar provisions exist in the current *Fair Work Act 2009 (FW Act)*; the decision is therefore relevant to employers.

The court acknowledged that although the director had not deliberately set out to breach the WR Act, he was 'willfully blind in shutting his eyes to his responsibilities as an employer'.

Federal Magistrate Neville said the director could not claim ignorance of the requirements of proper payment to the employees, and his responsibility could not be 'shirked or otherwise avoided'. As the sole director, he was the person solely responsible for determining and adjusting wage rates and conditions for employees. Despite that the director had ample opportunity to rectify the underpayments, the court found that his response was less than satisfactory.

In determining the appropriate penalty, his Honour found there was little contrition for the breaches. He also considered that now the company was in liquidation, the prospect of repayment from Aussie Junk was remote, and consequently ordered Mr Richter to pay nearly three-quarters of the maximum penalty available. The fine is to be passed on to the underpaid workers.

It is important for directors to understand that a person who is involved in a contravention of the FW Act, is taken to have contravened that provision. Accordingly, if an individual is involved in the contravention, he or she can be liable as an accessory and personally exposed to penalties. The FW Act provides that a person is involved in a contravention if, and only if, the person has:

- aided, abetted, counseled or procured the contravention; or
- induced the contravention, whether by threats or promises or otherwise; or
- been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- conspired with others to effect the contravention.

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This case very clearly demonstrates that directors can be held accountable for the failures of their businesses to provide employee entitlements. It also shows how willing the court is to award significant penalties. It is therefore important for employers, and particularly directors and officers, to understand their obligations with respect to employee entitlements.

## Putting termination in con-‘text’

In a recent hearing, Fair Work Australia (FWA) awarded almost \$10,000 to a woman who was sacked via text message. Sedina Sokolovic had been employed at Modestie Boutique for two years when her boss sent her a text message complaining about her swapping shifts without permission, and ultimately dismissing her. FWA found this conduct to be ‘harsh, unjust and unreasonable’ because the reasons given in the text message did not include any ‘serious misconduct’ that would justify an instant dismissal. Ms Sokolovic was also denied an opportunity to respond or explain the circumstances that had led to her sacking.

Employers should be mindful of the methods they use to dismiss their staff. While ‘dismixting’ (dismissal through texting) is a cowardly practice and strips an employee of the basic respect and courtesy owed to them, it can also land employers in trouble. The *Fair Work Act 2009* states that a dismissal may be deemed to be ‘unfair’ if an employee is not given an opportunity to respond to any reason relating to their capacity or conduct that may have led to the decision to terminate their employment. Regardless of the number of smiley-face emoticons that may follow a dismissal message, termination through text cannot be seen to afford the recipient the appropriate forum by which to justify their behaviour or challenge their dismissal.

FWA’s recent decision on this matter serves as a warning to all employers: show your employees the respect they deserve when terminating their employment, or pay the price.

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### Disclaimer

This newsletter is intended to provide general information on legal issues and should not be relied upon as a substitute for specific legal or other professional advice.

## Workplace Relations Highlights (Watch this Space)

The Australian Financial Review is reporting that the Victorian government is supporting Bendigo TAFE’s challenge to the High Court, saying the full Federal Court’s decision on adverse actions has ‘significant implications for all employees and employers’. For previous coverage on this issue, please see our [May 2011 Newsletter](#) and [February 2011 alert](#).

Employers should note that from 1 July 2011, the high income threshold increases to \$118,100 and the compensation limit under unfair dismissal increases to \$59,050.

Fair Work Australia has also published the modern award wage determinations. The determinations take effect from the first full pay period on or after 1 July 2011. Employers should access the determinations at [FWA’s website](#) to ensure they comply with their wage obligations.

A Fair Work Australia full bench has upheld a decision to make an employer pay \$25,821 to an employee who had her role unilaterally changed and her pay cut after she made a request for modified duties while pregnant [*Allied Express Transport Pty Ltd v Owens* [2011] FWA 2929].

An employer has won its High Court bid to challenge the opinion of a WorkCover Authority medical panel. A former partner of Maurice Blackburn Cashman was deemed by a medical panel to have a ‘serious injury’ and, as entitled under the *Accident Compensation Act 1985* (Vic) (**Act**), commenced common law proceedings against her former employer for damages. In pleadings, the law firm denied that the partner had suffered injury, loss and damage. The issue on appeal was whether the employer was precluded by operation of the Act from making that and other contentions in evidence or argument. The High Court found that the Act did not prevent a person dissatisfied with an opinion expressed by a medical panel from seeking judicial review of that opinion [*Maurice Blackburn Cashman v Brown* [2011] HCA 22].

A WorkSafe Victoria employee has asked Fair Work Australia to guarantee her part-time hours until her child starts primary school. The employee’s representative, FSU, argued that WorkSafe had failed to give due consideration to the employee’s personal circumstances, and had not established that her working part-time would sufficiently impact the ability of her team to fulfil its duties, and therefore should not have denied her request. Commissioner Smith has reserved his decision.

The *Crimes Amendment (Bullying) Bill 2011* has been passed, meaning bullying in certain circumstances is now a crime under Victorian law. Please see our [April 2011 Newsletter](#) for further details on the lead up to this legislation.