NEWSLETTER

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ENHANCING SUCCESS

MARCH 2012

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

Welcome to the first edition of the E&IR newsletter for 2012. We hope you find this bi-monthly update helpful and informative. If there are any particular topics you would enjoy seeing more on in 2012, please let us know.

On the team front, we are pleased to announce that Jane O'Brien has accepted a role as a full time member of the E&IR Group. Jane, who has been part of the group for 12 months now, has previously dedicated half of her time to our upcoming Revenue Law group, but has decided to pursue a career in E&IR law.

We also congratulate our current trainees, Matt and Georgia, who completed their traineeships this month. Matt and Georgia will attend a formal admission ceremony at the Supreme Court of Victoria, where they will sign the bar roll and officially become 'lawyers'.

This month, we also welcome a new trainee to the E&IR team: Lachlan 'Lachie' Currie. Lachlan completed a Science/Law degree at the University of Melbourne, majoring in chemistry. He is a skilled rock-climber and loves his cats, Harold and Mabel.

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Social media forum

The E&IR team held their first HR Forum for the year in early February. These forums are informal sessions where attendees are encouraged to direct any questions they may have to the panel. Hosted by David Moore, our Head of Intellectual Property, the forum focused on social media use and its impact on business, with particular regard to intellectual property (**IP**) and employment related issues.

Intellectual property and social media

There are two broad range risk areas from which potential breaches of a business' IP may arise (although it is important to note that the relevant acts do not distinguish by motive):

- classic infringement; and
- disparaging treatment.

Classic infringement

This concerns the scenario where a commercial competitor (including an ex-employee) breaches a business' trade mark rights or copyright via a social media platform for the purposes of commercial gain. Examples would include reproducing a company's logo on Facebook to direct traffic away from the original site to the infringing party's own site, or posting via Twitter information directly copied from a competitor's website. Classic infringement of this kind is remedied by traditional IP laws; these laws will apply regardless of whether the infringing content is online or not.

Disparaging treatment

This risk area involves situations where infringing material is used to disparage the lawful owner of the IP. Such scenarios could involve disgruntled employees or activist groups reproducing a company's IP for posting on various social media platforms in order to criticise and sully the company in question. An example of this was activists modifying the Nestlé image (including modifying the Nestlé Kit-Kat logo in order to include the word 'killer' next to the word Nestlé) in protestation against Nestlé's use of palm oil in the manufacture of some products.

It is difficult to use existing Australian IP laws to prevent disparaging conduct from occurring. Often the material will not cause sufficient confusion or deception such that it constitutes a breach of trade mark or fair trading laws. It may also fall under the protection of the parody or satire defence of the *Copyright Act 1968* (Cth). Further, there is no Australian equivalent of the US 'dilution laws' that prevent the use of material which, although not deceptively similar to another trade mark, nevertheless lessen the uniqueness of that trade mark (even though the infringing material may have little connection and not even be directly competing with the original trade mark).

Businesses may be able to acquire some protection if the platform hosting the disparaging accounts is willing to cooperate and disable the accounts on the basis that not doing so would constitute a breach of their terms and conditions. However, this is not a hole-proof panacea because the person disseminating the disparaging material is still able to create new accounts and continue engaging in disparaging conduct.

Further, the ease of identifying the infringing party can also be difficult. This is because there is no 'trail' of commercial transactions or client solicitations to trace; many social media platforms allow users to sign up for accounts without verifying any personal details provided. This gives people who wish to make the disparaging comments a degree of anonymity (and thereby makes it harder to trace them in order to institute proceedings). Further, given the internationality of social media users, jurisdictional issues also frequently arise.

However, social media is not necessarily all gloom and doom for businesses wishing to protect their IP. A proactive and progressive approach to social media can often greatly benefit a business. An example of this is the Coca-cola Facebook page. Originally started by two fans who had a passion for the soft-drink, the page (which adopted Coca-cola IP) was discovered by Coca-cola; however instead of attempting to quash the site, the company worked with the original creators and continued to build the page. By being involved, the company could then steer the page into representing the brand in a manner consistent with its business model. The page currently has over 38 million Facebook friends as of publication of this newsletter.

Employees and social media

Employers and social media

Social media can be a valuable tool for employers. Employers seeking to recruit staff can use the various social media platforms to conduct recruitment drives, interacting directly with prospective employees and obtaining a clear picture of the full range of candidates (and incidentally, cutting out the middlemen!). Moreover, social media can be useful in assessing the suitability of applicants and ensuring that potential candidates meet the criteria for the employer's business (it is important, however, that employers ensure they do not discriminate against hiring potential employees on illegal grounds such as family obligations etc).

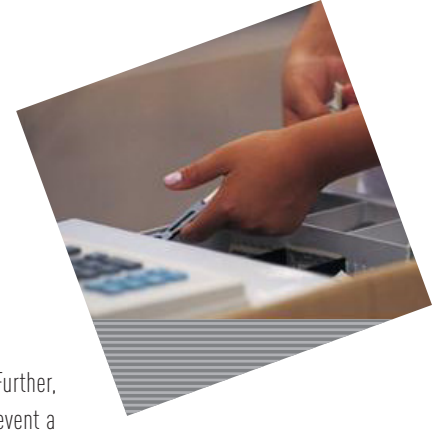
Employees and social media

There are inherent dangers for an employer when their employees are engaged with social media platforms, the most common being when an employee, through a medium such as Facebook, makes critical or disparaging comments about their employer or fellow employees. This can be damaging to the employer's brand, and depending on the nature of the comments, could lead to the employer being held liable for workplace bullying or other forms of harassment.

How can employers protect themselves against improper use of social media by employees?

First and foremost, employers should have a comprehensive social media policy in place. Such a policy would set out what is considered appropriate use of social media and what may be considered grounds for dismissal. Furthermore, the policy should be in accordance with the employer's workplace culture – this not only enhances the effectiveness of enforcing the policy, but is also more likely to succeed in achieving adherence.

Secondly, employees should be provided with training on the policy, including discussion on the policy's implications on conduct and any ramifications that may arise from misfeasance.



Finally, in instances where there has not been compliance with the policy, the employer should take care to ensure they are consistent in their dealings with the transgressing employees. Monitoring compliance with the policy could be an onerous task (especially in workplaces with large numbers of employees) and infringements may not necessarily be discovered until after some time; however when a transgression is discovered, it is important that the employer adopts a consistent approach to each of the relevant employees. This not only prevents any hint of bias or discrimination, but reinforces the core importance of the policy and adherence to it.

Conclusion

Social media should be recognised as the constant it is in the 21st century. Business should embrace social media and reap the many benefits it offers; but they should do so in a manner that offers them maximum protection. The most effective method by which an employer can protect themselves is through having a social media policy.

If you would like a social media policy created to prepare your business for the ever growing phenomenon of social media, please contact **Louise Houlihan** on +61 3 9608 2273, **Tonia Sakkas** on +61 3 9608 2157, **Jane O'Brien** on +61 3 9608 2227, or **David Moore** on +61 3 9608 2264. To email one of the team, please click on their name.

Shorter after-school shifts in retail

In September last year, Fair Work Australia (**FWA**) varied the General Retail Industry Award (**Award**) to reduce the minimum required shift length from 3 hours to 90 minutes for after school shifts worked by secondary school students. In accordance with the variation, a casual employee could be employed for a minimum 90 minute shift if all of the following applied:

- the employee was a full time secondary student;
- the employee was engaged to work between 3:00pm and 6:30pm on a day they were required to attend school;
- the employee agreed to work and a parent or guardian of the employee agreed to allow the employee to work, a shorter period than three hours; and
- the operational requirements of the employer or the unavailability of the employee made longer shifts impossible.

The intent of the determination was to make it easier for secondary school students to work under the Award and study while still at school, with the NRA saying that *'the proposed variation was intended to be facilitative in its operation with the object of creating opportunities for employment where they may not have existed previously'*. The changes were to be effective from 1 October 2011.

It's no secret that employers in the retail sector have been disgruntled by the requirement under the Award that retail employees' shifts must be a minimum of three hours, and the Australian Chamber of Commerce and Industry described Vice President Watson's decision as *'a common sense breakthrough'*.

Unfortunately for retailers, the Shop, Distributive and Allied Employees Association (**SDA**) applied to the Federal Court for judicial review of the determination on the basis that the decision was *'affected by error'*. The union also sought a stay until the appeal was heard, but Justice Richard Tracey denied the stay on October 13. Accordingly, until the Federal Court orders otherwise, 90 minute shifts are currently permissible under the Award if the required criteria are met.

The SDA has stated that its evidence establishes that employment among secondary students is *'very healthy'*. Further, the SDA argues that it is trying to prevent a reduction in minimum shift hours for those students currently working and to protect other vulnerable employees.

On 1 February 2012, the National Retailers Association (**NRA**) made submissions to the Federal Court that Fair Work Australia's determination was correct and that the ruling did not create circumstances that would lead to indirect discrimination. The NRA argued that the variation to the Award should stand because many retailers only open until 5:30pm on weekdays, making it difficult to roster secondary school students on after school, and that some retailers would employ more high school students after school if the minimum required shift length was reduced.

Justice Tracey has reserved judgment.

Social and community sector workers – big winners!

On 1 February 2012, Fair Work Australia (**FWA**) made a landmark decision that will result in up to 150,000 social and community workers throughout Australia receiving pay increases of up to 41% over the next eight years. This was the first equal pay ruling under the Australian Labor Government's Fair Work reforms.

The decision related primarily to an application made by the Australian Municipal, Administrative, Clerical and Services Union (**ASU**) on its own behalf and on behalf of several other unions in the social, community and disability services industry for an equal remuneration order under Part 2-7 of the *Fair Work Act 2009*.

The ruling followed a Fair Work Australia decision in May 2011 that social and community workers were receiving less remuneration than state and local government workers performing similar work, and that gender was a significant factor in causing the gap. FWA did not make a decision at that time, but instead gave parties the opportunity to make submissions on the matter.

The ASU submitted that wage rates in the industry were lower than they otherwise would be because of gender considerations. It argued that the minimum rates at each pay point in the sector should be equivalent to those in the Queensland Social and Community Services Award, the pay rates of which were increased after a landmark equal pay ruling in that state.

State and territory governments and employer groups made submissions opposing the application, as did various industry groups. While FWA did recognise that any order it made had the potential to affect employment levels and service provision as well as the finances of a number of states, it concluded that these risks could be *'satisfactorily addressed by an extension to the length of the implementation period'*, and ruled that the base rates of pay in these sectors were to be increased, some by as much as 41%.

FWA provided percentages by which each level in the sector would have its pay increased, and held that the increases are to be introduced over eight years in nine equal instalments, commencing on 1 December 2012 and ending on 1 December 2020. FWA also ruled that loadings in the sector were to increase by 4%.

Workplace Relations Highlights (Watch this Space)

Justice Iain Ross AO has been appointed as the new president of Fair Work Australia, succeeding Justice Geoffrey Giudice, who retired on 29 February. Justice Ross, who previously performed the role of Vice President of the Australian Industrial Relations Commission, is a former Victorian Supreme Court judge and last year became President of the Victorian Civil and Administrative Tribunal. He is also Chair of the Council of Australian Tribunals. He has held positions with the Australian Council of Trade Unions and worked with the law reform commissions in New South Wales and Victoria. From 1994-2006 he was Vice President of the Australian Industrial Relations Commission.

The appeal of the Full Federal Court's decision in *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 274 ALR 570 is to go before the High Court this month. In February 2011, a majority of the Full Federal Court found that in determining adverse action claims, the subjective intention of an employer for engaging in allegedly adverse conduct is relevant but not determinative. Instead, it is necessary to identify the 'real reason' for the conduct, which may not be the reason that the employer asserts, even where an employer genuinely believes that they were motivated by that reason. In effect, the court adopted an objective test for determining the reasons for an employer's conduct, with the majority stating that: *'The search is for what actuated the conduct of the person, not for what the person thinks he or she actuated by…the real reason may be conscious or unconscious…'* This decision was particularly troubling for employers because it meant that regardless of their subjective intention, a court could take a broader view and construe that the 'real' reason for their actions was a prohibited reason.

Fair Work Australia will soon be conducting a review of modern awards (including their transitional provisions), other than modern enterprise awards and State reference public sector modern awards. Parties who wish to file an application to vary a modern award must do so by 8 March 2012.