Newsletter of the Law

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WP Lawyers,
26 Nerang Street Nerang Qld 4211
07 55960 433

info@wp-lawyers.com.au
www.wp-lawyers.com.au

What's inside …

More disclosure required from franchisors

New changes to the Franchising Code of Conduct came into force on 1 July 2010. These changes require franchisors to communicate more to help prospective franchisees to make informed decisions before entering into a franchise.

The new amendments are also designed to strengthen the dispute resolution process.

Specifically, the amendments require franchisors to:

- give six months' notice if they are not going to renew a franchise agreement
- disclose to prospective franchisees information on confidentiality obligations
- make clear what kind of obligations a franchisee has in terms of future capital expenditure or whether there are any requirements to pay a franchisor's legal costs

If you fail to comply with the Code, you are in breach of the *Trade Practices Act 1974* and the Australian Competition & Consumer Commission can take legal action against you.

Remedies and penalties include injunctions to stop the conduct, compensation and damages, setting aside or varying relevant contracts and orders for corrective advertising.

The importance of complying with the Code was highlighted recently in a case brought to the Federal Court in Brisbane in which the court declared that a franchisor had engaged in unconscionable conduct towards certain franchisees by demanding, and ultimately obtaining, payment of increases of up to 50 percent in the ongoing weekly fees for access to its national telephone number.

The court found that the franchisor had no contractual basis for the fee increases and the judgment revealed "misstatement, non-disclosure of information, threats and intimidation and the abuse of the franchisor's position of strength."

A compilation of the updated Franchising Code is available at comlaw.gov.au or general compliance obligations can be obtained via accc.gov.au/franchising.

Find out more about these obligations by contacting us.

Fair Work modern awards take effect

The National Employment Standards and Modern Awards under the *Fair Work Act 2009* have now commenced.

These Fair Work changes impact on the day-to-day running of Australian businesses and include new entitlements to flexible working arrangements, unpaid parental leave, personal/carer's leave and compassionate leave, along with other changes to annual leave arrangements, redundancy pay and the new awards.

The award modernisation process has involved reviewing awards in the national workplace relations system. The Australian Industrial Relations Commission began the process in March 2008.

By the end of 2009, more than 1500 awards had been reviewed and 122 industry and occupation awards created.

These awards commenced on 1 January 2010, but most included provision to phase in wages, loadings and penalties from 1 July 2010.

Employers need to have determined which modern award applies to them and to be aware of how the new terms and conditions apply to their business.

All employment policies and contracts should be reviewed to ensure that they do not provide entitlements less favourable than the relevant modern award.

If employers want to exclude high income earning employees from award coverage, they must enter into an agreement to do so.

Case in point: Verbal abuse of pregnant worker

An apprentice hairdresser was awarded compensation of more than $10,000 after she lodged a complaint with Anti-Discrimination Commission Queensland, claiming she had suffered verbal abuse from her employer about her pregnancy.

An apprentice hairdresser in Brisbane told the Anti-Discrimination Tribunal that she was verbally abused by her employer after seeking time off to attend an antenatal doctor's appointment and that this abuse led her to resign.

Prior to her announcing the pregnancy, her employer had twice commented that staff who became pregnant would be sacked.

This case emphasises the need for both employees and employers to be aware of their rights and responsibilities.

The Anti-Discrimination Commission Queensland states that "under the *Anti-Discrimination Act 1991*, it is unlawful to discriminate against a person because they are planning a family, pregnant or because they have responsibility for the care of children or close relatives."

The complaint

The complainant in this case alleged that she was the subject of direct discrimination on the basis of pregnancy when she was verbally abused by her employer on asking to leave work to see a doctor for an antenatal examination. She claimed that this incident happened after two weeks of the employer's hostile behaviour during which time he was aware of her pregnancy.

The background

The tribunal found that both parties believed that they had a good relationship since the respondent had taken over the business and there was some evidence of "cheekiness" from the complainant and humour between them. The respondent said that the complainant was a good employee whose work was above standard for an apprentice.

The alleged threat

The complainant said that the respondent had told her that if she were ever to fall pregnant, he would sack her. This allegedly occurred in mid 2005, shortly after the respondent became the owner of the salon. The complainant also said that she had heard him make a similar comment to other staff members.

The respondent agreed that he had made these comments but said that it had been intended as a joke.

"Although I consider her evidence to the effect that the comment that staff who became pregnant would be sacked was made frequently while she was there was exaggerated, there is no doubt that it was made at least on more than one occasion," Member Roney of the Anti-Discrimination Tribunal said.

"I also accept that even if it had been said in some joking or half-joking fashion and was dismissed by more senior staff as precisely that, a young woman in the complainant's position would have reasonable cause to have considered the comment as one she should take seriously."

The treatment of the complainant after the announcement of her pregnancy

The complainant claimed that her employer began to treat her poorly after she told him that she was pregnant in October 2006. She said that he became insistent that she keep the salon tidy and criticised her work, suggesting it was not up to standard. The respondent denied that his attitude changed in any way toward her.

Member Roney said that, while he accepted that there may have been outward displays of the respondent's disappointment in the complainant during this time, he did not regard these as discriminatory conduct.

However, the respondent did accept in his testimony that he was disappointed that the complainant had become pregnant because he knew she would have to postpone her apprenticeship. He conceded that he felt she had let him down and that he saw her pregnancy as a breach of contract because he believed she had given a commitment to work for an unbroken period for the four-year term of her apprenticeship.

Pregnancy as a breach of contract

It was alleged that the respondent had complained to an officer of the Department of Employment and Training that the complainant had a bad work attitude, had taken numerous sick days and fallen pregnant, which was in breach of her contract.

The respondent denied saying these things, but the tribunal found that it was clear on the respondent's own evidence that it was what he believed.

"He felt that she was morally and contractually bound to work for him throughout the period of the apprenticeship and that this meant that she ought not become pregnant or impose upon him any of the consequences of that pregnancy, including, at that time, the necessity for antenatal treatment during working hours," Member Roney said.

"He accepted that in the discussion that he had with the departmental officers, he had expressed the view that he would refuse to agree to cancel her apprenticeship notwithstanding that she had already resigned and that he did not want her to work in another salon."

The decision and compensation

The complainant said that she resigned from the salon as a result of her employer's behaviour towards her and the respondent agreed that had she not resigned, he would have dismissed her.

The tribunal found that his decision to dismiss her was the direct consequence of the complainant's pregnancy and his conduct toward her was a reflection of that negativity.

The complainant was awarded compensation of $10,373.50 with interest of $1,099 plus costs.

If you have questions about employment or anti-discrimination laws, contact us.

Changes to the Do Not Call Register

The Do Not Call Register has been expanded to allow the registering of fax numbers and numbers used by emergency services and government bodies, as well as extending the registration period for numbers from three to five years.

The changes to legislation took effect on 30 May 2010 and were made to address concerns that unwanted calls and faxes could affect emergency service organisations' operations. It was also raised that those receiving unwanted faxes have to bear the cost of paper and printing toner, which shifts the cost of these faxes to the recipient.

A number can be registered if it is used or maintained primarily for private or domestic purposes, used or maintained exclusively for transmitting and/or receiving faxes, or by a government body or an emergency service number.

The Do Not Call Register has now been extended to ensure all registered phone numbers will remain valid for five years in total. If you recently re-registered your number, registration will be valid for five years from the most recent date you registered.

There are currently more than 4.9 million phone numbers on the register. Once a number is registered, telemarketers and fax marketers must not contact it or they could be in breach of the legislation and face penalties.

To register your number or find out more, visit donotcall.gov.au or call 1300 792 958.

Injured workers need rehabilitation

People with work-related injuries have shown that they want rehabilitation that will enable them to return to the workplace as much as they want compensation.

Recent changes to Queensland's workers' compensation scheme WorkCover have highlighted the impact of workplace injuries.

Under workers' compensation legislation, the purpose of rehabilitation is to ensure the worker's earliest possible return to work or to maximise the worker's ability to function independently.

This rehabilitation can include treatment, assessments of work capacity and suitable duties programs. Examples of rehabilitation measures include physiotherapy, occupational therapy, counselling, on-the-job training for new skills and special assistance for those with serious injuries.

WorkCover Queensland will pay any reasonable and necessary medical and rehabilitation costs related to an injured person's claim that are allowed under the new *Workers' Compensation and Rehabilitation and Other Legislation Act*, which commenced on 1 July 2010.

These costs may include medical treatment referred by a general practitioner and provided by a registered person such as a physiotherapist or psychologist, medicines and medical supplies essential to recovery and necessary equipment such as crutches or a wheelchair.

Under the legislation, the injured worker must participate in rehabilitation – if they do not, WorkCover Queensland may suspend their compensation benefits. Employers must also take every reasonable step to assist with rehabilitation and suitable duties during this time.

Car crash: what to do about property damage

Property damage disputes arising from motor vehicle accidents are common and can often be made more difficult if you don't know what your rights and responsibilities are and how to take the right kind of action.

The person who caused the accident is responsible for paying for the damage. If they have insurance, this will be managed by their insurance company. Most insurance policies require you to report the accident to your insurer as soon as possible.

You also have to report an accident to police if anyone was injured or if the property damage is likely to cost more than $2,500 to repair.

If you receive a letter of demand for damage to somebody's car, you can pass it to your insurer if you have insurance. This may mean you have to pay an excess amount before the company will access your claim.

If you are not insured, you are being asked to take responsibility for the accident and to agree to compensate the other party.

You need to consider whether you are fully or partially responsible. This is known as liability. You should contact a solicitor to get legal advice about your liability.

You should also ask for evidence of the amount of damage being claimed, such as quotes. This is called 'quantum' and can include written quotes from qualified repairers for labour and parts or, if the car cannot be repaired, valuations from car yards, qualified panel beaters or other expert valuers of its pre-accident value.

Once you have all this information and legal advice, you can negotiate with the insurer or the other driver.

If you cannot reach an agreement, you may have to go to court.

If the claim is valued at less than $25,000, it may go to the Queensland Civil and Administrative Tribunal.

It is always important to seek advice from before negotiating property damage disputes.

Buying a house

New house buyers often ask the question, "do I need a solicitor to advise me before signing a Contract of Sale?"

Although buyers are allowed to undertake this process themselves, many who opt for the do-it-yourself method run into trouble because they have overlooked a contract deadline or failed to make appropriate adjustments at settlement.

"They often end up seeking professional legal advice that can cost as much as, or more than, the original conveyancing charges they sought to avoid," Real Estate Institute of Queensland managing director Dan Molloy said.

"Using a solicitor often saves time on paperwork such as title searches and stamp duty and can also provide peace of mind when making, what may be, the largest single financial transaction of your life."

Even if you decide not to engage a solicitor's services, you still have to face the costs of title searches, certificates of rates, zoning, stamp duty and registration fees.

These searches are essential in determining whether the property has any restrictions such as outstanding taxes or encumbrances on title.

There are also recent changes that affect the use of warning and information statements in property contracts as well as issues relating to contract termination. These changes are due to start on 1 October 2010.

Contact us for independent legal advice before signing a Contract of Sale.

Superannuation reform

The final report of the Cooper Review into the governance, efficiency, structure and operation of Australia's superannuation system was released by the Australian Government on 5 July 2010.

In May 2009, the Government commissioned the Cooper Review to provide it with recommendations on how to make superannuation simpler, safer and more efficient.

The three stages of reforms to superannuation are:

- The Future of Financial Advice reform package which applies to financial advice generally, including advice relating to superannuation products
- The Government's Stronger & Fairer Superannuation reforms, including an increase in the Super Guarantee to 12 percent
- The Government's response to the Cooper Review.

Consultation work that went into the preparation of the report included more than 450 formal submissions.

House and land contracts changed

The Real Estate Institute of Queensland has amended its standard REIQ House & Residential Land and Residential Lots in a Community Titles Scheme contracts to allow for the national unfair contracts law which started on 1 July 2010.

The changes are designed to:

- better deal with the *Residential Tenancies and Rooming Accommodation Act 2008*;
- include the Queensland Civil and Administrative Tribunal within the definition of court;
- list essential terms for both buyers and sellers;
- remove the deemed satisfaction of the building and pest condition;
- clearly list affirmation and termination rights for sellers and buyers;
- cater for the decision of *Riggall v Thompson* [2010] QCA 144 with respect to the seller's loss; and
- include a severance clause.

There have also been recent changes to the system for forming a residential property sale contract. This was a result of amendments to legislation being passed in Parliament. These changes include new requirements for the use of warning and information statements and are due to commence on 1 October 2010.

We can assist you with all of your conveyancing needs and help you understand what these changes mean for you.

What is a Queensland workplace agreement?

A workplace agreement is something that an employer might ask you to sign when you start a new job.

Queensland workplace agreements, or QWAs, are made directly between employers and employees on an individual basis and should be approved by the Queensland Industrial Relations Commission. A QWA can only be made with an employee who is 18 years of age or older.

The Queensland Government's Department of Justice and Attorney-General outlines some of the things you should consider.

A QWA can cover anything relating to your work, such as wages, annual leave, hours of work and training. It should set out a procedure for resolving any disputes that could arise in the workplace, including discrimination issues, and must also say the length of time the agreement is valid.

Your employer must give you a copy of the proposed agreement, allow you sufficient time to consider it before signing, outline the terms and conditions, explain how it will affect your wages and working conditions and give you a copy of an information statement.

Failing to offer an agreement in the same terms to all employees who are doing the same work is considered to be unfair and an employer is prohibited from doing so.

An employer also cannot dismiss an employee for refusing to make a Queensland workplace agreement.

You are entitled to appoint a bargaining agent to be involved in the negotiation of your agreement.

What happens when parenting orders are broken?

Parenting orders are one way of resolving family disputes.

An alternative is attending family dispute resolution before filing a court application. If you and the other person reach an agreement, you can make a parenting plan, which is not a legally enforceable agreement.

It is important to seek advice from a lawyer who can help you understand your rights and responsibilities under the law. They can also help you find a way to reach an agreement without having to go to court, which can be stressful and costly.

You can also contact a lawyer to get advice on changing an existing court order that is no longer accurate in its reflection of custody arrangements.

You must ensure that you are complying with a parenting order.

The Family Law Courts website says that "the law about the consequences of failing to comply with orders if complicated and technical.

"What may appear as a failure to comply with an order to you, and your family and friends, may not be according to the law."

You could be in breach of an order if you intentionally fail to comply with it, make no reasonable attempt to comply with it, intentionally prevent compliance by a person who is bound by it or help a person bound by the order contravene it.

Consequences for breaching a parenting order include payment of expenses that you caused the other person, including legal costs, community service, a fine or jail term.

Ensure you contact us if you need advice on resolving a family dispute, creating a parenting plan, going to court, changing an existing parenting order or if you believe you or your ex-partner are in breach of a parenting order.

Making an enduring power of attorney

Making an enduring power of attorney is a big decision that involves selecting the person or people you trust to take responsibility for your finances and personal/health care should you ever lose your decision-making capacity.

However, it is important to consider this in your planning for the future – mindful that by the time you are unable to manage your own affairs, it could be too late to make your wishes clear.

Queensland's Elder Abuse Prevention Unit has reported on the growing prevalence of elder abuse, often relating to financial abuse and neglect. The Queensland Seniors Legal and Support Service has also said that financial abuse, involving wills and powers of attorney, is the most common form of mistreatment.

An enduring power of attorney can include specific clauses, limitations or responsibilities.

Due to the detailed and complicated nature of documentation for an eduring power of attorney, it is important that you seek independent legal advice to ensure that the process is completed accurately and securely and that both you and your attorney/s understand what has been agreed.

Banning the banners: new body corporate rules

New sustainable housing laws came into effect in Queensland on 1 January 2010.

These laws prevent new and some existing covenants and body corporate by-laws from banning energy efficient features or fixtures and requiring certain design elements in houses, townhouses, units and enclosed garages.

The law on these issues was further changed on 23 May 2010.

Covenants and by-laws made from 1 January to 22 May 2010 cannot restrict the use of light roof colours, energy efficient windows or window treatments and specific types of materials and finishes for external walls and roofs. They also cannot require minimum floor areas, a minimum number of bedrooms or bathrooms, more than one garage, orientation of a house in a particular way or minimum roof pitches.

For more information on these changes, contact us.

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07 55960 433 ; info@wp-lawyers.com.au

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