AN EMPLOYER’S GUIDE TO
AUSTRALIAN EMPLOYMENT LAW


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Foreword

An essential feature of Australia’s commercial and cultural identity has been the regulation of employment. This has created significant hurdles for employers, as well as giving rise to a rich and sometimes complex area of legal practice.

While it is tempting for practitioners to indulge themselves and each other in the vagaries and complexities of the law, there is little purpose to legal advice which can only be understood by other lawyers. Many of the legal resources currently available fall into this category. The approach of this text is to offer a detailed and in depth reference, designed specifically for employers, to help navigate the law surrounding employment relationships. It can be read from beginning to end, but chapters may be more beneficial if accessed when needed. Where possible, legal terminology and references to primarily law have been kept to a minimum.

In this second edition, we have gone even further to include answers to questions that businesses and HR managers come up against every day and to provide practical information to assist your business succeed.

For further information on any of the chapters, or to get in touch, please feel free contact us on 02 8436 2500 or at info@pclawyers.com.au.

Helen Carter, Director
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Part 1 – Types of Employment Relationship
Part 1. Types of Employment Relationship

1.1. Independent Contractors v Employees

We are often asked to advise on issues relating to independent contractors and the potential benefits of an independent contracting relationship over an employment relationship. Whilst an independent contracting relationship has superficial attractions it is not usually an effective substitute for a well-managed workforce of employees.

What is an independent contractor?

An independent contractor is any person who is engaged pursuant to a legal contract to provide a service. The archetypal independent contractor is the tradesperson who works on a house for the homeowner. Tradespeople run their own business and simply attend our house to fix a particular problem or undertake a specified piece of work. It would be impractical for the homeowner to employ (in a technical sense) a person to carry out this work.

The distinction between employees and independent contractors may have significant legal implications. For example, employees, will enjoy protections relating to unfair dismissal. Employers will generally be liable for the negligent acts of their employees under the doctrine of vicarious liability. Often employees will be able to access entitlements and working conditions under an industrial instrument which are not available to independent contractors. Understanding the difference between
independent contractors and employees AND being able to distinguish the two arrangements in practice is essential for all employers.

Usefully, the courts have identified key indicia that help distinguish between independent contractors and employees. The classic decision is that of the High Court in *Stevens v Brodribb Sawmilling Co (1986) 160 CLR 16*. Stevens, a truck driver involved in the Brodribb’s logging operations was injured through the negligence of Gray, a ‘snigger’ working for Brodribb. If Gray could be classified as an employee, then Brodribb would be liable under the doctrine of vicarious liability (which makes employers liable for the negligence of their employees).

In determining this question, the High Court pointed to a number of factors of importance including:

- The existence of a power to control the putative employee – the greater the control the more likely an employment relationship can be found;
- The method of remuneration and the deduction of income tax – the deduction of income tax is a frequent incident of an employment relationship;
- The provision and maintenance of equipment – independent contractors are more likely to provide their own equipment – more usually employees will be provided with equipment by their employer;
- The obligation to work – independent contractors are not usually subject to an ongoing obligation to accept work;
- The hours of work – usually independent contractors set their own hours of work, whereas employees are subject to the hours set by the employer;
- The provision of holidays – holidays are usually only provided to employees;
- The power to delegate work to others – only independent contractors can delegate the work (to their own employees or to sub-contractors).

The High Court noted that Gray was paid by the job and no income tax was deducted. He provided his own equipment. He was free to seek other work and, whilst work had been regular, Brodribb was under no obligation to provide him with work. Gray was free to set his own hours, received no holidays and could delegate his work to others (and Gray in fact delegated work to his son). As a result, Gray was not an employee of Brodribb and therefore, Brodribb was held not liable to Stevens for the injury caused.

In the later decision in *Hollis v Vabu Couriers (2001) 207 CLR 21*, the High Court considered the potential liability of a bicycle courier company (of the type ubiquitous in inner city Sydney) under the doctrine of vicarious liability for the negligent acts of one of its bicycle couriers (who injured Mr Hollis). The issue was whether or not the courier was an employee or an independent contractor.

Some factors in this case suggested that the bicycle couriers were independent contractors (and, indeed, the New South Wales Court of Appeal found this to be the
case). In particular, the couriers owned and maintained their own bikes and supplied all accessories other than their radios and their uniforms.

However, the High Court found other factors more persuasive, in particular, the fact that the couriers could not refuse to undertake work and probably could not delegate work. Payment was overseen by Vabu which accounted for deliveries and made deductions from pay. Annual leave was possible. Perhaps most persuasively, the couriers were seen as ‘emanations’ of Vabu being required to wear the ‘livery’ of Vabu and maintain certain standards as to their appearance. Apart from the advertising, Vabu had the clear intent that the public would identify couriers as Vabu’s staff. As such, Vabu was found to be vicariously liable to Mr Hollis.

Similar questions frequently arise before the courts. In the decision of Chee v Renown Business Solutions Pty Ltd [2012] FWA 5137, the Fair Work Commission considered the issue of whether or not an the employer was a small business employer (because it had 15 or less employees). The employer argued that it was because two of its 15 ‘employees’ were in fact independent contractors. These individuals provided bookkeeping and IT services through corporate entities. Despite this, the Fair Work Commission held that they were employees for the following reasons:

- The employer had day to day control over these ‘employee’s’ activities;
- The ‘employees’ worked regular hours from the employer’s premises;
- The ‘employees’ were provided with equipment by the employer; and
- The ‘employees’ held themselves out to be part of the employer’s enterprise in
  - email communications

As such, the employer was not a small business employer and could not rely on the additional protections available to small business employers.

**Should businesses engage independent contractors instead of employees?**

In many ways, ‘employing’ independent contractors appears to have significant benefits over employing employees. For example, unfair dismissal provisions do not apply. Similarly, it may be possible for employers to exert greater bargaining powers over independent contractors than is possible in relation to employees.

Often, however, the advantages of an independent contractor arrangement for employee like services will be at least partly illusory. Many protections apply to independent contractor arrangements, including protections against adverse protection under the *Fair Work Act 2009* (the ‘Fair Work Act’) (these protections are similar to those available to employees). Other protections apply under the *Independent Contractors Act 2006* (Cth) and, subject to that Act, under state legislation (such as section 106 of the *Industrial
Relations Act 1996 (NSW)). Amongst many other grounds, for example, an independent contractor may be able to seek a remedy on the basis that:

- ‘the contract is designed to, or does, avoid the provisions of... the Fair Work Act 2009.’; (section 9(1)(e)(i) Independent Contractors Act 2006 (Cth)); and
- the contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work.’ (section 9(1)(f) Independent Contractors Act 2006 (Cth)).

Protections also exist under Part 3-1 of the Fair Work Act against ‘sham contracting’ which includes situations where employees in fact are told or held out to be independent contractors and where employees are terminated to be re-engaged as independent contractors.

Despite these protections, some situations will lend themselves to independent contracting arrangements. In particular, circumstances where the equipment required is expensive or the work is highly specialised will often be amenable to independent contracting arrangements. Many transport and construction operations are based around independent contracting.

It is also important to note that courts will not be bound by the labels that parties choose to place on their relationship and may find that an employment relationship exists where the parties themselves regarded the relationship as one of independent contracting – with significant potential costs for the employer.

Employers considering independent contracting arrangements for services should also note that superannuation, workers’ compensation and occupational health and safety arrangements will often apply to independent contractors. These costs and obligations cannot usually be avoided by independent contracting arrangements. Even where principals require contractors to incorporate so as to avoid superannuation and workers’ compensation arrangements, these costs will need to be incurred and will usually be passed on to the principal in contract fees.

Whilst independent contracting arrangements may have benefits for employers, the many protections available to independent contractors diminish the benefits of employing independent contractors as a substitute for employees. In our view it is preferable that independent contractor relationships are used judiciously for specific purposes relating to defined targets and requiring specific equipment or expertise. Businesses will usually have greater success with a well-managed group of employees whose primary concern is the business of the employer.
1.2. Casual Employees

1.2.1. General Considerations when Employing Casuals

Casual employees are invaluable to many businesses, whether they are used for covering employees who are sick or on leave, working shifts that may otherwise be unpopular amongst permanent staff or simply used when the business gets busy and it needs extra workers. Because of the flexibility that having casual employees affords a business, casuals are a very attractive option to many employers, with approximately 1 in 5 Australian workers being engaged on a casual basis. It is therefore likely that at one point or another, a business will employ a casual employee.

However, despite the widespread use of casual employees, many businesses are unaware of the entitlements that casual employees must be provided with and believe that all that is required of them is to pay a casual employee casual loading. Whilst casual loading must be paid, some casual employees will also have additional entitlements including in some circumstances, unpaid parental leave, long service leave, a right to request flexible working arrangements and an entitlement to file an unfair dismissal application if their employment is unfairly terminated.

What is a casual employee?

Whilst the term ‘casual employee’ may seem like one that is easily defined, this is actually far from the case as the term has not been defined in the Fair Work Act or in any other legislation or modern award. This has meant that courts and tribunals have been given the task of determining whether a particular employee is a casual, based upon the set of facts and circumstances that apply to each case.

In *Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589*, the Court found that an employee is likely to be casual if they work on the demand of the employer and do not have an advanced commitment as to the duration of their employment or the days (or hours) they will work.

In addition, each occasion that a casual employee works is viewed as a separate engagement pursuant to a separate contract of employment. This means that employees are only engaged from week to week, day to day, shift to shift or hour to hour, depending on the arrangements between the employee and the employer.

Issues regarding the definition of ‘casual employee’ do not usually arise unless there are concerns that an employee may be a ‘long term casual employee’, a term which is used in the Fair Work Act. A ‘long term casual employee’ has additional entitlements than a casual
employee, including the ability to make requests for flexible working arrangements and the taking of parental leave.

Section 12 of the Fair Work Act provides that a ‘long term casual employee’ is an employee who is casual and has been working on a regular and systematic basis during a period of at least 12 months. What is meant by working on a ‘regular and systematic basis’ has not been defined, however points such as whether the employee worked regularly, whether there was an expectation that the employee would continue to be offered work and the total hours that the employee worked will be used to determine whether the employee worked regularly and systematically.

**What is a casual employee?**

**Casual loading**
Employees who work on a casual basis are required to be paid a casual loading, which compensates them for the fact that their work is irregular and unguaranteed and the fact that they do not receive annual leave and person/carer’s leave.

Most modern awards have provision for the payment of casual loading, which is usually 25%. However, prior to paying casual loading, an employer should refer to the modern award applicable to the employee.

**Requests for flexible working arrangements**
Section 65 of the Fair Work Act states that a ‘long term casual employee’ who has reasonable expectation of continuing employment on a regular and systematic basis is entitled to make a request for flexible working arrangements. To be eligible for such a request, the employee must also be a parent or have responsibility for the care of a child, be a carer, have a disability, be 55 years or older, be experiencing domestic violence or supporting a family member because of domestic violence.

If a casual employee can satisfy these criteria, they are eligible to make a request for flexible working conditions, which may include varied or reduced working hours or working from home. Such a request can only be refused on reasonable grounds, which might include the arrangement being too costly, likely to result in the business suffering a loss in efficiency or productivity or the arrangement having a significant negative impact on customer service.

**Parental leave**
Sections 67 and 70 of the Fair Work Act provide that a ‘long term casual employee’ who, but for the birth or placement of a child, had a reasonable expectation of continuing employment on a regular and systematic basis is entitled to unpaid parental leave. This
means that if a long term casual employee or their spouse gives birth to, or adopts, a child, they will be entitled to 12 months’ unpaid parental leave.

**Long service leave**

Under the *Long Service Leave Act 1955* (NSW), a casual employee who has been working for the same employer for 10 years is entitled to 2 months’ (8.67 weeks) paid leave. For casual employees, long service leave will be calculated by averaging the employee’s weekly remuneration earned over the 12 months or 5 years prior to taking the leave, whichever is greater.

A casual employee may be entitled to receive pro rata long service leave when their termination is effected after they have been employed for more than 5 years, depending on the circumstances on the termination.

**Unfair dismissal**

Section 384 of the Fair Work Act provides that a casual employee will be protected from unfair dismissal and can therefore make an unfair dismissal application if they worked on a regular and systematic basis and had a reasonable expectation of continuing employment on that basis.

Whilst engaging a casual employee, in most circumstances, can be much simpler than hiring permanent staff, it is more important for businesses to understand what entitlements casual employees are to receive so that they comply with legislation. Refusing to pay or grant an employee their correct entitlements can result in significant fines being imposed on a business and unnecessary hassle and stress for business owners or managers who are required to handle the issue.
1.2.2. Common Misconceptions of Employing Casuals

Casual employees are a valuable asset for many businesses as they provide the flexibility to cover shifts when other staff are sick or on leave, mean that there is someone to cover otherwise unpopular shifts and allow the business to react to increased customer demand at short notice. It is estimated that over 25% of the Australian workforce are engaged on a casual basis, so it is clear that businesses are taking advantage of the benefits and flexibility of casual employees.

Despite the widespread use of casual employees, many businesses and managers are operating on the basis of myths and untruths about casuals, their entitlements and protections. This is especially true when it comes to long term casuals, who have some different entitlements compared to other casual employees. By busting these myths, you can then get the most out of the benefits that are afforded by engaging casual employees, so that you can manage your casual workforce most effectively.

Long term casuals

It is common for businesses to operate under the assumption that casual employment is only for short term engagements and that they cannot engage the employee for years on end without being required to offer them full or part time employment. This is a myth that we are happy to bust.
Whilst some casual engagements will only be for the short term to get the business through a busy time, over half of Australian casual employees have spent more than 12 months in their job and approximately 7% have worked in the same job for more than 10 years. There are great benefits offered by long term casuals, including that the business has a loyal and knowledgeable casual workforce to help out when needed and the business can save money as casuals are generally cheaper to hire and keep employed than permanent staff. Further, casual employment can also be an attractive option for many people who have children or who have other interests outside of work, including studying or other jobs, as it provides them with the time and flexibility to pursue these. Legislation also reflects the fact that many Australian businesses are opting to use long term casuals, with the Fair Work Act defining the term to mean a person who is a casual and has been working on a regular and systematic basis for a period of at least 12 months.

There is absolutely nothing wrong with engaging a casual on a long term basis, especially if the employee is happy with the arrangement. It also means that the business can offer them permanent work if the need arises, with the employee free to say no and continue working on a casual basis. However, it is advisable, where an employee has been offered permanent employment but has declined, that you send a short letter to them confirming this so as to avoid any disputes later down the track.

In most circumstances, an employer and an employee can come to an agreement that a casual will transfer to permanent employment, however, under some modern awards (for example, the Hospitality Industry (General) Award), a long term casual employee has the right to elect to have their employment converted to full time or part time employment. The employer does have the right to refuse the request if there are reasonable grounds for doing so.

**Termination of casual employees**

One of the great benefits of casual employees is that they are not entitled to receive notice of their termination or payment where their position is made redundant. However, this does not necessarily mean that a casual who has been employed on a long term basis can be terminated at any time without the employer being required to follow steps and procedures that would ordinarily apply to permanent employees. This is a myth that can by quite costly for a business if it is relied upon.

Long term casual employees who have been dismissed in circumstances which they claim are harsh, unjust or unreasonable may be entitled to make an unfair dismissal application to the Fair Work Commission. Provided that they can establish that they had been working for at least 12 months on a regular and systematic basis, their unfair dismissal application will be treated in the same way as one made by a permanent employee and the Commission will consider such things as whether there was a valid
reason for their termination, whether the employee was given the opportunity to respond and whether they were notified of the reason for their termination. If an employer operates under the myth that they can terminate a long term casual employee’s employment anytime they wish, they could potentially be liable to pay compensation to the dismissed employee or reinstate them to their previous job.

In *McKinnon v Reserve Hotels Pty Ltd [2014] FWC 5053*, a casual employee was found to have been unfairly dismissed after his employer terminated his employment without providing him with an opportunity to respond to allegations made against him. The employee worked, on average 25-30 hours per week and had done so for approximately a year and a half. The Commission found that the employee worked on a regular and systematic basis and ordered the employer to pay him $7,000 in compensation.

Employers also make the mistake in thinking that because an employee is not entitled to redundancy pay, there is no requirement to follow the other procedural steps which would normally apply when making a person redundant. Whilst modern awards do not strictly require employers to consult with casual employees when their position is made redundant, it can be a good practice to do so as it keeps employees fully informed of the situation, ensures consistency between permanent and casual employees and goes a long way towards ensuring that employees do not leave their employment with bad faith towards the business, which can often lead to ill-conceived claims from employees which can be costly and time consuming.

**Leave for casual employees**

Another one of the cost saving benefits of engaging casual employees is that they have no entitlement to annual leave and personal leave. However, this does not mean that casual employees are not entitled to take any leave at all. Under the Fair Work Act, a casual employee is entitled to two days of unpaid carer’s leave and compassionate leave.
when a member of their immediate family becomes ill, injured or dies. There would also be little argument from most employers that the employee is able to take time off to travel or spend time with family due to the very nature of them being a casual employee.

Long term casual employees are also entitled to unpaid parental leave in the same way as permanent employees, provided they had a reasonable expectation of continuing employment on a regular and systematic basis. This means that if a long term casual employee or their spouse gives birth to or adopts a child, they will be entitled to 12 months’ unpaid parental leave. They must also be returned to their pre-parental leave position.

Further, in most states, casual employees are also entitled to long service leave provided they have the required continuous period of employment. In NSW for example, this means that a casual employee is entitled to 2 months’ paid leave (averaged out over 12 months or 5 years, whichever is the greater), after 10 years of service. It also means that if the employer terminates their casual employment after 5 years of service, they may have an entitlement to pro rata long service leave.

Whilst long term casuals are provided with more protection than those working sporadic or irregular shifts, these entitlements are not prohibitive and should not restrict your usage of casual employees. Resisting the urge to rely on long held beliefs and assumptions about long term casual employees, which may prove to be myths, can offer great benefits to your business and means that you can adapt to change quickly and seamlessly and without the unnecessary costs.
1.3. Internships

It has become common practice in a great number of industries to expect prospective employees to volunteer their time to gain ‘on the job’ experience and knowledge before being offered employment. In competitive industries regarded as ‘prestigious’ or financially rewarding such as entertainment, politics and law, it has become customary for prospective candidates to endure unpaid internships as a rite of passage before they are even considered for a paid role. But is this practice legal? The short answer is almost always ‘no’.

The common trap employers find themselves in is when their businesses lack sufficient financially viable roles for inexperienced recruits, but have a lengthy queue of quality prospective employees competing with each other for experience. It is operationally tempting to create unpaid roles to fill this demand. The important fact that employers should remember is that the statutory entitlements provided by the Fair Work Act and the Modern Awards cannot be bypassed by employers, nor waived by employees - even those who consent to, or even initiate the arrangement in order to advance their careers.

In a 2015 finding of the Federal Circuit Court a media company, Crocmedia Pty Ltd, was found liable for breaches of the Fair Work Act in failing to recognise that their “interns” were actually employees. In this case two university students, who were seeking experience in the media industry, performed unpaid work for three weeks before being offered casual employment. During the unpaid period, these employees were effectively working as ad hoc producers on the ‘All Night Appetite’ radio program broadcast between 12am and 6am daily. Based on the type of work done, the court held without hesitation that the ‘interns’ were actually employees, and significant pecuniary penalties were imposed on the employer, in spite of the fact that they had already agreed to repay the employees their missing entitlements.
Many interns and employers may argue that willing participants should be free to enter into these relationships if it suits all of the parties. However, there is deeper principle at stake here. In the 2013 Stewart and Owens report entitled *Experience or Exploitation? A report to the Fair Work Ombudsman*, the authors discuss the issue in the context of the purpose of the Fair Work Act. They agree that very often unpaid interns initiate these arrangements. In this sense they find it hard on an individual basis to describe the arrangement as ‘exploitation’. However, they add:

“There is an important point of principle here. Such arrangements do not just undermine the integrity of labour standards, they potentially erect barriers to entry to the labour market for those who do not have the means to spend lengthy periods of time in unpaid work. An intelligent and articulate graduate from a wealthy family who opts to do months of unpaid work in order to break into their chosen profession may not seem very vulnerable. They may not seem to be a ‘victim’ of exploitation. But the point of investigating their situation and (if appropriate) taking action is not necessarily to protect them as an individual. It is to assert a principle – a fair day’s pay for a fair day’s work – that underpins our system of minimum labour standards. And it is to promote the goal of ‘social inclusion’ that is expressly made part of the objects of the Fair Work Act.”

The Fair Work Act does contain an exception in respect of ‘vocational placements’ for those industries for which work placements are an essential part of a broader educational purpose. These exceptions are a little ambiguous, and those employers should tread carefully. The Fair Work Ombudsman has published the following guidelines on their webpage:

"Generally, the longer the period of placement, the more likely the person is an employee...

Although the person may perform some productive activities during the placement, they are less likely to be considered an employee if there is no expectation or requirement of productivity in the workplace...

The main benefit of a genuine work experience placement or internship should flow to the person doing the placement. If a business is gaining a significant benefit as a result of engaging the person this may indicate an employment relationship has been formed...
Unpaid work experience placements and internships are less likely to involve employment if:

☐ they are mainly for the benefit of the person

☐ the periods of the placement are relatively short

☐ the person is not required or expected to do productive work

☐ there is no significant commercial gain or value for the business derived out of the work."

In summary, if the internships are short, primarily for the benefit of the participant, and contain no expectation of productivity or commercial gain to the employer, then they are likely to be legally compliant. From an operational perspective – these short periods weighed towards benefiting the intern have very little use for recruitment, training or induction purposes. Employers in industries that seem more prestigious and appealing than the reality may like the idea of potential recruits getting a taste of the 'real thing' before wasting their time and money, and in these circumstances a short internship for the exclusive benefit of the participant can be a useful exercise. But as soon as the employer seeks to actively train the individual, exposes them to tasks that should normally be done by employees, or tries to incorporate the intern’s time in a way that benefits productivity, there are some very real dangers of non-compliance. Strict penalties may follow this breach.

Whenever possible, it’s almost always advisable to employ them properly, or not at all.
Part 2 – Managing Employees
Part 2. Managing Employees

2.1. Legal Issues in Recruitment

With the holiday season behind us, many businesses will start the process of hiring new employees to fill positions that have become vacant over the past few months. There are legal risks involved in any recruitment process but with it brings the potential to add talented new employees into the organisation. The key is to manage the legal issues, without allowing these potential difficulties to limit the organisation’s ability to attract new talent.

Some key issues to be aware of are:
- Privacy
- Discrimination
- Ensuring there are no legal restrictions on the person’s capacity to work.

Privacy

Whilst the Australian Privacy Principles do not apply to the records of current and former employees, they have important operation in relation to candidate information. If an employee is an entity covered by the Australian Privacy Principles, there are significant obligations regarding the manner in which candidate information is to be handled. Under the Privacy Act 1988 (Cth), a candidate has the right to access and correct personal information (including a referee’s report) which an organisation holds about the person. It is therefore important that human resource managers do the following:
Advise potential referees that the information they are providing (including notes of telephone references taken) may be accessed by the person who is the subject of the references.
If a business intends to hold onto information regarding unsuccessful candidates, it must expressly obtain their permission to do so. Throughout the entire recruitment process, be aware that the file and documents held on a candidate may be able to be accessed by that candidate if they are unsuccessful.

**Discrimination**

Under state and federal anti-discrimination legislation, it is unlawful to discriminate against a person on the basis of, amongst other things, their age, sex, race, disability, marital or relationship status or carer’s responsibilities. This applies to circumstances where an employer makes a decision based on one of these criteria as to what candidate should be offered a role or what the terms and conditions of their employment will be.

In *Bair v Goldpath Pty Ltd & Callinan [2010] QCAT 483* a small school uniform manufacturer and its employee were found to have unlawfully discriminated against a job candidate during an interview when they asked for his date of birth and questioned whether he had children. The Tribunal found that whilst these questions had been asked as a result of a lack of human resource training, there was no reason as to why these questions could be required other than for discriminatory purposes. The company was ordered to apologise to the candidate.

Much of the recruitment process is based on subjective experiences and views. Many unsuccessful candidates will form views (often incorrectly) about the reasons they were unsuccessful and these can include a belief that they have been unlawfully discriminated against.

Some practical measures an employer can take to limit the risks of a discrimination claim being made against it include the following:

- During interviews, do not ask questions related to such matters as health, family responsibilities, gender, race or sexual orientation.
- Take great care in relation to the notes made regarding candidates by interviewers. Be aware that in the event of a claim of discrimination, these notes could be discoverable. There is also the possibility of the candidate obtaining access to parts of the file under the National Privacy Principles.
- If there is a genuine concern about a candidate’s ability to perform the position due to a health matter or family responsibilities, great care must be taken in how this concern is managed. It is only lawful to discriminate against a candidate if they cannot perform the inherent requirement of the position. The inherent requirements of a position does not include everything an employer might want a person to do in a perfect world. It is the essential or necessary parts of the job viewed objectively.
- Any decision made on the basis of a candidate’s medical condition must be based on information provided by an appropriate doctor (either the treating doctor or an independent expert).
Employee’s legal capacity to work

An important question which many businesses fail to ask before offering a job to a candidate is whether they are subject to any non-compete or post-employment restraints from their previous employment. This can have serious consequences for a business if an employee subsequently breaches their restraints and their old employer commences proceedings against the individual and the new employer.

Whilst asking the question of a candidate during the recruitment process may not ultimately affect the business’ decision to hire the person, it will give them the opportunity to take steps to mitigate the risk of being caught up in a protracted legal battle. This could include approaching the previous employer and coming to some agreement that they will not seek to enforce the restraint or that they will only enforce it for a specific period of time. Alternatively, the business could temporarily place the employee into an area of the organisation where they will have no opportunity or reason to contact previous clients or use confidential information belonging to the old employer during the restraint period. In many cases it will be appropriate to include in the contract of employment a warranty from the new employee that they are not under any restriction (contractual or otherwise) which would prevent them working.

The Migration Act 1958 (Cth) also imposes significant obligations on employers to ensure that a person is legally able to work as either a citizen or a foreign citizen who holds a valid visa to work in Australia. Employers should, at the appropriate time, request evidence that an employee is legally entitled to work in Australia.

Whilst the recruitment process can be challenging for a business, it can also be extremely rewarding when the right person for the job is found. Being aware of the legal issues that can crop up throughout the process is important for all businesses so that steps can be taken to mitigate the risk of legal difficulties arising.
2.2. Lawful and Reasonable Directions

The success and failure of a business is dependent upon ensuring that employees are doing what is required of them and that they are complying with directions given to them by their employer. It is a challenge for any employer to deal with an employee who simply won’t follow directions and it is important to be able to differentiate between directions that you can reasonably request employees to comply with and those which may be deemed to be unreasonable.

What is a lawful and reasonable direction?

Under common law, employees have an implied duty of obedience and cooperation in their contract of employment. Employees therefore have a duty to obey an employer’s directions, so long as they are lawful and reasonable.

A ‘lawful’ direction is generally easily ascertained and will be dependent upon whether the direction of the employer requires the employee to contravene a State, Territory or Commonwealth law.

The reasonableness of the employer’s direction will depend upon the circumstances of each individual case. When taking into consideration whether a direction is reasonable, you must consider the nature of the work that the employee does, the terms of the contract of employment, customary practices and the usual course of dealing between the parties.
Directions in respect of off-work activities

Employers must be mindful not to give directions to employees that might extend to or impact the personal or private activities of the employee and which would not otherwise affect their work. Only in exceptional circumstances would it be regarded as reasonable for an employer to direct an employee how to conduct themselves outside the workplace and have the right to extend its supervision over the private lives of employees. In considering this issue, the court will look at whether there is a significant connection between the outside activity and the employee’s employment.

In Michael King v Catholic Education Office Diocese of Parramatta [2014] FWC 219, a high school teacher willfully disobeyed the directions of his employer not to transport students of the school in his car outside of school hours. The school was in the midst of dealing with allegations of child sexual abuse and several allegations had also been made against the teacher, although these were unfounded. The school believed that it had a legitimate interest in the interactions between its teachers and students both inside and outside of the school and wished to avoid teachers being placed in potentially compromising positions. The Full Bench of the Fair Work Commission found that the school had a duty of care to protect students from the wrongful behaviours of third parties, including teachers and that this duty was not confined to school hours. Because of this, the scope of the teacher’s employment was extended to conduct outside of school hours which arose because of his relationship with the school and its students. The directions of the school were therefore reasonable and lawful.

Examples of how an employee could reasonably refuse a lawful and reasonable direction

☐ An employee not performing their role and responsibilities as stated in the employee’s employment contract;
☐ An employee refusing to follow company policies or procedures;
☐ An employee continuing to act in an unreasonable way despite being told not to.

Steps in handling employees who do not follow lawful and reasonable directions

1. Address the matter immediately. Do not simply ignore the behaviour and allow the employee to continually refuse to comply with reasonable directions;

2. Determine the reason as to why the employee will not follow the direction. The employee may have genuine concerns about complying with the direction. For example, the employee may have workplace safety concerns. Understanding why
an employee refuses to comply with directions will help to overcome the issue or make adjustments that will satisfy both parties;

3. Document any conversations or correspondence you have with the employee about their failure to comply with directions and record their responses;

4. Remind the employee of the obligations of their role and their duty to follow instructions;

5. Advise the employee that if they do not comply with directions, they may receive formal disciplinary action or their employment may be terminated;

6. Consider placing the employee on a performance improvement plan which details the performance standards of which they are expected to maintain;

7. If the behaviour is continually repeated or sufficiently serious, termination of the employee may be considered.
2.3. Managing Underperforming Employees

Managers who fail to tackle promptly and effectively the problem of under-performing employees risk long-running and, possibly, expensive headaches with important legal ramifications.

Not only can poor performers undermine the efforts of co-workers and harm workplace culture, their failings can have nasty consequences for the bottom line.

More often than not, businesses facing these problems have underperforming employees that usually haven’t been properly made aware of their poor performance issues. Real difficulties emerge when managers:

- fail to act decisively and skirt around the poor performance issues;
- are too concerned about confrontation or discomfort to raise the matter; or
- are too busy to tackle the problems.

Early, decisive action is crucial. Companies regularly seek advice on handling employees who have been under-performing for years. Worryingly, where an employee has been allowed to underperform for so long their misunderstanding of what is required of them often becomes entrenched. As a result, such employees often react with real resistance when challenged on their performance.
Failure to act early and decisively on poor performing employees can often lead employers into legal difficulties when the employer finally decides to move. Commonly-arising legal issues in these circumstances include claims of constructive dismissal or unfair dismissal, adverse action, breach of contract, discrimination and workers’ compensation claims.

Failure to confront the issue not only affects the workplace culture and co-workers, but can also affect a company’s bottom line. Acting promptly and with certainty when managing poor performing employees will reduce legal risk, improve workplace morale and, thus, benefit business.

**Act early**

In a 2015 unfair dismissal case before the Fair Work Commission it was held that a sales manager working for a carpet company was unfairly dismissed due to poor performance as he had been given no opportunity to improve and no warning. Senior Deputy President Richards noted:

"Where an employee is put on notice at an early point as to their employer’s concerns with their apparent capacity or performance, an opportunity is required for rectification."

This case, *Roger Byrnes v Tuftmaster Carpets Pty Ltd [2015] FWC 1039*, highlighted a clear requirement to tackle poor performance at the earliest stage possible.

All too often managers put off raising performance issues individually with employees when they arise either because they have too much on their plates or they are want to avoid possible hostility or other highly emotive reactions. However, delay will inevitably lead to bigger performance issues down the track. Putting off these discussions can result in the managers spending even more time dealing with the issue and incidental factors, such as complaints from colleagues and recruitment being required if other staff leave due to this inaction.

Early action, such as a one-on-one meeting with the employee and issuing a warning, if required, need not be overly onerous or uncomfortable. After all, this should be part of a manager’s role and requires the employer to know exactly what performance they require from their staff. Having prompt discussions when a matter arises can often result in its resolution, or if this does not occur a lawful termination can take place down the track.
Act decisively

In *Ken Goodwin v Hadfield Industry’s Holdings T/A Arvo Steel Roofing* [2013] FWC 4793 it was held that generalised “pep-talks” with a long term employee were not enough to constitute a warning. The employer in this case submitted evidence of many conversations over two years with the employee about poor performance. The Commission held that these conversations were not decisive enough and were too non-specific in nature to constitute properly raising the poor performance issues or issuing a warning.

Employers must ensure they act decisively when talking to employees about their poor performance. It is not enough to skirt around the issue or to raise performance concerns broadly in a group context. Employees should be spoken to plainly and frankly about their poor performance, including being informed that if they do not improve, their employment may be terminated. Confirming the conversation, including the possibility of termination of employment, in an email or letter is also highly advisable.

The Full Bench of the Fair Work Commission in the matter of *Heran Building Group Pty Ltd v Eduard Annevelts* [2013] FWCFA 4744 at [38] reaffirmed the previous Australia Industrial Relations Commission Full Bench decision and reasoning in the matter of *Fastidia Pty Ltd v Goodwin* (C No. 33477 of 2000) where it set out that:

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...a warning must:

☐ identify the relevant aspect of the employee’s performance

which is of concern to the Employer; and

☐ make it clear that the employee’s employment is at risk

unless

the performance issue identified is addressed.

In relation to the later requirement, a mere exhortation for the employee to improve his or her performance would not be sufficient.
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To ensure that employers are doing more than generally appealing to employees to improve they must:

1. Be as specific as possible about what constitutes the poor performance, including referring to any relevant position description, dates or actions not met.
2. Detail how the employee can improve their performance to the required standard, including providing specific actions to be undertaken and deadlines to be met.
3. Set out a reasonable timeframe within which the employee must improve.
4. Where appropriate, support the employee by, for example, providing internal additional training or additional meetings with their manager.

Acting decisively and promptly is fundamental to managing employees' poor performance and ensuring that these issues do not get out of control. By drawing lessons from Fair Work Commission case law, employers can dramatically minimise the legal risks associated with managing poor performers while also benefiting the bottom line.
2.4. Personal Leave

2.4.1. Personal Leave – Requesting Information

When employees go on sick leave one question regularly arises: what information may absent workers be required to provide? Sick leave is an inevitable part of any employment relationship but long periods can disrupt business. Also, legitimate health and safety concerns can arise when a worker goes on such extended leave. Sick leave should be managed appropriately with regular communication and follow up.

The Fair Work Act sets out evidentiary requirements for sick leave. It provides that an employer may require evidence that would satisfy a reasonable person that an employee is unfit to carry out their duties (sections 97 and 107 (3)). Modern awards, enterprise agreements and workplace policies specify when a medical certificate or a statutory declaration may be required from an employee.

When can more information be required?

While the Act provides a test for employers to use it is not clear, on the face of it, what a ‘reasonable person’ would be satisfied with. The following factors should guide employers in determining whether more information may be sought:

☐ the evidence, if any, that the employee has produced to date;
☐ the length of service of the employee and their record of sickness;
☐ has a timeframe for a return to work been provided?
☐ are there implications for work health and safety, including concerns that the injury or illness might be work-related?; and
business considerations such as rosters, training and licensing (see Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32).

Under the Australian Medical Association’s Guidelines for Medical Practitioners on Certificates Certifying Illness 2011, doctors are not required to provide a diagnosis on a medical certificate. Instead, they may, if they deem it sufficient, simply state that an employee is unfit to attend work for a specified period.

Employers can request further information from an employee’s doctors, but only with the employee’s express consent. If such consent is not provided, and depending on the factors listed above and if there is insufficient information to satisfy a reasonable person, an employer may still require further information from an employee.

An implied contractual term in employment contracts allows employers, depending on circumstances, to request further medical information (see Australian International Pilots Association v Qantas Airways Ltd at [61]-[64]). It is on this basis that employers may, if a reasonable person would not be satisfied that an employee is injured or ill, demand further specific information or instruct an employee to attend an independent medical assessment.

The Fair Work Commission also upheld the dismissal of an employee who failed to provide the employer with information the company needed to assess the employee’s fitness to work safely. In Columbine v The GEO Group Australia Pty Ltd T/A GEO [2014] FWC 6604, the employee provided a medical certificate stating she was fit for work after an administrative role was no longer available for her. She refused to allow direct communication with her doctor or to agree to an independent medical assessment.

What if it is suspected that an employee is not really sick?

Employers should be cautious about how they handle situations where they suspect an employee is not genuinely injured or unwell. In accordance with the Act and the relevant industrial instrument or workplace policy, information should be sought promptly directly from the employee. The following steps should be taken:

1. **Contact the employee** to inquire about their injury/illness, the expected period of leave and to request a medical certificate if such has not been provided.
2. If a medical certificate provides insufficient information to allay the reasonable person test, request consent from the employee to **contact their doctor**;
3. If the employee fails to provide consent, consider whether an **independent medical assessment** is necessary in the circumstances;
4. After the above steps are taken, if it can be established that a reasonable person would not be satisfied that the employee was unfit to attend work disciplinary
action, including, potentially, termination of employment in serious cases, may be taken.

An example of disciplinary action that was held to be lawful arose in a case heard by the Fair Work Commission where an employee was dismissed for misuse of sick leave. The employee had informed his employer that he would take a day's sick leave to attend a soccer match in another city. His employer strongly counselled him not to do so but the employee ignored the warning and subsequently produced a medical certificate for the relevant date which he took as sick leave.

In Anderson v Crown Melbourne Ltd [2008] FMCA 152 the Commission cautioned that the circumstances were highly unusual. The employee claimed to be emotionally unfit to attend work due to the soccer match taking place. Despite the certificate, the employer maintained that a reasonable person would not have been satisfied that the employee was unfit to attend work. The Commission agreed. It also noted that the doctor who issued the medical certificate had previous disciplinary action against him, was a poor witness and had issued the medical certificate in unsatisfactory circumstances.

The best way to minimise disruption to business as a result of extended periods of sick leave is for employers to consistently require sufficient medical information from all employees. A workplace policy that clearly communicates what is expected when an employee goes on sick leave will greatly assist the appropriately management of this issue.
2.4.2. Managing Personal Leave

Managing the taking of employees’ personal leave can be a tricky process, especially when an employee takes regular sick days and the business suspects that they are not genuinely ill and are instead ‘chucking a sickie’. In Australia, taking a sickie has unfortunately become a part of many workplace cultures, with some employees believing that it is their workplace entitlement to take a sick day whenever they feel like it, whether it is because they want to enjoy a long weekend by taking Friday or Monday off or because they just can't face the idea of going to work. However, despite the fact that many managers assume that they can’t take any action against an employee who they suspect might be misusing their personal leave, there are steps that businesses can take to address the issue.

Employees are entitled to accrue ten days of personal/carer’s leave per year, which enables them to take time off work when they or one of their immediate family members is sick or injured. However, whilst taking a day off when genuinely sick is a workplace right, which means an employer can’t take adverse action in response to it, this does not stop employers from taking steps to: (1) prevent employees from ‘chucking a sickie’ and (2) confront an employee when the business has evidence of them misusing sick leave.

Preventing and monitoring sickies

Under the Fair Work Act, an employer can request that an employee provide a medical certificate or a statutory declaration for any personal leave that they take. Whilst requiring an employee to produce a medical certificate for time away from work due to illness can assist in reducing the likelihood of employees chucking a sickie, most people would agree that it is usually not difficult to get a medical certificate from a doctor, even when a person is perfectly well.

For this reason, it is important for businesses to have mechanisms in place addressing sick leave. This can include a workplace policy as to how sick leave is to be notified and what evidence is required when an employee takes sick leave. It also requires managers to monitor the taking of sick leave and identify any patterns that may be occurring in relation to when an employee is taking sick leave and the reasons as to why.

Some points that managers and employers can implement to reduce the likelihood of employees taking ‘sickies’ include:

- Require an employee to phone and speak to their manager when they are sick and need to take a day off work. A phone call, as opposed to a text message or email, can lower the chances of an employee chucking a sickie when they know they are required to have a conversation with their manager;
When misusing personal leave can result in disciplinary action

There tends to be an assumption amongst managers that once a medical certificate has been provided by an employee, they cannot question its authenticity or put an allegation to an employee that is suspected of 'chucking a sickie'. Fortunately for managers who are in this position, this is not the case if there are genuine concerns and supporting evidence that an employee has misused their personal leave.

If an employee produces a medical certificate which the business thinks is suspicious, the first step should be to contact the doctor or medical centre to determine whether they did in fact issue the certificate. Whilst the doctor will not be able to provide information about a patient or their medical history, in most cases, they should be able to confirm whether
the certificate is genuine.

In *Tokoda v Westpac Banking Corporation* [2012] FWA 1262, an employee provided a medical certificate without the doctor’s provider number on it. Suspecting that the certificate may be false, Westpac phoned the doctor’s surgery, which confirmed that they did not issue the certificate. Westpac put allegations to the employee that she had provided a false medical certificate, which she eventually admitted to. Westpac dismissed the employee, who went on to make an unfair dismissal application. The Fair Work Commission found that the dismissal was fair on the basis that the employee had been dishonest, fraudulent and had breached Westpac’s code of conduct by producing a false medical certificate.

Similarly, if there are other grounds for believing that an employee has misused their sick leave and there is sufficient evidence, allegations should be put to the employee and they should be required to respond. In *CFMEU v Anglo Coal (Dawson Services) Pty Ltd* [2015] FCAFC 157, an employee who threatened (and then actually took) sick leave after his annual leave request was denied, had his employment terminated following a procedurally fair investigation. Despite the Court noting that it might be unjust given that the employee had been legitimately sick, the employer had not terminated the employee because he took personal leave but because his conduct had irreparably broken the employment relationship.

**Be cautious**

Despite there being a temptation to rush out and confront every employee who has been suspected of chucking a sickie, which given the trend in Australia, there are probably many employees who fit into this category, it is important that businesses act cautiously when investigating the misuse of personal leave.

Under section 352 of the Fair Work Act, an employer must not dismiss an employee because they are temporarily absent from work because of illness or injury. Further, both state and federal discrimination legislation makes it unlawful for an employer to subject an employee to a detriment, including disciplinary action or termination of their employment on the grounds of their disability, which can include a temporary illness.

For this reason, it is vital that a business has sufficient evidence (rather than just mere suspicions) to establish that an employee has misused personal leave prior to taking any action against them, otherwise it could end up in protracted disability discrimination proceedings or facing claims that it unlawfully terminated an employee’s employment.

Given the difficulty in taking disciplinary action against an employee who is ill or injured, having a sensible personal leave policy and taking steps to understand the reasons as to why employees are ‘chucking sickies’ are the most important steps a business can take not only to reduce employee absenteeism but also to increase employee engagement.
2.5. Managing Injured Employees

At some point every employer will confront managing an employee who is suffering from an injury, medical condition or disability. There are important legal protections for injured and ill employees and for employees with a disability. Whilst at times an employee cannot continue employment due to illness or injury, failures of process in managing or terminating the employment of an ill or injured employee can result in employees having a substantial legal claim against their employer.

The nature of obligations

Whilst there are critical obligations placed upon an employer in relation to managing a sick or injured employee, there are also limitations on those obligations. For example, if even with reasonable adjustments an employee cannot perform the inherent requirements of their position, an employer is not required to continue the employment of the employee.

Another issue which arises frequently in the workplace is where the medical condition of the employee is such that it may place the employee, or other employees, at risk. If, even with reasonable adjustments, the employee still cannot perform his or her essential tasks safely, the employer is not required to continue the employee’s employment.

Short absences from work

Great care is needed before reaching the decision to terminate an employee who is temporarily absent, but likely to regain their health and be able to perform the inherent requirements of the position. It can be an offence under the Fair Work Act to dismiss an employee because that employee is temporarily absent from work due to illness or
injury. In most cases, it will not be an offence if the employee has been absent for more than three months.

Many contracts of employment will provide that the employee’s employment can be terminated if the employee has been absent for a period of three months in a calendar year. Whilst this may provide a contractual right to terminate, it is important for the employer to consider whether termination of employment in those circumstances could constitute disability discrimination. Employers have an obligation to make reasonable adjustments for employees with a disability which includes a medical condition. Where the employee is likely to return to full health or is able to undertake the role with adjustments which do not cause unjustifiable hardship, keeping the position available for longer than three months may be required.

**Work related injuries**

Injured employee legislation in all the states contains protections for employees who have become unfit for work as a result of a work related injury. In New South Wales, it is an offence to terminate the employment of an employee because they are unfit for work due to a workplace injury within six months of them becoming unfit. It is also important in these cases for employers to consult with their insurer in relation to any implications for premiums if suitable duties are not provided for the employee.

**Medical information**

An employer should never make decisions about what an injured employee can or cannot do based on generalisations or assumptions. It is always important to obtain information from the treating doctor and/or an independent expert. If the employee refuses to provide consent to the employer obtaining medical information or a medical report, it may be appropriate for the employer to notify the employee that in these circumstances they will have to manage the employee as if they do not have a medical condition. If it is already known from medical advice that the employee has a medical condition and the employee refuses to allow the employer to obtain updated information, this could be grounds for dismissal particularly if the employer has genuine safety concerns associated with the employee performing his or her role.
Dos and don’ts of managing injured employees

There are some things an employer must not do when managing an injured or ill employee:

- Do not make assumptions about a medical condition without obtaining expert medical information regarding the condition;
- Do not do anything to the employee’s detriment because of the illness or injury if the illness or injury has no impact on the employee’s work;
- Do not assume that it is okay to treat all employees the same. An employer has an obligation to make adjustments (provided those adjustments are reasonable and do not provide unjustifiable hardship upon the employer) to enable an employee to carry out their position;
- Do not assume that the position description sets out the inherent requirement of a position;
- Do not base employment decisions entirely what the employee tells you about a medical condition; and
- Do not make assumptions about an employee’s particular condition based on generalised information (such as information from the internet).

There are some things an employer must do when confronted with an employee suffering an injury or illness:

- Make an assessment of the job performed by the employee to determine what the inherent requirements of the position are;
- Obtain the consent of the employee to either speak to or obtain a report from the treating doctor or send the employee to an independent medical officer;
- Provide a doctor or other expert with information regarding the inherent requirements of the position;
- Carefully consider the medical condition of the employee based on the opinion of the expert;
- Ensure that any views formed about the employee’s employment are put to the employee for their comment and response; and
- Ensure confidentiality is maintained at all times in relation to medical information.
2.6. Flexibility at Work

For years it has been predicted that the technology revolution would lead to dramatic changes in the way Australians work, with flexibility the catchword. Evolving work practices include remote working, job-sharing, reduced work hours and variable start and finish times.

Now, it appears, these changes are well and truly upon us. A [2013 eye-opening study](#) by the Australian Media and Communications Authority (ACMA) says more than half the Australian workforce work, for some of the week at least, away from the office, usually at home.

![Image](image_url)

The effects

Among some very surprising findings, the ACMA study says that 5.6 million Australian workers (51 percent of the workforce) are ‘digital workers’ – people using the internet to work away from the office outside ‘standard working hours’ – and ‘teleworkers’ who are allowed to work away from the office, substituting coming into the office for part or all of the day. This includes 49 percent (2.8 million) of employed Australians who work away from the workplace at least two days a week. Technology advances have played a big part in allowing more employees to work remotely.
Legal considerations

When an employer deals with (a) a request to work under flexible arrangements and (b) with the implementation of such request, two important issues must be considered:

- The requirement to consider and properly respond to a request
- Obligation to ensure remote working is done safely.

To be entitled under the Fair Work Act to make a request under this section an employee must fall into one of the categories defined in the section. These include a person who:

- has a child of school age or younger;
- is a carer;
- has a disability;
- is over 55 years of age; or
- is experiencing violence from a family member or is providing care or support to an immediate family or household member who is experiencing such violence.

An employer’s written response must indicate whether the request has been accepted or denied. If it is denied reasonable business grounds must be given for the denial such as the proposed arrangement being too expensive, damaging customer service or teamwork, or causing difficulties for other employees. The expenses involved with complying with work health and safety obligations are also relevant.

An employer’s failure to comply with the procedure set out above can incur a penalty of up to $33,000. In Stanley v Service to Youth Council Incorporated [2014] FCA 643, despite an employer having been found to have unintentionally contravened the procedure and showing contrition it was still fined $4,000.

Work Health and Safety legislation does not differentiate between the official workplace and other places where employees are approved to carry out work. If you have an employee who has been approved to work remotely from home, you need to consider the health and safety implications of this work area just as you would your office space.

In Hargreaves and Telstra Corp Ltd [2011] AATA 417 an employee of Telstra who twice fell down the stairs in her home was awarded compensation for medical treatment as well as weekly compensation. On the first occasion Ms Hargreaves, who worked from home two days a week, was coughing violently as she went down stairs in her socks to get cough medicine. On the second occasion she fell while descending the stairs to lock her front door, as instructed by Telstra after an earlier burglary at her property. Both of these falls were held to have occurred while Ms Hargreaves was carrying out her work.
If an employer considers allowing and employee to work from home, a work health and safety audit should be conducted to ensure that reasonable steps are taken to avoid risks to health and safety when work is carried out. Some common health and safety risks in the home include trip hazards from wires, back injuries from unsuitable office equipment and safety hazards such as potential fires from excessive clutter on or around office equipment.

Pros and cons

Flexible arrangements can offer real benefits for employers, but potential drawbacks also should be considered and steps taken to avoid or mitigate them.

The positives for employers include savings in overheads such as rent, office equipment and electricity, resulting from smaller or more shared work spaces. Flexible arrangements can also make a business more attractive to valued employees.

On the other hand, employers can find it more difficult to engage with and reap some positive benefits from employees who work under flexible arrangements. The benefits of shared learning can diminish when more experienced employees are the ones more likely to take up flexible options and, thus, spend less time face to face with a team. Flexible arrangements can also stymie good team work and result in increased employee grievances, if not managed appropriately. Requiring a fixed number of days working in the office along with effective communications with remote or part-time workers can be of real benefit.

By and large employers are embracing employee flexible working options which technology allows them to use. While these arrangements can have real advantages, businesses need to keep the legal issues firmly in mind and work proactively to overcome some of the drawbacks of employees working apart.
2.7. Enterprise Agreements

Where modern awards provide base employment standards for whole industries or occupations, enterprise agreements are tailored agreements that meet the needs of a particular enterprise. These collective agreements are made between employers and employees and usually address the terms and conditions of employment for all. Enterprise agreements can be made between one or more employers and two or more employees with their chosen representatives. They will usually address a broad range of matters, including employment conditions, rates of pay and dispute resolutions procedures. These agreements cannot include unlawful content, like discriminatory or objectionable terms.

Why bargaining can be controversial

Collective Bargaining has been a feature of the employment relationship since the industrial revolution. It has also been a political battleground throughout the western world:

- The political right, led by industry, have argued for deregulation, providing greater freedoms for employers to bargain directly with their workforce;
- The political left, led by unions, have fought to maintain and improve a safety net of standards for their workers.

Like all ‘bargaining’ contexts, the incentive to participate in bargaining for all parties has always been provided by the prospect of improving their position.
In Australia, the debate reached fever pitch in 2005 with the Coalition’s *Work Choices* reforms, leading to one of the biggest and more important High Court decisions in modern times. The Federal Government successfully wrestled control of the bulk of industrial relations law away from the states, in order to provide employers with a virtually unfettered freedom to bargain directly with individual employees. For the Howard Government, this was a legal triumph but a political disaster, contributing to their landslide loss at the 2007 election.

The ALP’s subsequent enactment, the *Fair Work Act*, restored significant regulation to agreement making. The Act including the *National Employment Standards* (NES), reintroducing a meaningful statutory ‘safety net’ for national system employment. These standards cannot be contracted out of, or bargained away, by employers. Enterprise Bargaining Agreements (EBAs), as well as Individual Flexibility Agreements (IFAs), are now also subject to the ‘Better Off Overall test’ (BOOT). An EBA will not be approved by the Fair Work Commission unless they are satisfied that the employees are better off overall under the agreement than they would be under the relevant modern award.

However, this has led to many employers questioning whether there are any remaining benefits to the Enterprise Bargaining Process. If employers are stuck with the NES, and if every agreement results in employees being better off, does this mean that an agreement is required to make the employer worse off? Where is the ‘bargain’ in this? What is the incentive for employers to participate? Under the *Fair Work Act*, a more creative approach to bargaining is now required, but with a proactive and careful approach it is still possible for enterprises agreements to be hugely beneficial.

What are the benefits?

If an employer takes control of the bargaining process, an enterprise agreement can offer additional benefits to employees, while at the same time promoting flexibility, simplicity and innovation. Potentially, an enterprise agreement can also endure compliance, while increasing productivity and reducing administrative costs. Enterprise agreements can and should be tailored to the particular business. A successful enterprise agreement will ultimately increase productivity and meet the needs of both employees and employers. Cooperative enterprise bargaining should result in long term benefits and rewards for all parties.

Possible outcomes of successful bargaining can include things like:

- A simplification of the onerous and more complex Modern Award provisions, which reduces cost, improves compliance and aids employees in achieving a proper understanding of workplace rights. This promotes harmony at work;
- More flexible hours and rosters to meet the exact operational requirements of the business;
- Improved talent retention due to the ability to direct resources approximately to the target employees;
• Broader job classifications, and classifications that can be tailored to the exact roles performed in the business;
• Agreement to achieve greater efficiency gains such as new production targets or a reduction in waste;
• Improved service delivery to achieve greater client satisfaction;
• Improved procedures for handling employee grievances or consulting on workplace issues.

As organisations become more diverse and the workforce is more likely to move across numerous job types and business areas, enterprise agreements can be very useful for employers that operate under a number of awards. They enable a business to define its own classification structures, rather than limiting staff movement according to award coverage or the complex system of classifications across multiple awards. This makes compliance easier. The vast majority if workplace disputes concerning underpayment are due to the generalised nature of modern award classifications. It can be difficult for employers and employees to exactly correlate the very general award classifications to the very specific roles performed in the business. A well drafted agreement removes this hurdle.

The follow-on effects from this simplification can be a reduction in payroll administration time and cost, as well as a reduction in compliance risk. Furthermore, as the employees are actually engaged in the bargaining and approval process agreements are likely to identify issues that can be addressed and will speak to long-term employee commitment to the organisation. Employers who have successfully implemented agreements at work also report that the existence of an agreement, as well as the process of bargaining, can add value to the wider workplace culture.
The process

Best practice enterprise bargaining should see employers and employees working cooperatively in good faith, as equal partners working towards a common goal. However, the employer taking a proactive role is key. Developing the agreement also allows employers to remain on the front foot: instigating and negotiating at a time that suits them, unlike when a union seeks an agreement and the organisation is not prepared or has limited resources to invest in the process.

The Fair Work Commission plays an important role at all stages of an enterprise agreement: providing information on the process, assessing and approving finalised agreements and dealing with disputes that may occur over the terms.

1. **Bargaining**
   
The first stage in any enterprise agreement is the bargaining process. Representatives of the company and the employees will meet and discuss the scope and terms of the potential agreement. At the end of this stage, a proposed agreement should be ready for the Fair Work Commission approval process.

2. **Employer completes pre-approval process**
   
   - **Explain terms**
     
     The employer must ensure reasonable steps are taken to ensure that the terms of the agreement, including their effect, are explained to all employees in an appropriate manner.

   - **Notice and voting process**
     
     A majority of employees who will be covered by the proposed agreement must approve it through a vote.
○ A successful vote
  Depending on the type of proposed agreement, there are different criteria for a successful vote, more information can be found at the FWC website.

○ Agreement content
  The employer must ensure that the proposed agreement does not contain unlawful content, such as discriminatory and objectionable terms, terms that would enable an employee to ‘opt out’ of the agreement and terms that modify or exclude the application of unfair dismissal provisions in a detrimental way.

3. Applying to the Fair Work Commission for approval
  A bargaining representative for the agreement must apply to the Commission for approval in an approved format, usually within 14 days of the agreement being made. The Commission will then assess the agreement and make a decision.
2.8. Parental Leave

Understanding exactly what is meant by parental leave and what obligations and entitlements come with it can be a difficult process. Combined with the fact that the issue often receives significant media attention and is regularly debated in the political sphere, it is not surprising that many businesses are unsure about what to do when an employee or their partner becomes pregnant and what their obligations are in relation to parental leave.

**National Employment Standards**

There are a number of obligations and entitlements relating to parental leave set out in the *National Employment Standards* (NES). These obligations are non-negotiable and cannot be contracted out of for any reason.

Despite many misconceptions, parental leave does not just apply to women who have given or will give birth to a child, but can also extend to fathers or same sex de facto partners. To be eligible for parental leave, an employee must have the responsibility for the care of a newborn or recently adopted child and have worked for their employer for a continuous 12-month period. If an employee satisfies these criteria, they are entitled to take 12 months’ unpaid parental leave. This includes full time, part time and casual employees.

Employee couples who both intend to take unpaid parental leave do however, face a number of limitations as to when that leave can be taken, whether that is concurrently or consecutively. An employer may be entitled to request information from an employee’s partner or employer if this is the case.

Whilst an employee is away from work on parental leave, an employer still has a number of obligations to the employee, including the requirement to consult with them regarding
any significant changes occurring in the workplace. This might include an organisational restructure which changes the employee’s title or reporting line. In addition, an employee is permitted to undertake up to ten ‘keeping in touch days’ which does not impact on their period of parental leave. These days are used to enable the employee to keep in touch with their job in order to facilitate their return to work once their parental leave ends and cannot be used by the employee to undertake normal work.

One of the most difficult obligations for an employer to comply with is the requirement that the employee is to be returned to the same position they held prior to taking parental leave. If that position is no longer available, the employee must be given a position that they are suitably qualified for and is equal or substantially similar in status and pay. Employees returning to work can also request flexible work arrangements which can only be refused by the employer on reasonable business grounds.

This can have a significant impact on businesses, especially those with a small workforce, as they are required to find a replacement whilst the employee has been on parental leave and then upon their return, ensure they are returned to the same position and/or allow them to have flexible work arrangements.

However, despite the significant burden, both financially and logistically, that these obligations can pose to a business, the NES requires full compliance by employers, regardless of their size. Failure to provide employees with their full entitlements can result in serious financial consequences for businesses and protracted court proceedings.

**Parental leave workplace policies**

It is increasingly common for employers to have workplace policies relating to parental leave. These policies are often a summary of the entitlements and obligations set out in the NES and the paid parental leave scheme, which can be quickly and easily referred to by managers and employees when an issue relating to parental leave arises.

Whilst drafting such a policy might seem like a relatively simple and straightforward task, it is vital that a workplace policy correctly reflects the NES, as it is inevitable that any time a parental leave issue arises, managers will consult the policy and then accordingly advise employees of their entitlements. This can have disastrous effects if the policy doesn’t comply with the NES and a manager blindly follows the policy, potentially denying an employee their statutory rights.

In *Scullin v Coffey Projects (Australia) Pty Ltd [2015] FCC 1514*, a company’s parental leave policy was found to have breached the NES. The policy stated that employees were only entitled to unpaid parental leave if they were the primary care giver of the child.
This differed from the NES as an employee need not be the primary care giver of a child and only need to have a responsibility for the care of the child to be entitled to take parental leave. The employee, who took a mix of paid and unpaid leave for 12 months, returned to work and was only offered part time work. He was subsequently made redundant. The Court awarded the employee $170,000 for his loss, which stemmed from the employer’s breach of its parental leave obligations under the NES.

Some employers also have workplace policies with terms exceeding the minimum entitlements set out in the NES. This can be in the form of a payment before and/or after the employee has taken parental leave. This is often used to encourage good workers to return to work after their period of parental leave finishes and to assist them financially with the costs of raising a child.

Paid Parental Leave Scheme

Something which often receives significant media attention is the federal government’s paid parental leave scheme which provides eligible employees with payments whilst they are on parental leave. The current maximum amount an employee can receive is $657 per week, paid for 18 weeks. Casual, part time and full time employees are all eligible to receive the full amount.

The scheme is fully funded and run by the federal government and as such, does not place heavy compliance obligations on employers. However, the paid parental leave scheme is often a source of great concern for many employees and so therefore, businesses are often required to understand what the scheme is and when an employee will be entitled to receive paid parental leave. Further, an employer is responsible for making parental leave payments to an employee on behalf of the government so it is important that employers understand the scheme.

Changes to the paid parental leave scheme

In October 2016, the federal government announced intended changes to the paid parental leave scheme. While these changes will not be implemented until such time as parliament passes legislation, it is important that employers understand the potential changes and the impact that they could have on their workplace policies.

Where eligible new parents, as determined by a means test, are currently able to claim 18 weeks of government funded paid parental leave regardless of whether they receive an employer provided benefit, the new policy seeks to restrict how much of that 18-week payment new parents can claim when their employer also offers paid parental leave. Under these changes, the government entitlements will work only as a ‘top up’ for workplace benefits that are less than the 18 weeks.
What should employers do to ensure compliance with parental leave obligations?

On each occasion a query relating to parental leave arises, an employer should thoroughly check each source of authority to ensure that they do not provide advice or information that is incorrect or misleading.

Internal policies relating to parental leave should be regularly checked and amended in order to ensure that they correctly reflect the entitlements set out in the NES and the paid parental leave scheme. There are many policies that are still used in businesses which differentiate between maternity and paternity leave (the differentiation no longer exists) which are unlikely to comply with the NES and should be immediately amended.

Keep updated as to whether changes to the paid parental leave scheme are passed by the government. If changes are made which affect an employee’s ability to receive paid parental leave from both their employer and the government, the business may wish to consider amending their workplace policy in response.
2.9. Workplace Surveillance

Many employers are unaware that workplace surveillance is regulated, particularly in NSW. There are two key acts in NSW which regulate surveillance of employees. These are the *Workplace Surveillance Act 2005 (NSW)* and the *Surveillance Devices Act 2007 (NSW)*.

These acts dictate a number of areas where employers may seek to undertake monitoring of employees including in relation to computers, cameras, listening devices and GPS tracking.

In this era of technology monitoring employees can be a very useful tool for work health and safety purposes, protecting a company’s proprietary rights to confidential information and intellectual property, as well as seeking to minimise workplace misconduct.

However, employers must be cautious in the manner in which they monitor employee’s workplace activities to ensure that they are not breaching sections of the relevant acts or else they could face potential fines and, or, imprisonment.
Computers

For employers to carry out surveillance of workplace computers under the *Workplace Surveillance Act*, prior written warning must be given to the effected employees.

Notice must be given by the employer at least fourteen days before surveillance begins on an employee. If surveillance of employees in the workplace already occurs, then new employees can be given notice prior to commencing work that they too will be under surveillance. Commonly, notice is given to new employees in their contract of employment.

Written notice must include the following specifics:

- The kind of surveillance to be carried out;
- How the surveillance will be carried out;
- When the surveillance will commence;
- Whether the surveillance will be continuous or intermittent; and
- Whether the surveillance will be for a specified limited period or ongoing.

To be in compliance with the *Workplace Surveillance Act*, companies must have a surveillance policy concerning computer surveillance of employees within the workplace. Employees must have been notified of this policy in advance.

Although notice is essential, consent of the employees concerned is not required. Computer surveillance is not limited to desktop computers, but can also include checking of smart phones and other electronic devices. Computer surveillance is one of the most regularly used methods of monitoring employees. It can be used for a variety of activities including tracking emails, internet sites visited, software downloaded, files saved to external storage devices and accessing of employer software.

Cameras

Cameras are used within many workplaces, particularly in sectors including hospitality and retail. The notice requirements for carrying out this type of surveillance under the *Workplace Surveillance Act*, is the same as is required for computer surveillance as outlined above.

Camera surveillance cannot be carried out in certain circumstances, including in bathrooms, change rooms or toilet facilities. In addition, cameras or their casings must be clearly visible within the workplace and signs must be utilised to notify employees that they are under camera surveillance. Cameras in the workplace can be a useful tool for reviewing customer service levels and starting and finishing times of employees.
They can also serve the purpose of protecting employer’s property and acting as a general deterrent for the employee misconduct.

**Listening devices**

Under the *Surveillance Devices Act* an employer cannot install, use or cause to be used or maintained a listening device to overhear record, monitor or listen to a private conversation. The legality of installing a listening device is legally very risky because conversations that would be considered private take place regularly in the workplace.

It is very unusual to install listening devices within the workplace. The exception to this is where employee’s phone calls are recorded in industries such as telemarketing to ensure quality control and compliance with the law. In that situation both the employee and the customer are aware that the call may be being monitored.

There are significant penalties for breaching the *Surveillance Devices Act* by installing a listening device. This can include fines of up to $55,000 per breach for a corporation and $11,000 per breach for individuals, as well as up to 5 years’ imprisonment.

**GPS tracking**

Under the *Workplace Surveillance Act*, employers are allowed to track vehicles that employees utilise for work. To do so employers must display a notice that is clearly visible on the vehicle, setting out that it has GPS tracking. Employers are also able to track other things such as workplace property; these items must also clearly display a notice that they are being tracked.

Often GPS tracking devices are installed by companies for security reasons, as well as employee safety reasons. Tracking devices are very commonplace in the trucking industry, so that goods along with employee safety, including break times, can be monitored.

The same written notice requirements as outlined for computer surveillance above is also required for GPS tracking devices.

It is important for employers to know how far is too far when it comes to workplace surveillance. Under the *Workplace Surveillance Act*, any breaches of notice provisions or surveillance can result in fines for employers and its directors of up to $5,500 per breach. Workplace surveillance is a very important tool for workplace safety and the protection of company property.
Employers are allowed to monitor their employees, both in the workplace as well as when they are on work computers or devices and in work vehicles. However, employers must ensure that any surveillance is done in accordance with the above outlined legislation. The upmost care should be taken to explain to employees that surveillance is occurring and what its purposes are. This exercise can be just as vital as the surveillance itself, as it helps to set expectations of workplace behaviour for employee.
2.10. Swearing at Work

The F-Word: What's Appropriate in the Workplace?

Given that we spend a large proportion of our lives at work, often in stressful situations, it is understandable that some of us may drop the odd f-bomb at work. However, whilst this would be accepted and even applauded in some workplaces, in others it might be seen as highly offensive and result in disciplinary action being taken against the foul mouthed employee. It is therefore important for both managers and employees to understand what is appropriate and what isn’t before throwing an expletive into a workplace conversation or taking disciplinary action against an employee.

One study found that employees who frequently swear in the workplace may lose out on a promotion, with 57% of employers saying they would be less likely to promote someone who swears as it calls their professionalism into question, demonstrates a lack of maturity and control and makes an employee appear less intelligent. However, despite this, employers are not innocent, with 25% admitting that they have sworn at their employees.

Whilst it may seem obvious, not every occasion an employee swears is likely to warrant the intervention of an employer or manager. The context, the type of swearing and the audience are all important factors in determining whether swearing in the workplace is inappropriate.

An important consideration which must be made in the context of considering swearing at work is whether there are any workplace policies that regulate such language. In *Symes v Linfox Armaguard Pty Ltd* [2012] FWA 4772 an employee was dismissed after he told his supervisor to “get f...d” and complained about the “f...g roster”. The employee later apologised to his supervisor. The employer had not historically ensured compliance with the 'no swearing' policy in place at the workplace. Whilst the Fair Work Commission found
that the swearing did amount to misconduct, to dismiss the employee because of his
swearing was unfair when other employees had not been previously disciplined.

Swearing at a customer, as most would correctly assume, has been found to be grounds
for dismissal. In *Roderick Macdougall v SCT Pty Limited T/A Sydney City Toyota [2013]*
FWC 1077 an employee was terminated after he swore at a customer. The Fair Work
Commission rejected the employee’s unfair dismissal claim as customer service was a key
part of the employee’s job and his conduct threatened the profitability and reputation of
the business.

An important distinction in many cases is whether the swearing is used whilst in a general
discussion to describe an inanimate object, for example, a malfunctioning printer, or
whether it is specifically directed at a particular person. In *Mark Baldwin v Scientific
Management Associates (Operations) Pty Ltd [2014] FWC 5174* an employee who swore
at his manager using extremely crude and profane language in a threatening
manner and had caused his manager to become fearful for his own safety was found not
to have been unfairly dismissed. The Fair Work Commission said:

“there is… a qualitative difference between swearing in the workforce
per se and swearing directed to one’s manager (or to another
employee) which is not only offensive but highly personalised.”

In some workplaces, swearing at work may be normal and even used as a way to
motivate employees. Research has found that swearing can foster team bonding and
humanise the people you work with. However, swearing also has the potential to offend,
bully and intimidate.

**What are the vital considerations in attempting to manage workplace swearing?**

- If there is a ‘no swearing’ policy, enforce it consistently against all employees who
  swear in the workplace. If there is no policy and swearing is not condoned in the
  workplace, consider implementing a ‘no swearing’ policy
- There is a difference between swearing during general discussion and launching
  into a tirade of swear words against an employee
- Consider the culture you wish to cultivate. Employees will obviously take cues
  from their supervisors. If there is a manager swearing up a storm regularly,
  employees will therefore believe it is ok for them to swear as well
Consider the audience which the swearing is directed at. Is the audience likely to be offended? Will the swearing damage the reputation of the business?

How serious or offensive are the swear words that were used? If the words were only mildly offensive, consider giving the employee a stern warning.

Employees should take particular care to regulate their language in the workplace. Likewise, employers should not disregard poor language if it has the potential to offend or cause harm to other employees, otherwise the employer may be seen to be condoning behaviour which could amount to bullying.

Having a sensible workplace policy in place can provide guidance to employees as to the appropriate language expected within the workplace, without employees feeling too restricted by what they can and can’t say. A policy that is correctly implemented and consistently applied can also provide employers with a source of authority should disciplinary action be necessary against an employee.
2.11. Christmas Parties

2.11.1. Managing Alcohol

Workplace Christmas parties are a great way to reward employees for their hard work over the last twelve months. Unfortunately, case law shows that these workplace parties can often result in physical injuries and allegations of sexual harassment and bullying.

Many employees see their work function as an opportunity to socialise and let their hair down. However, employers need to remain vigilant about enforcing workplace policies and procedures.

An event such as a Christmas lunch or drinks, which is organised by an employer, is very much considered to be part of an employee’s employment. As a result, if there are physical injuries or unlawful behaviour occurs, which impacts upon another employee, there could be consequences of liability for an employer.

Most of the poor behaviour or injury that arise out of office Christmas parties inevitably involves the consumption of alcohol. While we do not advocate banning alcohol at your party, we do suggest that the following practical tips are put in place to reduce the risks surrounding its consumption:
☐ Remind Employees of the Code of Conduct - Be clear and upfront with employees about what behaviour is expected at work functions, including the Christmas party, and the fact that all workplace policies apply to these situations.

☐ Provide Alternatives - Plenty of non-alcoholic drinks should be available and you should consider whether there are limits placed on the types of alcohol that can be consumed (i.e. beer and wine instead of spirits).

☐ Limit Consumption - Consider setting a limit on how much alcohol can be consumed by employees by issuing drinks vouchers and centralising the point of alcohol distribution so that topping up of alcohol, without an employee’s awareness, can be avoided.

☐ Entertain - Ensure there are other activities to take place throughout the function which will provide alternative past time to drinking alcohol, in particular food should be provided to ensure people are not drinking on an empty stomach.

☐ Think ahead about Transport - Ensure alternative transport options are in place such as public transport, private buses or taxis and expressly inform employees prior to the event of arrangements. If required specifically communicate with intoxicated individuals at the event that they are not to drive.

☐ Monitor Employees - Particular members of management need to be given designated roles of being on the lookout for poor behaviour and excessive drinking. Management should step in to provide instructions to employees where appropriate.

Are you still not convinced that some forethought is required before launching into your office party? Consider the Australia Drug Foundation’s statistics that one in five Victorian workers say that have experienced unwanted or inappropriate behaviour from a person affected by alcohol at an organised work function.

Ensure that your start to the New Year will not be plagued with the headache of dealing with mishaps that could have been avoided at the Christmas party by talking a little time to plan ahead. With a bit of forethought both you and your employees can truly enjoy the festivities of your party.
2.11.2. General Considerations of Holding a Work Christmas Party

We’ve all seen it, the workplace Christmas party that gets out of hand. Someone has too much to drink and shows it. An unwelcome move is put on a colleague. People snap pictures, or worse, take videos that will end up on social media. Lewd jokes are made. For bosses, even just the thought of what can go wrong is enough to put a nasty dampener on the joy and festive feeling they might have envisaged.

So, apart from canning the event altogether and earning the nickname “The Grinch Who Stole Christmas”, what safeguards can you adopt to limit the risks?

Be proactive not reactive

Thinking ahead about proactive steps to limit risks at a workplace event is essential. Key issues to consider include:

1. Who will monitor the events?
2. What time will the event run from, and, more importantly, to?
3. How will you ensure the responsible service of alcohol?
4. What workplace policies should employees be reminded about?
5. What health and safety risks does the event pose?

Better by far to resolve these issues in advance than to suffer, as one employer did, a court finding that the sacking of an employee who misbehaved badly at the staff Christmas party was unfair because the employer supplied unlimited alcohol at the event.
In Keenan v Leighton Boral Amey Joint Venture [2015] FWC 3156 an employee was accused of having committed various acts of poor behaviour at the workplace Christmas function. This included allegations of sexual harassment, swearing at colleagues, criticising the company and bullying attendees. The employee’s job was terminated for these acts, which occurred after he had consumed lots of free alcohol. Vice President Hatcher noted in this case that it was: ‘contradictory and self-defeating for an employer to require compliance with usual standards of behaviour at a function but at the same time allow unlimited service of free alcohol at the function.’ The Vice President observed that no one was in charge at the function to observe and address employee behaviour. In fact, despite the employee’s noticeably poor behaviour and clear intoxication he was not stopped from further consuming alcohol or forced to leave. The decision that the employee was unfairly dismissed, despite his deplorable behaviour, highlights the folly of not being properly prepared for a workplace party.

Workplace policies

The best way to remind employees how to behave is to issue a clear statement about this preferably at the start of the event or in an earlier email. Employees should be reminded that they are still at work during the event and that the normal workplace policies and expected standards of behaviour apply. Specific policies, such as the code of conduct and the bullying and harassment policy should be highlighted.

While raising workplace policies is a good start it is important that this be not just a token gesture. Given the additional risks raised by alcohol consumption in the workplace, monitoring of behaviour is crucial. Managers assigned to the event should tell any employees who have drunk too much to stop drinking (and ensure this is enforced) and should direct employees to leave the event if inappropriate behaviour is exhibited.

Alcohol

Banning alcohol at your event might seem a little drastic but other approaches can temper consumption.

A coupon system might be put in place to limit the number of drinks employees are able to consume. In addition, employees should be informed that they may not have more than a prescribed number of drinks. Alcohol should be served to employees rather than laid out for employees to take as they please. Further, the strength of alcohol to be provided should be carefully considered. For example, should spirits be provided?

At the designated finish time the serving of alcohol should cease and the event close down. If employees then continue celebrating elsewhere any mishaps that occur will less likely be connected to their employment, and the employer will therefore be less likely to be liable. Employees should be clearly advised well before the event that they should plan suitable
transport if they are going to consume alcohol. As employer, you might provide suitable transport options or suggestions. Managers in charge of monitoring behaviour at the event must keep a close eye on intoxicated employees to ensure they do not drive. While workers’ compensation claims for journeys between work and home are largely a thing of the past, there is still potential for such liability where an employer provides alcohol and lets an employee drive home intoxicated.

If inappropriate behaviour does arise at the event, it should be addressed quickly but not rashly. The offending employee should be sent home immediately and the offending behaviour should be addressed later in a procedurally fair manner, taking into account the employee’s performance history, the context and the various options available to for discipline.

So, with some thoughtful planning and a realistic assessment of potential risks your Christmas event can spread joy, peace and goodwill.
2.12. Workplace Relationships

TV Drama or Workplace Reality?

It is inevitable that workplace relationships, both on a friendship and a romantic basis, will develop when people are working together in close proximity for an extended length of time. Such relationships can, however, create significant challenges for employers and managers.

As many organisations place great importance upon recruitment and often involve stages requiring psychometric and personality testing, an element of corporate selection develops. People with similar educations, personalities, backgrounds, interests and values are likely to be employed by the same organisation. Combined with the fact that many workers spend more time with their colleagues than with their families, it is unavoidable that both employees and employers struggle with managing workplace relationships.

Sexual relationships and affairs are the stuff that TV drama is made of, and according to statistics, it is not exaggerated. Over 11% of Australians will date someone that they work with. Whilst this may result in improved motivation and enthusiasm for the parties on a short term basis, the negative and widespread impacts that such a relationship can have on the workforce is impossible to ignore. Some of the most obvious of these are the blurring of boundaries, distraction from work, accusations of favouritism and bias, reduced outputs, gossip, tensions with other workers and the ramifications of any future breakup between the parties.
In *Kym Suzanne Reedy v Global Cranes Pty Ltd [2011] FWA 3037* an employee’s employment was terminated for partaking in office gossip “in a tantalising and highly dramatic manner... which was designed to cause trouble in the workplace.” The employee, Ms Reedy had a meeting with her manager, Mr Vidaic and his fiancée who was also an employee. Ms Reedy then described to Mr Vidaic’s fiancé in a “hurtful” way that the gossip around the office indicated that Mr Vidaic had been photographed having dinner with another woman and was thus having an affair. Ms Reedy made an unfair dismissal claim. The Fair Work Commission found that the termination was not harsh unjust or unreasonable and that the working relationship under the contract of employment demanded that Ms Reedy should have considered making an “attempt to privately warn Mr Vidaic that there were unfounded and damaging rumours about him, in an act of loyalty or friendship.” This obviously did not involve disclosing those rumours directly to his fiancé. This case demonstrates not only the difficulties that can arise when having intra-office relationships, but also how damaging workplace gossip can be.

Chatting and catching up on your weekend are normal things to do with a workplace friend. However, when this evolves into long periods of standing around talking, taking extended coffee breaks and sending multiple non work related emails to each other, it has the potential to cause problems. Employers expect their staff to be doing work and not just socialising. Other employees often get frustrated and demotivated by the lack of work a particular employee is doing and the disruption it causes. References to out of work hours’ social events during work hours can also have the potential to make other employees feel excluded and can even contribute to or cause complaints of workplace bullying.

The potential for conflicts of interest when there is a close personal relationship between two employees must also be considered. In *Lakatos v Termicide Pest Control Pty Ltd [2014] FWC 5839* Ms Lakatos and her partner both worked for a pest control company. The partner’s employment was terminated. The employer had reason to believe that the partner had commenced work with a direct competitor. Ms Lakatos was asked by her employer where her partner was working and she refused to answer. The Commission held that the termination of the employment of Ms Lakatos was not, overall, unfair. The Commission found that the employer had a reasonable concern about a potential conflict of interest and the employer was reasonably entitled to make the inquiry. It was also held that Ms Lakatos was well aware of the reason for the inquiry. The Commission said that when Ms Lakatos refused to answer the inquiry the employer:

"Lost confidence in the Applicant as an employee who would serve him with all due fidelity".
Tools for managing workplace relationships

The question is then, how does an employer manage these workplace relationships to ensure that it is getting the most out of its workforce whilst remaining fair to employees and within the law.

☐ Have an open channel of communication and transparency – if management receives complaints from other employees about the nature of a workplace relationship, inform the parties (separately) and suggest ways in which each of them can manage the situation whilst at work.

☐ If the organisation has a policy on workplace relationships, use it and use it consistently. A policy which is ignored or not used consistently can be worse than having no policy at all.

☐ Consider the effect that a workplace relationship has on the parties of the relationship, their work and other colleagues. If the behaviour does not adversely affect the employee’s work, no action may be necessary. A good manager should have the skills to assess this and react accordingly.

☐ If there is a close personal relationship between employees, try to identify any potential conflicts of interest and assist employees, where possible, in managing such conflicts of interest.

☐ It is essential that managers never raise confidential matters about a particular employee with other employees who do not have a genuine work reason to be aware of these matters. This applies equally if not more so when there is a personal relationship between two employees.

In conclusion, as a manager, if you see an inappropriate display of affection between employees at work or an overly personal discussion between colleagues (which can tend to exclude others) intervene straight away in a friendly tone. If there is a repeat of the conduct formal disciplinary action may be needed.
Part 3 – Managing Disputes
Part 3. Managing Disputes

3.1. Investigating Sensitive Matters

A workplace investigation involves a review of allegations and complaints in the workplace, conducted by an impartial third party. For example, an investigation may be regarding allegations of bullying or inappropriate conduct by an employee. Investigations can be an integral mechanism that allow for the smooth running of a business. Essential to any successful investigation are pre-designed procedures to manage sensitive and divisive issues in a just and fair manner. Inappropriate or poorly run investigations can be very costly for employers as employees may resort to legal action and seek workers’ compensation as a result. A 2012 case heard in the Queensland Industrial Relations Commission, State of Queensland (Queensland Health) v Q-COMP and Tracy Connors highlights the negative ramifications on businesses and investigators if practices are not carried out appropriately or reasonably.

Ms Connors was appointed as a casual Operational Officer at the Mackay Base Hospital in January 2010, by Karen Metassa, the Director of Environmental Services. In March 2010 Ms Connors received a letter notifying her of an investigation and her participation in an interview, in which she was ‘identified as a potential witness’ and assured ‘the investigation is not about you’.

However, according to the Investigation Terms of Reference, the opposite was true. The basis of the investigation involved allegations of a relationship between Ms Connors and her superior, Ms Metassa. It was alleged Ms Connors was not hired according to appropriate regulations, such as a failure to disclose their relationship and that Ms Metassa requested Ms Connors not be rostered for one week so they could go on a holiday together. Ms Connors was shocked and distressed by the allegations, denying any truth to the matter.

Essentially the true nature of the investigation was concealed and as a result the Commissioner held that Ms Connors was not provided with sufficient details to prepare herself adequately for the interview process. Moreover, he found that the investigator may have been acting beyond the scope of his authority when he conducted the interview. Ms Connors lodged an application for Workers Compensation claiming psychological injury resulting from the unreasonable and premature investigation and was successful in her claim.
There is a myriad of different remedies employees may seek as a result of poorly handled and unjustified investigations including unfair dismissal claims, Workers Compensation claims, Workplace Health and Safety claims and breach of contract claims, to name just a few.

Employers need to ensure that they are conducting a fair investigation therefore minimising the risk of costly litigation against them. The following are some recommendations for employers concerning carrying out investigations in order to reduce their legal risk and ensure the fair treatment of employees:

- Establish a transparent investigation procedure and plan the process thoroughly before commencing action.
- Any allegations must be kept confidential and only disclosed to relevant parties.
- There must be preliminary enquiries to ascertain whether the complaint has some foundation before embarking upon the interviewing and investigation process. This involves the gathering of substantial evidence to justify the claim.
- The interviewee or employee must be given adequate notice of the investigation to prepare themselves. They should also be given details as to the true nature of the allegation and the option to have a support person present with them. This communication is vital to avoid grounds for employees to successfully bring legal action.
- If the allegations in question regard sensitive matters, ensure extra care should be taken when wording letters of notice and questioning employees. The manner in which questions are communicated may be the difference between making the employee feel respected or distressed.
- The interview must be recorded.
- The interviewer should ensure that the interviewee is aware of the allegations and the nature of the interview. They should re-offer the opportunity to have a support person, if the interviewee had originally declined.
- Once a decision is made the employee subject of the allegations must be given a reasonable period of time to respond.

By aiming for a fair and just investigation process and having transparent procedures in place, employers will be in a good position to defend any legal action taken against them as a result of an investigation.
3.2. Workplace Investigations

Employers should take great care when responding to serious allegations and workplace incidents. Often it will be appropriate to have an investigation carried out externally, although a truly independent internal investigation will be sufficient. Whenever an investigation is conducted if certain procedures are not followed employers could end up unsuccessfully defending a claim that arises out of the process or outcome.

When should an investigation be undertaken?

Investigations are conducted formally and informally all the time in workplaces. It is inevitable and should therefore be expected, and not necessarily seen as a poor reflection of a workplace’s culture, that when a group of people with different personalities, beliefs and interests are put together that conflicts will arise. Examples of when an investigation should formally be conducted include:

1. Where a grievance has been raised by one or more employees against others employee/s;
2. Where allegations of fraud, sexual harassment, physical or verbally threatening behaviour or serious bullying allegations have been raised;
3. Where alleged breaches of health and safety have occurred by an employee;
4. Show cause events where an employee might be terminated for allegations made against them; and
5. Where there are allegations of misuse of company property or damage to it.
6. Employers should have processes in place for each of the above matters to be raised by employees and a clear system as to how an investigation for each of the matters will be carried out.

Why is it important to investigate?

If serious allegations come to an employer’s attention and they fail to take appropriate action they could be held liable, either directly or vicariously, as a result of an employee’s actions for that behaviour. Furthermore, if there are health and safety issues an employer as a person conducting a business or undertaking, in accordance with the Work Health and Safety Act 2011 (Cth), could be penalised for any breaches of this Act. Directors can also be held personally liable for such breaches.

What is the purpose of the investigation?

The purpose of any investigation should be to determine whether the allegations are substantiated or not. Whilst it can be hard to make such a determination a person conducting an investigation should take all reasonable steps to inform themselves of the relevant facts to make a determination.

An investigation should not have ulterior purposes and employers could be found to have taken prohibited adverse action against an employee in breach of section 340 of the Fair Work Act if an investigation is not conducted in good faith and is for underhanded motives. In the Federal Court decision, Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3) [2013] FCA 525 (the ‘Visy Packaging Case’), it was held that Visy Packaging Pty Ltd undertook prohibited adverse action against an employee who was a health and safety representative that had tagged a forklift for being unsafe.

The employer had subsequently alleged that the employee had acted in an uncooperative manner, amongst other things, and determined that an investigation into this behaviour was warranted. Justice Murphy found that the real motive for the investigation and the subsequent written warning issued was the employee’s behaviour in tagging the forklifts which resulted in productivity losses and interruption to work. This was prohibited adverse action under the Fair Work Act.
The key considerations – procedural fairness and being thorough

It is important that any investigation that is undertaking is procedurally fair and is thorough enough to determine all relevant facts. Some of the key considerations to keep in mind in this regard when carrying out an investigation are listed below:

1. **Carefully collect and look at all available information** – in a matter before the Fair Work Commission (*Duncan v BlueScope Steel Ltd [2013] FWC 8142* (the ‘BlueScope Steel Case’)) it was held that the employer conducting an investigation into alleged serious misconduct by an employee had failed to asked crucial questions and had relied on information which was drawn from witnesses who had a clear conflict of interest. As a result, the termination which came about from the investigation was deemed unfair and the employee was reinstated.

2. **Determine whether an independent investigator is required** – whilst Justice Murphy in the Visy Packaging Case identified that it is not a legal requirement for an investigation to be done independently it is still important to consider this. If an unfair dismissal application is lodged a crucial aspect of the matter will be whether the employee was given ‘a fair go all around’. It will be difficult to show this if a person who has been heavily involved in factual circumstances or has a conflict of interest undertook the investigation.

3. **Do not rely on the evidence of one person which is unreliable and inconsistent with other witnesses** – the Commission found in the BlueScope Steel Case that one witness who had a bad recall of events and made up things was unjustifiably relied upon to the exclusion of other employees.

4. **Document evidence and make written findings which clearly connect to the outcome** – the best way to show that a thorough and considered investigation has occurred is to map out exactly what has been looked at. In the *CFMEU v BHP Coal Pty Ltd [2013] FCA 1097* Justice Collier found the evidence of the investigator, which included ‘detailed records of interviews and events’ to be very helpful and therefore ultimately found her to be credible.

5. **Be open about where the process is heading with relevant parties** – it is crucial that procedural fairness is applied throughout an investigation and part of this is ensuring that any relevant parties are made aware of next steps and potential outcomes.
3.3. Managing Informal Complaints

Informal workplace complaints are unfortunately something that managers have to handle on a regular basis: whether it's an employee letting off steam and having a whinge about their colleagues or something more serious that an employee just wants to get off their chest and insists they don't want investigated.

Given the very nature of informal workplace complaints (the fact that they are usually verbal, aren't made in accordance with a formal workplace policy and are often made by reluctant complainants), it can sometimes be difficult for managers to find the right balance in dealing with them. On many occasions a relatively minor complaint may be blown out of proportion by an employer’s knee-jerk response and on the other hand very serious complaints might be brushed under the carpet on the basis that the employee didn’t want it to be taken further or that the complaint wasn’t made in accordance with a complaints or grievance policy. Both of these responses can have a detrimental impact on employees, the business and on the potential liability the business might face down the track. For this reason, a good manager must be able to use their judgment as to when a complaint is serious enough that it warrants further investigation (regardless of the complainant’s wishes) or when it is appropriate to tell the employee that they should desist from engaging in nitpicking or whingeing behaviour.

The whinging employee

Dealing with employees who have a tendency to whinge or moan about every workplace concern, no matter how trivial, is unfortunately something that would be familiar for many managers. Some employees will simply not get along and others will strongly disagree with processes or procedures that a business has in place or disagree with ‘the way things are done around here’ and feel that it is their responsibility to bring this to their manager’s
constant attention. The key to these types of complaints is to be measured, address the complaint head on and not over-react.

Allowing an employee who tends to regularly whinge about workplace issues to continue with their conduct can result in reduced morale in other employees who have to put up with the constant complaining and encourages the complaining employee to continue with their behaviour. In circumstances where the employee’s complaints are nothing but nit-picking and will not be taken further by the business, a manager should not hesitate to calmly inform the employee that they should cease bringing up the subject again and inform them of the reasons why no further action will be taken.

However, if the employee’s concerns are legitimate and have the potential to cause harm to someone in the workplace, the business should investigate the complaints further, whether that involves having a conversation with the employee the subject of the complaints, considering changes in the business’ processes and procedures or conducting a formal investigation.

**The manager who knows there is a problem**

In many cases, a manager will be aware from their own observations or feedback from other employees that there is a problem in the workplace. This might be that staff members are not getting along or that employees are being overworked. There are many reasons why an employee may not approach management to make a complaint, including that they feel uncomfortable or that they fear that they may lose their job as a result of being a ‘trouble maker’. Managers should understand that some employees may be reluctant to make complaints, no matter how serious their concerns are. This reluctance can also occasionally manifest itself in anonymous complaints being made. Whilst employees should be strongly encouraged to put their name to a complaint, anonymous complaints cannot be ignored, especially if serious and legitimate concerns are raised.

There often tends to be a belief from managers that they must wait until a formal complaint is made before they can take any action. This belief, which is false, sometimes reinforces a business’ reluctance to investigate and can be used by a manager to stick their head in the sand about what is going on in the workplace. Under work health and safety legislation, contract and tort, an employer must take all reasonable steps to protect the health and safety of employees. This includes taking action as soon as becoming aware of serious workplace concerns, regardless of the way these may be communicated to the business.
Taking action early also assists in deterring future formal complaints and can improve employee morale and performance.

The employee who complains but doesn’t want an investigation

It is not unusual for an employee to approach a manager to assist them with concerns that they have or to mentor them through a tricky situation with the express request that the manager not pass on the information to anyone else. Whilst the vast majority of concerns will be relatively simple and can be resolved by providing coaching or mentoring, on occasion, the concerns may be so serious that the manager has an obligation to disclose the matter and take further action, despite the employee’s wishes. Ignoring serious complaints or not taking further action on the basis that the employee has requested that a formal investigation not be conducted can potentially have disastrous consequences for the business.

In *Swan v Monash Law Book Co-operative [2013] VSC 326*, an employee was being relentlessly bullied, harassed and intimidated by her manager. The employee went to the Board in 2003 to complain about the behaviour, however, the employee stated that she did not want the manager to be spoken to and advised the Board to “sit on it at this stage and take the comments on notice”. On this basis, the Board took no further action. The bullying continued and in 2007, the employee suffered a severe psychological condition. The Court, when considering whether the employer had breached its obligations to the employee, rejected the claim that it would have been inappropriate for the Board to speak to the
manager when the employee had asked it not to. The Court stated:

“It was inappropriate for the defendant... to rely on choices made by its employees as to the employer’s proper response to the employee’s complaint... the employer is under an affirmative obligation to actively consider amelioration of a risk of injury and cannot abrogate that responsibility to its employee.”

The Court found that if the Board had acted appropriately in 2003 when first becoming aware of the complaint, it was likely that the employee would not have suffered the severe psychological condition. The employee was awarded almost $600,000 for past and future economic loss and damages for pain and suffering and loss of enjoyment of life.

Whilst handling informal complaints can be difficult for a number of reasons, ignoring the complaint altogether, no matter how trivial it might seem or that the employee does not wish for it to be investigated further, can have significant consequences on a business. Addressing complaints early on and when first becoming aware of them can reduce a business’ potential future liability, improve employee morale and loyalty to a business and decrease the risk of a future formal complaint arising.
3.4. Bullying

3.4.1. Fair Work Commission Anti-Bullying Jurisdiction

In 2013 the Fair Work Commission was given an anti-bullying jurisdiction with the addition of the new Part 6-4B in the Fair Work Act. These provisions were given the broadest possible application by importing the broad concept of ‘workers’ from the Work Health and Safety Act 2011 (NSW). This means that in section 789FC(2) the anti-bullying provisions cover every person "who performs work in any capacity", including as "an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student on work experience or a volunteer.”

The range of businesses covered is also broad, covering constitutional corporations, Commonwealth bodies and body corporates incorporated in the Territories as well as the plenary coverage provided in referring States (including New South Wales). However, the Commission has shown in cases such as Schoshana Amzalak [2016] FWC 6590 that they will apply a very strict reading of the coverage of the Fair Work Act. In order to begin considering the ‘bullying’ aspect of any application, the Commission must determine the identity of the employer. This includes an analysis of factors like:

- Whether the employer is in fact the subject of referred powers or a constitutional corporation; and
- What the nature, and sometimes even the location, of the legal person conducting the business or undertaking.

In both Schoshana Amzalak and Ms S.W. [2014] FWC 3288, the applicants were employed as teachers in state public schools operated by the respective state Departments of Education. These are not corporations or separate legal entities from the State and ‘the absence of a corporate entity means that it cannot be a constitutional corporation’ and is therefore not within the scope of the Act.

There are also limitations to the scope of the Commission’s capacity to deal with an anti-bullying application where the employment or contractual relationship has ended. In Mr Richard Bussanese [2015] FWC 3515 the applicant was dismissed prior to lodging an anti-bullying application, the Commissioner found that he was unable to make a finding as there was ‘no basis upon which a further relevant risk of bullying conduct might arise ... in the absence of that risk or a foreseeable basis for such a risk, no orders can be made as a result of the application even if bullying conduct was to be found.’

Section 789FI provides another important exclusion from the scope of the new provisions. This section clarifies that the anti-bullying regime does not apply to actions or omissions that “could be reasonably expected to be prejudicial to Australia’s defence, Australia’s national security” or covert or international operations undertaken by the Australian
Federal Police. Section 789FE clarifies that the Fair Work Commission may dismiss an application concerning one of these excluded matters.

What behaviour will the Fair Work Commission address?

The core concept of the anti-bullying provisions is 'bullied at work'. A worker is 'bullied at work' if three criteria are satisfied:

1. The perpetrator (who may be an individual or a group) must repeatedly behave unreasonably toward the worker (or a group of which the worker is a member).
2. This behaviour must occur at work in a constitutionally-covered business.
3. This behaviour must create a risk to health and safety.

It is hardly surprising that, given the breadth and scale of workplace bullying, unreasonableness lies at the core of these provisions. However, the legislation does not contain any particular guidelines which means that it will be up the courts to clarify the requisite 'unreasonableness' that will invoke the jurisdiction. The requirement that the unreasonable behaviour occurs 'while the worker is at work' has significant ramifications, particularly in relation to impugned behaviour occurring in social settings and particularly through the use of social media. Often bullying that has its genesis in the workplace reaches a zenith outside of the workplace.

In Application by Ms SB [2014] FWC 2104 the Commission addressed these criteria and what they mean for the first time. In this case, Ms SB made an application for an order to stop bullying against two of her subordinates and the employer. The two employees had
made complaints about Ms SB to their employer which, on investigation, were found to be unsubstantiated. Ms SB alleged the employer’s actions were also unreasonable conduct, including accepting and investigating the complaints against her, failing to prevent similar unfounded claims being lodged in the future, not supporting her in the face of ongoing malicious rumours or notifying employees of the investigation outcomes in her favour.

**Definition of bullying**
The Commissioner in *Application by Ms SB* considered what kinds of conduct might amount to bullying within the definition in section 789DF(1), such as:

- That there is no specific number of incidents required, in relation to individuals repeatedly behaviour unreasonably, so long as there was more than one occurrence of unreasonable behaviour;
- The same specific behaviour does not necessarily have to be repeated, instead there could be a range of behaviours over time;
- Assessing whether behaviour is unreasonable is an objective test, having regard to any and all relevant circumstances that may apply at the time;
- There must be a causal link between the unreasonable behaviour and the risk to health and safety, although the behaviour need only be a substantial cause of the risk and not the sole cause;
- A ‘risk to health and safety’ could be satisfied by the mere possibility of danger, it does not have to be actual danger; and
- The risk to health and safety must be real and not simply conceptual.

**Bullied at work**
In determining this question, it is important to take an overall view of the behaviour and the circumstances. While in *Application by Ms SB* the Commissioner accepted that making vexatious allegations and spreading rude or inaccurate rumours could constitute bullying under the Act and that a manager could be the subject of bullying by subordinate employees, there was insufficient evidence ‘to provide a basis for findings that an individual or group of individuals have repeatedly behaved unreasonably towards the applicant’ creating a risk to health and safety. Further, while some of the behaviour leaned towards unreasonable, he was not satisfied that ‘the limited degree of unreasonable behaviour by the individuals concerned was such that it created a risk to [Ms SB’s] health and safety’.

**Reasonable management action plan**
One further clarification to the concept of 'bullied at work' provides that it the section does not apply to 'reasonable management action carried out in a reasonable manner'. In *Application by Ms SB* the Commissioner discussed the meaning of ‘reasonable management action’ under section 789FD(2), considering that:

- The provision, rather than being an exclusion’ from the definition of bullying, acts as a ‘qualification which reinforces that bullying conduct must of itself be unreasonable’;
• ‘Determining whether management action is reasonable requires an objective assessment in the context of the circumstances and knowledge of those involved at the time.’;
• Other relevant considerations include the consequences that flowed from the management actions taken and the emotion and psychological health of the worker involved;
• The test is whether management action was reasonable and not whether the applicant perceived it to be unreasonable or if the action could have been undertaken in manner that was more reasonable;
• In order to be reasonable, management actions must be lawful and rational, but they need not be perfect or ideal; and
• A general course of actions may be reasonable despite particular steps in the course not being so.

The receipt of the complaints against Ms SB and the conduct in investigating, including engaging an external law firm, were the ‘only reasonable and prudent’ responses. Further, contrary to Ms SB’s claim that the employer failed to take appropriate action to support her after the first complaint was found to be unsubstantiated, evidence showed that the employer made efforts to offer support but that Ms SB ‘did not see the value of that support at the time’ and communicated so. It was found that Ms SB had not been bullied at work within the meaning of section 789FD.

**Remedies**

Provided that the jurisdiction of the Fair Work Commission is invoked, the Fair Work Commission is required to act promptly to deal with a worker’s application. It must start to deal with the application within 14 days after the application is made (section 789FE). In order to obtain an order, the applicant must establish not only that he or she has been bullied at work within the meaning of section 789FD, but that there is a risk that the bullying will continue by the individual or group.

If these are proved, the Fair Work Commission is empowered to make any order that it considers appropriate to prevent the bullying continuing in the future. In making the order, the Fair Work Commission is required to take into account any investigations (such as internal investigations), the availability (or otherwise) of workplace grievance procedures and their outcomes and any other matters the Fair Work Commission considers relevant. These orders may be directed at other employees or may be directed at the employer (such as the introduction of training or induction programs). Importantly, the Fair Work Commission has no power to order compensation be paid to the affected worker/s. However, the anti-bullying regime contains no impediment to the worker/s seeking compensation by other means (on grounds such as discrimination, adverse action or common law methods). Section 789FH clarifies that *Workplace Health and Safety Act* proceedings will not be affected by proceedings under the anti-bullying regime.
The prevention of bullying in the workplace is an important issue. Legislative changes to the Fair Work Act seek to empower individuals and workplaces in stopping these behaviours, however it is important that employers also ensure they have effective bullying guidelines, policies and procedures in place. As shown in Application by SB, management actions do not have to be perfect to be considered reasonable, however bullying complaints must still be accepted, managed, investigated effectively and respond to all concerns that have been raised.
3.4.2. Training Employees on Bullying and Harassment

Workplace bullying and harassment are issues of fundamental importance to business. Not only is the cost of workplace bullying and harassment significant – estimated annually by the Productivity Commission at $6 billion to $36 billion. The consequences however are far more than 'costs'. Employers and employees can be held liable for workplace bullying and directors standing behind companies can be made personally liable. Workplace bullying can result in prolonged periods of leave and downtime, both for injured victims and the workplace bullies. Perhaps most significantly of all, workplace bullying can, tragically, cost people their livelihoods and even their lives. It can affect all businesses in all industries, including small businesses. For this reason, all businesses should as a matter of standard practice address the risks of workplace bullying.

The two most important preventative steps that businesses can take are developing reasonable workplace policies and ensuring that all staff are trained regarding their responsibilities and rights in relation to workplace bullying.

How does the law deal with bullying?

Because of its broad and somewhat amorphous nature, bullying and harassment are not subject to one legal regime or even definition. In addition to the Fair Work Commission’s anti-bullying jurisdiction discussed in 3.4.1, workplace bullying and harassment may also constitute:

- A breach of workplace health and safety laws;
- Adverse action under the Fair Work Act;
- Discriminatory conduct in breach of anti-discrimination legislation;
- Criminal conduct; and
- A breach of personal injury laws.

In many of these areas, courts and tribunals are empowered to grant significant remedies including fines, injunctive relief, reinstatement and compensation. Obviously
criminal conduct (especially in cases involving physical abuse or stalking) may result in fines and/or prison terms.

The best step, however, is prevention. Involvement in legal proceedings in any of these areas can be extremely costly, especially where the evidence concerns repeated behaviours and complex workplace situations. Even when an action relating to bullying or harassment is successfully defended, the costs can be enormous – and usually well above the capacity of the individual complainant. In the well-known case of Dye v Commonwealth Securities Limited [2012] FCA 242, Commonwealth Securities successfully defended tenacious and public sexual harassment proceedings. However, the costs of this defence exceeded $5 million – money which the bank is unlikely to recover from the complainant.

**Identifying bullying and harassment**

By their natures, bullying and harassment elude usefully concise definitions - however, most experts regard workplace bullying as involving four elements:

1. Behaviour which involves or arises out of the workplace;
2. Behaviour which is repeated;
3. Behaviour which is unreasonable (as a minimum); and
4. Behaviour which has – and is intended to have - an adverse impact by intimidating, offending, degrading or humiliating the victim.

The harm sustained by victims can include physical, psychological and social harm (for example, ostracism in the workplace).

Whilst the catalogue of behaviours that can constitute bullying is potentially endless, common examples include:

- Physical abuse (including hazing and initiation ceremonies);
- Hurtful or humiliating remarks or comments;
- Exclusion from workplace activities; and
- Creating work or workplace conditions which are unreasonable including unnecessary work, impossible deadlines, or unreasonable working hours.

It is important to remember that, while workplace bullying traditionally occurred at the workplace, modern forms of communication – especially social media such as Facebook and Twitter – can significantly extend the possibility of workplace bullying outside the workplace it can still be considered workplace bullying.
Whilst harassment and bullying are often used synonymously and are indeed conceptually close, harassment is usually regarded as being related to discrimination (for example, sexual harassment or harassment arising out of racism). Where bullying requires some form of repeated and persistent behaviour, harassment can arise out of a single incident. For example, a single inappropriate touching can constitute sexual harassment. Usually a single incident of an insult between one employee and another will not constitute bullying, where repeated humiliation may constitute bullying. Of course, single instances of physical aggression or stalking may easily constitute criminal acts.

Reasonable actions

An important distinction exists between bullying and reasonable actions instituted by the employer. Subject to other legal requirements, employers have the right to manage and arrange their workforce as they see fit. Reasonable directions to carry out work, the imposition of reasonable sanctions for misconduct (including censure and demotion) will not constitute bullying provided that the conduct was reasonable in the circumstances.

How can employers address the risks of workplace bullying?

Employers have the most significant obligations in relation to workplace bullying. Obviously, employers must, themselves, refrain from bullying staff. However, employers can be held liable (without any additional proof of fault) for the actions of their employees under the doctrine of vicarious liability. As such, employers cannot argue as a defence that they were ignorant of circumstances of bullying inflicted by their employees.

In order to discharge their duties, employers should take reasonable steps to educate their workforce and prevent incidents including:

- Engage actively with their workforce and ensure that they are aware of the working conditions affecting employees in their business;
- Develop workplace grievance, equal employment, sexual harassment, bullying and social media policies;
- Actively develop a no-tolerance culture towards bullying and harassment;
- Train staff in relation to bullying and relevant workplace policies; and
- Consistently implement policies and monitor compliance.

The importance of staff training was highlighted in the following two decisions. In Zareski v Hannanprint Pty Ltd [2011] NSWADT 283, accusations of discrimination were brought against the employer due to victimisation by the employee’s manager. Despite
dismissing the case, the ADT found that a previous training session on discrimination had only been attended by non-management staff. This was found to be insufficient by the Tribunal who directed the employer to provide training to all staff.

In *Menere v Poolrite Equipment Pty Ltd and Anor [2012] QCAT 252*, the Queensland Civil and Administrative Tribunal found that the applicant was subjected to sexual harassment by another employee. However, the Tribunal held that the employer was not liable because it:

> “caused its employees to undertake training in respect [of] sexual harassment within the workplace on a number of occasions, both before and after the harassing incidents. By doing so, it did more than merely have a policy in place. It took sufficient positive steps to ensure awareness and attempted compliance with appropriate workplace practices. The [employer] had an appropriate policy in place and took steps to prevent the [offending employee] and others from contravening the Act through, for instance, undertaking the training courses at [63].” (emphasis added)

It is important to note that the offending employee was held liable. Despite this, the employer was not required to guarantee a harassment-free workplace, but to take reasonable steps to prevent harassment.

Bullying and harassment are issues that can affect every business and occupation. The potential costs are enormous, not just to the victims, but to the business operations and, in serious cases, to the ongoing viability of a business and a brand.
3.5. Optimising Settlement Outcomes

Settlement involves the resolution of disputes without the need for a court to make a formal order. Settlements are usually effected by a formal agreement between the parties giving effect to the settlement and releasing each side from the claims which the other has. Often, if court proceedings have been invoked (or court orders are required for some purpose), the court or tribunal can assist by making orders by consent of all the parties.

There are several key advantages to settlement. The first is the opportunity for parties’ claims to be resolved without the need to spend significant funds on legal fees. Legal fees can mount up significantly, particularly at the evidence preparation stage and during court proceedings. For this reason, the greatest savings in legal costs can occur if settlement is effected before these stages. (Once significant costs have been incurred, this alone can be an incentive to continue – just for the possibility of avoiding an adverse costs order or recovering one’s own costs.) However, there is a tradeoff – a strong case becomes stronger after the evidence is prepared and when the case is presented in court. This can facilitate a stronger settlement even taking into account the increased legal fees.

![Conflict Resolution Diagram]

An early settlement can also minimise the ancillary costs to the parties. Often in litigation, parties become entrenched in their positions with the result that parties develop a ‘win at all costs’ approach to the litigation, rather than seeking to resolve the litigation expeditiously and move on with their personal lives or their business. This can result in significant personal or organisational costs to the parties. A proactive attitude...
to settlement throughout the proceedings can avoid this problem, even when settlement negotiations are not initially successful.

It is also important to recognise that a far greater range of outcomes can be achieved with settlement than it is possible for a court to order. For example, in employment matters, courts may often only be able to order a lump sum compensation remedy or reinstatement. A settled solution may involve structured payments, partial reinstatement and possibly support for redeployment – or any combination thereof which best suits the parties to the dispute.

The courts and the parties generally promote parties exploring settlement and settling on reasonable terms. Courts and tribunals often require parties to attend settlement negotiations (usually with a court appointed conciliator or the registrar). It is a fundamental ethical obligation on lawyers to promote settlement. Parties themselves can ‘force’ or at least encourage the other side to settle on reasonable terms by threatening adverse costs order which requires a party who fails to settle on reasonable terms (which the refusing party does not achieve in litigation) to pay ‘indemnity costs’ which involve a complete indemnity for the successful party’s costs. These indemnity costs can be imposed even in jurisdictions that label themselves no costs jurisdictions, such as the Fair Work Commission.

The first step in most matters involves the preparation of a letter of demand and/or a statement of claim. It is important that parties prepare for settlement even before these documents are prepared. Often these documents will outline the ambit of the claims but do not accurately reflect the amounts that are reasonably attainable on settlement. The simple reason is that few parties will agree to pay the maximum recoverable voluntarily under a settlement – they will instead prefer to take their chances in court. Settlements will always be well inside these theoretical maximums.

It is important that parties be prepared to compromise their claim from the outset and discuss likely outcomes with their legal advisers. Having said this, in order to achieve good settlement outcomes, it is usually advisable that claims are strenuously fought and that parties appear resolved to fight all the way if necessary. Often there are tactical advantages to showing this resolve during settlement negotiations.

How should parties approach settlement? The main key to a successful settlement is, so far as possible, to think rationally about the other side’s position and understand ‘where they are coming from’. This sounds logical, but is often not done properly. Parties to a dispute are often emotional and bitter about the dispute and quite willingly label the other party and the other party’s claim in a simplistic fashion. For example, an employer may be seen as greedy and exploitative and unwilling to hear the employee’s concerns. Employee applicants may be seen as in it for a quick buck. These attitudes
are often fostered by the media. They will not, however, help with a settlement negotiation. Accordingly, it is important that the parties:

1. Understand as far as possible the nature of the other side’s legal position as expressed in writing (usually at least some form of claim and response will have been delivered). If there is any evidence this should also be understood.

2. Try – empathically - to stand in the other parties’ shoes so far as possible. If the other party is a company, stand in the shoes of the managers or directors who have made the relevant decisions. What is the claim really about? What outcomes does the other side really want? What fears does the other side hold? What motivates their actions? For example, an employee’s claim in a dismissal will often be expressed in a monetary form (possibly lost salary and entitlements) and/or reinstatement. However, the claim is often about hurt feelings (how can these be redressed – or how can the employee be persuaded to put these to one side), loss of reputation (is it possible to recharacterise the events in some other way – for example by a reinstatement and resignation procedure) and loss of job security (is a redeployment possible or could the employee access job service promoted by the employer?) Tailored and structured solutions under a settlement can often do a better job of remedying the complaint than even the best court or tribunal decision.

3. Understand the monetary ambit of the claim and the possible settlements that could be negotiated. For example,
   a. What is a realistic recovery?
   b. Will that sum be subject to any fees or taxes?
   c. What are the likely legal cost incurred by each side?
   d. Are there any cross-claims and if so what is their value?
   e. What is the likely organisational or personal cost of continuing the claim?

If you are involved in a court or tribunal proceedings, ensure that settlement possibilities are explored at the outset and remain under consideration for the duration of the proceedings. A good settlement will usually get both parties away from hostilities with a minimum of expense and avoid the organisational and personal traps posed by long term litigation.
Part 4 – Protecting The Employer
Part 4. Protecting the Employer

4.1. Workforce Management Planning

With the new business year now well underway, you will, no doubt, be seriously into workplace planning and strategising for the year ahead. Issues on the table might include: Is hiring more staff a priority? Is a new Enterprise Agreement on the cards? Are you considering restructuring to realign your business?

The following are useful pointers to bear in mind as you plan your next steps in workforce management.

1. Contracts and policies

If you are planning to hire more staff, early preparation of contracts and policies will pay dividends. Do not be fooled into thinking that one style fits all, or that you can put off preparing documentation until after you find your ideal recruit. Such delay could run you into serious difficulty, especially if your employees or contractors work in quite different positions or are of varying seniority. Different contractual terms and considerations are required depending on the various characteristics of the role, the business, and the individual.

Award awareness and crucial terms
Making sure you know if your employees are covered by an industrial award is the starting point. Next priority is building a contract which takes into account the relevant award, if there is one, and which incorporates terms and conditions suitable for your business environment. Absolutely crucial terms to consider for new employees, leaving aside the all-important matter of pay, are the probationary period and the basis on which both parties can terminate the relationship.

A clearly defined probationary period, and process for review, will allow you to properly determine if the individual suits your company. Termination clauses need to set out not just the period of notice, but whether you can immediately dismiss the employee or contractor and pay them in lieu of notice. A list of circumstances in which dismissal, without any notice, can occur also needs to be nutted out.

Other terms you need to consider are post-employment obligations and restrictions, particularly regarding confidential information, intellectual property, “non-competes” and restraints. These will vary drastically depending on the type of role and industry. Employees who are senior and can be seen by clients as the ‘face of the company’ can be
particularly important to restrain for some period from post-employment solicitation. See for example *HRX Holdings Pty Ltd v Pearson* [2012] FCA 161 where a senior employee was successfully restrained. Ideally, these obligations should be drafted by an expert otherwise you risk having them found to be partially invalid, not covering the right activities or, simply, unenforceable at the critical time.

**Beware the Policy Trap**

Brevity and clarity are at the essence of sound workplace policies. Creating weighty tomes that no one will read or follow is a waste of time and legally risky. Case law has shown that the courts are increasingly willing to read company legal obligations into these documents to the detriment of businesses. You should therefore be alert to not include terms in policies placing obligations on your company which are onerous, unrealistic or inflexible. See for example *Romero v Farstard Shipping* [2014] FCAFC 177, where a company was found, due to the language of its workplace harassment and discrimination policy, to not have complied with this document and accordingly to have breached the employee’s contract.

### 2. Enterprise Agreements

Enterprise Agreements can be very useful tools for some businesses in workforce planning. If your employees are covered by multiple awards or you are looking to stabilise labour costs over the next three to four years an Enterprise Agreement is well worth considering.

**What is an Enterprise Agreement?**

An enterprise agreement (EA) is a legally enforceable arrangement at the workplace level between an employer and a segment of its employees (i.e. all staff except, usually, senior management or an otherwise definable section). To implement an EA, first a document must be drafted which complies with the Fair Work Act, then a process of bargaining with employees has to be entered into. Then follows a vote on the EA document before it can
proceed to be approved and implemented by the Fair Work Commission.

Many employers are frightened off EAs due to the initial work required in bargaining with employees and then getting the support of more than 50 percent of those that vote on the agreement. However, in many workplaces the bargaining process can lead to a useful openness of workforce planning issues and can be a positive experience. During bargaining, employees often raise concerns that have not even been thought about at the management level, potentially leading to greater awareness and innovation. Bargaining does not have to be onerous. A fairly set and agreed timetable can usually be pursued to give the Employer certainty about timing and the resourcing required for such bargaining.

What benefits could an Enterprise Agreement bring to Your Business?
Benefits that clients can potentially gain as a result of implementing enterprise agreements include:

- **HR, administrative and financial certainty** – knowing what the terms and conditions in place with employees are that must legally be complied with. These Agreements can use simple and easy to understand language that is suitable to your business.

- **Improve workplace culture** – employers and employees have a formal opportunity to open up to each other and to discuss shared aims. This can only be beneficial. Broader cultural aims and elements of the business can be included in the Enterprise Agreement.

- **Planning certainty** – not only is this good for any business in terms of being able to project the labour force costs for the next three to four years as set out in the EA but also if you tender for work or are looking to sell your business this can be very useful and attractive to buyers or clients.

- **Flexibility** – in trade-off for granting employees entitlements which are above base legal entitlements more adaptability can be implemented to suit your business and client needs.

- **Increase Productivity** – EAs can be targeted to increase productivity or efficiency thereby improving your business and incentivising employees.

- **Set the Scene** – EAs can lay out important procedures and therefore act as a go-to document for employees and employers without further document preparation or work being required.

3. Restructuring

Workforce changes can be onerous at the best of times, let alone when you have to tell people their role no longer exists. While making people redundant is, to most, a grim task, it can often be necessary and can result in drastic improvements to your bottom line and business direction.
Process to enact redundancies

Carrying out redundancies does not have to be time-consuming or nightmare-inducing. Knowing what consultation obligations are required is important and having in place a procedure that is fair but efficient takes most of the risk and much of the worry out of the process.

If the relevant employees are covered by an industrial award, a consultation process must be undertaken providing information, prior to a final decision being made, on why the redundancies may occur. You must also listen to and consider any suggestions that an employee might have to avert or reduce the impact on them. Ultimately, if the decision proceeds, you will need to make the appropriate redundancy payments applicable under the National Employment Standards as well as providing notice to the employees.

One of the most common errors occurs where companies make a person redundant rather than deal properly with issues of behaviour or performance. This could land your business in hot water with the Fair Work Commission and, potentially, the tax office. To be lawful, a redundancy must be a genuine case of a role no longer being required to be completed (or being subsumed into another role.)

With forethought and preparation, you can set up your workforce for a productive, stress-free year. Inertia is common when it comes to workplace planning. If you engage in intelligent, well-informed planning of staffing matters this will give your business real advantages over the competition.
4.2. Statutory Liability

4.2.1. Penalties for Breaches of Workplace Law

Small businesses should be wary of facing penalties for breaches of workplace laws

The following two cases demonstrate that the courts are not hesitant when it comes to awarding penalties against employers who breach industrial relations laws. A range of considerations are taken into account by the court when considering such penalties including whether similar breaches have occurred in the past and whether a contravention is deliberate. In light of these decisions it is particularly important for small businesses, which do not always have human resources or legal support, to ensure that they have a clear understanding of their legal obligations. Significantly, penalties can be awarded not only against a business but also, as shown in the two cases below, against individuals.

$20,000 penalty against Migration Training Australia

Migration Training Australia contravened section 352 of the Fair Work Act by dismissing Ms Kavassilas, the General Group Manager, on 11 August 2010. Ms Kavassilas was terminated because she was absent from work due to illness and was claiming sick leave for this one week period. Nonetheless the employer claimed she was terminated because she failed to alert the company to her absences. Migration Training Australia failed to displace the burden of proving that their reasons for dismissing Ms Kavassilas were not unlawful under section 352 of the Act. Consequently, Ms Kavassilas sought to impose a penalty on Migration Training Australia.

Ms Kavassilas brought legal action against her employers, arguing that they had contravened section 352 of the Fair Work Act. It must be noted that section 361 of the FWA places an evidentiary burden on MTA whereby they must establish that their reasons for dismissing Ms Kavassilas did not fall under the unlawful reasons prescribed under section 352.

The termination letter received by Ms Kavassilas was found to be “a cloak for unexpressed true reasons which have never been adequately articulated”. Federal Magistrate Smith also labelled the directors’ true reasons as “impulsive and irrational” and “prompted by her absence”. He further hypothesised that the real reason
underlying her termination stemmed from the directors’ doubts of whether they wanted to continue to engage Ms Kavassilas’ services and whether she wished to carry on in her employment. It seems the directors held the mistaken belief that Ms Kavassilas could be lawfully terminated under the FWA until a medical certificate was provided. Thus, the court held that Ms Kavassilas had taken reasonable steps to inform the directors of MTA of her absence on sick leave, that she was treated unfairly and unreasonably by MTA and she was owed compensation in the form of $33,706.21 plus interest of $4,605.74.

The issue which subsequently arose was whether the imposition of a penalty was appropriate in this instance. The Full Magistrates Court has emphasised the discretionary nature of the imposition of civil penalties for breach of industrial legislation.

Federal Magistrate Smith held that whilst there was no conscious disregard of the law, there remained a serious degree of culpability in the form of a reckless disregard of MTA’s legal obligations. Additionally, one of the Directors was a legal practitioner who should have known better. The culmination of the baseless grounds provided to Ms Kavassilas evinced an intention to veil the real reasons for her termination. Moreover, MTA showed no element of contrition, corrective action or co-operation with the prosecutor. A penalty in this case was held to serve elements of both specific and general deterrence to directors of small businesses in a similar situation. There were no other mitigating factors, nor was there any evidence of other contraventions.

The Federal Magistrate issued the following orders: a penalty of $20,000 on MTA to be paid to Ms Kavassilas for their contravention of s352 of the FWA, specifically dismissing Ms Kavassilas because she was temporarily absent from work due to illness.

Furthermore, the court ordered compensation in the amount of $33,706.21, plus interest of $4,605.74 and, lastly, MTA was ordered to pay one half of Ms Kavassilas’ legal costs on the basis that MTA unreasonably caused her to incur costs.

$220,000 penalty against Henna Group Pty Ltd

The Fair Work Ombudsman has taken legal action against the Henna Group Pty Ltd, who operate a retail shoe business ‘Scarpe Shoes’, for contravention of the Workplace Relations Act 1996 (Cth) and the Fair Work Act, along with various awards. The company’s breaches included failing to:

- pay overtime;
- pay penalty rates for hours worked on the weekends and public holidays;
- pay accrued and untaken annual leave upon termination of employment;
- pay the required payment for personal/carer’s leave;
- make a payment in lieu of notice of termination;
provide employees with required meal breaks;
provide payslips;
pay wages on a regular basis; and
pay the basic periodic rate of pay.

Moreover, it was found that Sahil Rasul and Bulbula Amin, the company’s group manager and owner, had intentionally underpaid four staff members the sum of $16,036. Henna Group Pty Ltd had a history of complaints to the Fair Work Ombudsman, where between 2007 and 2010 five complaints were sustained in relation to underpayment and non-payment of wages. This pattern of non-compliance and deliberate disregard for obligations under the applicable industrial instruments was held to clearly demonstrate a lack of cooperation with enforcement authorities and a need for general deterrence. Specifically, Magistrate Riethmuller felt it necessary to send a message to the community and, in particular small businesses, that employers must take steps to ensure correct employee entitlements are paid.

Justice Tracey said it well in *Kelly v Fitzpatrick [2007] FCA 1080*,

“No less than large corporate employers, small businesses have an obligation to meet minimum employment standards and their employees, rightly, have an expectation that this will occur. When it does not it will, normally, be necessary to mark the failure by imposing an appropriate monetary sanction. Such a sanction must be imposed at a meaningful level.”

The Henna Group Pty Ltd was fined $160,000, and the second and third respondents, Rasul and Amin respectively, were fined an additional $30,000. This total of $220,000 exceeds Victoria’s highest penalty as a result of a Fair Work Ombudsman prosecution since 2009 in the case of *Roger Yates (workplace inspector) v Reiquin Pty Ltd and Richard Timothy Reid*.

These cases serve as a warning to businesses that they should ensure that they are fulfilling their obligations under the Fair Work Act. Small businesses in particular should be wary and if necessary seek advice on their obligations.
4.2.2. Third Party Liabilities

Individuals and corporations can be held accountable under the Fair Work Act and other legislation for actions which are carried out by third parties if it is considered that they have been involved with the actions. Two examples of this are:

- businesses being held liable for actions of contractors; and
- managers and in particular human resources professionals being held liable for breaches of Awards and legislation of business.

We consider below some of the ways a business or individual can fall into the significant trap of being held liable for a third party’s breaches and provide some practical tips on how to minimise the risks of being held accountable for accessorial liability.

Contractors breaching labour laws

Section 550 of the Fair Work Act prescribes that a person (which includes a corporation) that is “involved in” contravening other specific sections of the Act is taken to have contravened those provisions themselves. A very broad approach is taken to defining “involved in”. If a company has aided, abetted, counselled, procured, induced, or in any way by its acts or omission been involved in a contravention this is enough for
it to be found accessorially liable. Further, if a company has conspired in such contraventions it will also be so liable.

Section 550 is particularly applicable in relation to the issue of contractors. If a company enters into an arrangement with a contractor who employs its own employees and that contractor is involved in contraventions of the Fair Work Act, it too would be open to prosecution for those breaches. This is despite the fact that the company engaging the contractor is not considered to be an employer of the wronged individuals employed by the contractor.

Companies need to be wary that they must not turn a blind eye to the arrangements of their contractors with its employees. A clear example of this is seen in a case involving supermarket Coles (Fair Work Ombudsman v Al Hilfi [2012] FCA 1166). This matter saw the Fair Work Ombudsmen on behalf of a number of foreign trolley workers pursue the contractor, its sub-contractor and the principal in the arrangement, Coles. It was alleged that there were various serious contraventions of the Fair Work Act including contravening a modern award, not keeping proper employee records and not providing pay slips.

Coles was not pursued by the Fair Work Ombudsmen as the primary contravener, rather it was considered to be “involved in” the alleged contraventions. Significantly, it was alleged that Coles knew that contractor’s estimated labour costs were only $1940 per week for a total of 9 employees. It was also alleged that it knew that there would be no penalty rates, over time or casual loadings paid to any employees. It was therefore alleged that Coles was aware that the wage conditions were such that they would not comply with the relevant award. Despite this knowledge the Fair Work Ombudsmen asserted that Coles did not take any action to ensure that its sub-contractor complied with the minimum wages and conditions. It was further asserted that Coles in fact induced the contractor to contravene the Fair Work Act by refraining or omitting to taking any action despite its knowledge. Ultimately this matter settled out of court. However, it provides a clear example of where a business is not simply able to turn shirk labour laws because it is not the employer at law in order to get cheap services.

Liability of managers, directors and HR professionals

Individuals involved in the management of businesses and in particular the management of staff related matter can and have been held liable as accessories under the Workplace Relations Act 1996 (Cth) for breaches of the Act and relevant awards.

In a series of sham contracting decisions involving Centennial Financial Services the Managing Director and Human Resources Manager were held to involve in certain contraventions of the law by the corporation. The facts of the matter were complex but
involved “Corporate Associates” being engaged on a commission only basis by Centennial Financial Services. The arrangement was held to be sham and the Corporate Associates were considered employees with entitlements to salary and leave. The Managing Director and Human Resources Manager were held by the Federal Magistrates Court to be knowingly involved in the contraventions of the Workplace Relations Act by the company. They were required to pay pecuniary penalties as a result of this involvement. In relation to the penalties payable by the Human Resources Manager, the Court held accepted that the Human Resources Manager was overborne by the Managing Director and he was placed under significant pressure. However, the Court said:

“Nevertheless, as human resources manager, he should have been aware of, and at least attempted of give advice on, Centennial’s obligations under the WRA”.

Interestingly, a 2014 report by Melbourne University’s Centre of Employment and Labour Relations Law, called upon the Fair Work Ombudsman to include HR Managers and in house counsel in claims against enterprises who have breached legislation and Award obligations as HR professionals were often in a position to monitor and control corporate conduct.

Minimising risk of accessorial liability

When businesses are facing economic challenges significant pressure can be applied to reduce costs. There are many ways in which this can be done lawfully. However, when it comes to minimum payments and leave entitlements under the National Employment Standards for employees proscribed under Awards and legislation regulators take a substance over form approach. The ultimate business receiving profits as a result of any underpayment by contactors have and will be pursued by the Fair Work Ombudsman and held accountable in the Courts. Further if a business or individual knows and is involved in the non-payment of these minimum entitlements by another person, they are at great risk of prosecution.

This is a complex area and it is important to be vigilant. Some key measures which a person involved in managing which has employee or contractor or holding a position with human resources responsibilities should take are as follows:

- Checking their contractor’s compliance with labour laws;

- Being aware of minimum wage rates in an industry. If a contractor is offering services to your business at a cost which is lower than minimum wage rates there is likely to be a problem.
• Utilising ongoing auditing processes to ensure that all subcontractors are vetted for compliance on an ongoing basis with labour laws.

• If you have a management or human resources position in a business and believe or suspect minimum entitlements are not being paid, you should investigate and put your concerns in writing.
4.3. Protection of Interests

4.3.1. Confidential Information – The Law

**Confidential information in the electronic age**

Protecting confidential information is one of the most challenging issues for clients. PCC Lawyers is usually approached by clients when the matter has reached crisis point - allegations of breaches (usually classed as theft) are flying thick and fast and employers are fearful that their valuable information (usually in the form of customer lists and therefore their goodwill) will walk out the door with departing employees. Unfortunately, at this point, the remedies are usually costly and often involve elements of compromise to achieve the quickest solution.

Often these problems arise out of misunderstandings about exactly what is confidential and which information employers want to protect. These problems also arise because of poor information management practices which blur the line between work and personal property. The crisis situation is not a good way to resolve misunderstandings or disputes - such situations unfortunately are usually resolved by unhappy compromises achieved at significant legal expense or even court orders.

![USB drive](image)

**What is confidential information?**

Confidential information concerns that most slippery of concepts – information. By its nature, information is difficult to protect: once something is said it cannot be unsaid and once it is disseminated, it usually cannot be recovered. The past thirty years has seen an explosion in the quantity of information available and, particularly, the means of accessing
and disseminating that information. Online tools like twitter now mean that one piece of information can be directed at the push of a button from a single source to millions of friends or followers using a myriad of hardware and services. A few more clicks can see the number of recipients grow exponentially. In most cases, this dissemination of information - especially through social media - spreads across many borders and therefore across a range of jurisdictions. It is the slippery nature of information - even before the modern digital age - that left courts reluctant to try to stem the flow of information. Almost more than any other area prevention is the only solution - the damage cannot be undone and usually cannot be effectively remedied.

The modern protections applied to confidential information were developed by the English courts of equity principally over the past century. In substance, to receive legal protection:

1. the information concerned must have a quality of confidentiality (or a value in being kept secret);
2. the information must have been imparted (or received if it was never willingly given) in circumstances importing an obligation of confidence; and
3. there must be some actual or threatened disclosure or unauthorised use of the information.

Importantly, the basic legal protection can be applied to any information - family secrets (such as photos of a wedding or the revelation of private relationships), governmental information (such as information about spy agencies) and commercial information. One matter that has often come before the courts involves the disclosure of inventions or concepts for a new business to a potential financial backer. In such a case, the first person will receive legal protection against the unauthorised disclosure or use of that information. Another common situation in the commercial field involves the disclosure of customer lists.

This ‘quality of confidentiality’ will obviously not be found in matters that are already in the public domain. Confidentiality can also be released and disclosure and exploitation consented by the ‘owner’ of the confidential information. Obviously, this consent can be provided on terms including payment terms.

The third point is relevant as well. Confidential information is often not further disseminated, but is used to the detriment of its original owner or the benefit of the receiver. Customer lists and trade secrets are both examples of this improper use without further disclosure. In many circumstances, courts may be willing to infer this third element without the need for direct proof of malicious intention.
Confidential information and related legal protections

This doctrine of confidential information should not be confused with other forms of protection that might apply to the way in which information is presented or the devices that hold or contain the information. Copyright, for example, protects the way in which information (amongst other things) is expressed, but does not protect the information itself. Patents provide protection for limited types of information - inventions and novel processes - but only for a limited time and only at the expense of complete disclosure and publication (and therefore loss of confidentiality). A book which contains information remains the property of its owner. But the information inside is not protected along with the physical object.

It is also important to note that whilst confidentiality is often an issue in restraint of trade matters, the two are not synonymous. Restraint of trade, at its core, involves the act of competition, usually with a previous employer or business associate. This act of competition may involve confidential information acquired from the employer or associate (such as customer lists or trade secrets), but this is not necessary for a breach of the restraint to occur. Importantly, restraints of trade must be reasonable in their geographic restrictions and duration whereas the protection provided to confidential information is perpetual unless that information loses the necessary quality of confidence.

The sources of confidentiality obligations

The doctrine of confidential information developed by the English courts provides a form of universal protection for confidential information which the courts may enforce with injunctive relief (stopping or preventing a breach) or with damages. However, there are other significant sources of an obligation of confidentiality:

1. Most contracts of employment will contain some obligation of confidentiality obligation owed by the employee towards the employer.
2. Many workplaces have developed policies of confidentiality. So long as employees are contractually required to comply with such policies, the use of policies can have greater flexibility for employers than direct contractual terms.
3. Employees of corporations which are subject to the Corporations Act 2001 (this includes most businesses) have statutory obligations under section 183 to avoid the improper use of information obtained during employment. Whilst this duty is not identical to the general legal obligation, it will operate in a similar fashion, with similar remedies to the general legal duty outlined above.
4. Many workplaces, particularly in professional fields including medicine, law and accountancy will be subject to professional codes of ethical conduct which include obligations of confidentiality, especially regarding client matters and client information (but not usually extending in themselves to employer specific information such as work methods, billings or pay scales).

5. Many businesses will become subject to confidentiality obligations as part of their business dealings with other entities (especially in relation to larger or non-routine activities or joint ventures). It is quite usual for a separate obligation to be imposed on the business employer to obtain confidentiality undertakings from each employee of the business (or in larger businesses, those who are involved in the particular enterprise).

6. Confidentiality obligations and undertakings are a routine part of settlement deals and are incorporated into boilerplate deeds of release and settlement.

It is important to consider these sources in considering how best to protect the valuable information of a business. Any policy of confidentiality and/or employment contract must accommodate all of the different types of information that apply to the business and the circumstances in which the business might find itself. For example, a law firm’s two principal issues of confidentiality will be concerned with client matters (where any obligations on employees must reflect the ethical obligations imposed on the professionals) and the business side - especially billings and comparative information concerning the business owners. It is less likely that law firms will need, however, to adopt transaction specific confidentiality obligations affecting all staff. The situation, however, may be very different for a mining exploration company where ethical obligations have no significant role to play, but transaction specific confidentiality is the foundation of the business. Media companies again will find themselves in a very different operating environment.

**Legal obligations that supersede confidentiality**

Confidentiality is a private arrangement between legal individuals. In most cases confidentiality will not supersede legal obligations to provide information, usually in the context of legal proceedings (such as in response to a subpoena) or in the context of an investigation (for example pursuant to a search warrant). There are limited circumstances where confidentiality arising from a legally recognised privilege - especially legal professional privilege, which protects communications between lawyers and their clients - will be protected even in the face of a subpoena or warrant. However, such privileges are not usually available in commercial dealings.
4.3.2. Intellectual Property in the Workplace

Confidential information including intellectual property plays a significant role in the long term financial success of a business. There was once a time when swipe cards and physical security of the workplace was a key to protecting proprietary information. That time is long gone and robust legal protections are needed now more than ever.

**Intellectual property created during the course of employment**

It is well settled by Courts that if an employee creates information, documents or inventions during the course of their employment and that is what they were actually employed to do, any intellectual property which arises will belong to the employer. In *Courier Pete Pty Ltd v Metroll Queensland Pty Ltd [2010] FCA 735*, the Court stated:

“If the employee was employed to make or discover inventions of the type ultimately produced, then that is work for which the employer had paid and the employer is entitled to the benefit of the invention.”

This means that if an employee has been employed by a business to create inventions, documents or designs, any intellectual property rights that arise because of their employment will be owned by the employer. This will even be the case if an employee attempts to claim that they formulated the idea away from work and not during work hours. If the case were otherwise, employees would on each occasion simply state that they came up with the idea whilst they were at home and not engaged in work at all in order to avoid assigning intellectual property rights to their employer.

In many circumstances when an employee or ex-employee is accused of stealing or misusing intellectual property, the matter arises for one simple reason: the employee innocently believed that because they created or assisted in creating the intellectual property whilst they were working, they therefore owned it and could use it in whatever way they wanted.

Communication with employees is therefore, the first and most important step in protection an employer’s property and preventing future disputes. This includes statements in the contract of employment and workplace policies but also in simple assessable frequent communications. The message should include:

- That the employer owns all work products including all things done by employees in the course of their employment.
- Which information or material is confidential. Specifying with some particularity what is confidential (e.g., customer lists, research, pricing information) is critical as general statements that everything is confidential proprietary information carries little weight.
• Job descriptions of employees in key roles including product development, marketing and research should include statements to the effect that the position’s responsibilities include development of intellectual property on behalf of the business.

Inventions unrelated to employee’s job

What about intellectual property that is created during working hours and is unrelated to the employee’s job? For example, a sales manager whose job it is to manage a sales team, oversee client relations and manage budgets may, during working hours, create an electronic game which proves very popular with teenagers. In these circumstances, whilst the employer may be able to terminate the employee’s employment on the basis that they have misused company property and time, the employer is unlikely to be deemed the owner of the program that was created. The reason for this is that the employee was not employed, paid or directed to create the software program.

In University of Western Australia v Gray [2009] FCAFC 116, Dr Gray was employed as a Professor of Surgery. As part of his appointment, he was required to teach, supervise, undertake, organise and stimulate research among the staff and students. There was no duty place upon him to make inventions. During his employment, Dr Gray carried out extensive research into liver and bowel cancer and as a result, he invented technologies which targeted treatment of cancerous tumours. Dr Gray subsequently patented his inventions in his own name. The University then sued him alleging that he had breached his contract of employment by failing to assign the intellectual property to the University. Importantly in this case, there was no clause in Dr Gray’s employment contract which required him to assign intellectual property to the University but it argued that there was an implied contractual obligation imposed on Dr Gray to do so. The Full Court of the Federal Court rejected this argument stating:
“unless the contract of employment expressly so provides, or an invention is the product of work which the employee was paid to perform, it is unlikely that any invention made by the employee will be held to belong to the employer.”

The Court therefore found that as there was no express term in Dr Gray’s contract requiring assignment of intellectual property, nor was he required to invent as part of his employment, Dr Gray was the owner of the proprietary rights in the inventions. Had the University correctly drafted Dr Gray’s employment contract and a position description, it is likely that the court would have come to a different conclusion.

Steps to protect intellectual property

Whilst courts have the power to order that an employee hand over any intellectual property to their employer, there are a number of steps that businesses can take to avoid the costs and time involved in drawn out litigation, where there is no guarantee that the business will succeed.

1. Communicate with employees and contractors about the ownership and importance of confidential information and intellectual property.
2. If possible, engage individuals in sensitive roles within an organisation as employees, not contractors. If the person must, for some reason, be a contractor, ensure a rigorous contractual framework is established to ensure assignment of intellectual property rights to the business, which may include a separate deed and the establishment of a process under which intellectual property rights can be assigned if a dispute arises in the future (such as agency or power of attorney).
3. Ensure that in all contracts of employment there is a clause requiring employees to assign intellectual property rights to the business. This should be done even for employees who may not be strictly required to invent as part of their role, as these employees may create documents or precedents which will be used in the future and which the business wishes to copyright or otherwise protect.
4. For senior employees, the contract of employment should include a provision that all inventions of any type created whilst the person remains employed belong to the company. If there is a need for an exception to this, that should only occur after the other work being done by the employee out of business hours has been fully disclosed to the employer and consent in writing has been obtained.

Intellectual property is a vital asset for many businesses and the investment undertaken by business to create the intellectual property is significant. By proactively taking steps to protect intellectual property created by employees, a business can avoid the need for protracted and expensive court proceedings when a dispute arises and decrease the possibility of intellectual property being deemed to belong to the employee.
4.3.3. Protecting Confidential Information

Starting points for protecting confidential information

Businesses who wish to provide the best protection for their valuable information must start by analysing their business and its information:

1. What types of information does the business use and retain? These might include production processes, employee information, customer information amongst others.
2. What is the value in retaining the confidentiality of each type of information. What damage will be done if confidentiality is not retained? There will usually be several answers to this question. Disclosure of production processes may be destructive of the business completely (for example, the formula of Coke), but often such processes will be well known and understood and the business relies on the accuracy and skill or its employees. It may be that the particular processes are licensed and that licensing is subject to confidentiality obligations. Each of these considerations must be identified in relation to each type of information that is held by the business.
3. For each type of information:
   a. Who needs to know the information for the business to operate?
   b. Who actually knows the information?
   c. How is the information stored? This particularly can be a difficult topic when businesses have distributed workforces and also when there is a culture of employees working at home.
   d. Who can access that information?
e. How is access to the information recorded and how specific is the recording (or logging) of the access to the information?

4. What is the culture of the business concerning work practices and information management. This can be a challenging issue to consider. Many businesses foster an attitude of hard work which includes employees working long hours, often under time and financial pressure. Employees are encouraged (if not directly, then by the culture), to take work home on memory sticks or via email systems as well as in brief cases and to work on personal computers and personal phones. Although these businesses are often successful and profitable, the risk to valuable information may be enormous.

These questions are a starting point for developing comprehensive policies to manage a business’s information.
4.3.4. LinkedIn Connections

The War of LinkedIn Connections: Employer vs Employee

For many businesses that operate in client driven industries, it is not until an employee leaves the organisation that the business asks two important questions: who owns the LinkedIn connections that the employee amassed during the employment and do those connections amount to confidential information capable of being owned?

Ownership of LinkedIn accounts and the connections made during employment has been widely debated but has not yet been authoritatively decided by courts here in Australia or in other jurisdictions. This is often due to the fact that whilst the employment relationship is still ongoing, LinkedIn is regarded as a key marketing and networking tool for the benefit of both the employer and the employee. Employers often fail to plan for when an employee leaves the organisation and to recognise the threat that LinkedIn poses to an organisation’s profitability should an employee be permitted to leave and retain ownership of the LinkedIn connections that they have acquired during their employment.

An employer’s need to retain ownership of LinkedIn connections will usually be dependent upon the industry that they operate in and the ability of a former employee to exploit the information for their own purposes if they commence employment for a competitor or establish their own business in competition with their former employer. An industry that is particularly reliant upon LinkedIn and the connections that are made during employment is the recruitment industry, which is starting to focus its efforts on establishing connections on LinkedIn with potential candidates for current and future job openings.

Overseas cases

In a UK case, *Hays Recruitment (Holdings) Ltd & Anor v Jons & Anor [2008] EWHC 745*, a recruitment consultant copied the email addresses of Hays’ clients and then used them to
connect with clients on LinkedIn once he had left Hays and established his own rival recruitment firm. There was evidence to suggest that he had contacted the connections in an attempt to entice them to leave Hays and become clients of his new firm. In a preliminary pre-trial hearing, the High Court of England and Wales found that as Hays had encouraged the employee to use LinkedIn for the purposes of carrying out his job, the connections amounted to Hays’ confidential information. The employee was ordered to hand over all of his LinkedIn connections, as well as messages sent and received from LinkedIn.

The High Court of England and Wales took a similar approach in *Whitmar Publications Limited v Gamage & Ors [2013] EWHC 1881*, where the court found that Whitmar’s LinkedIn connections and groups were considered to be its confidential information. In this case, a number of former editors and publishers established a competing business and attempted to solicit business away from Whitmar by using LinkedIn groups that were maintained by Whitmar. Once discovered, the former employees refused to provide Whitmar with the access details for the LinkedIn groups that they had previously managed as part of their employment. The Court granted a ‘springboard’ injunction against the former employees restraining them from gaining an unfair advantage due to their misuse of confidential information, including LinkedIn contacts and groups.

Whilst the Court did not specifically determine whether the groups and connections were the property of Whitmar, the Court found that LinkedIn connections and groups will have the same status as any other confidential information, where it is well established that exploitation is prohibited.

**LinkedIn’s view**

Attempts by employers to assert ownership over an employee’s LinkedIn connections are made even more difficult by the User Agreement between the individual and LinkedIn which states:

____________________________________________________________________________________

“You agree that… you are entering into a legally binding agreement (even if you are using our services on behalf of a company).”

____________________________________________________________________________________

To date, LinkedIn has appeared unwilling to intervene in a dispute where the employer is attempting to claim that it is the legal owner of an employee’s LinkedIn connections. LinkedIn has instead taken the view that the rightful owner, under the User Agreement, is the employee and not the employer. It has therefore become the duty of the courts to determine otherwise.
In *Eagle v Edcomm & Ors* (No 11-4303) (E.D. Penn, 12 March 2013), an employee who had over 4,000 LinkedIn connections sued her former employer, Edcomm, after it took control of her LinkedIn account and changed the password, effectively locking her out of her account. Edcomm then changed the account to reflect the name, picture, education and experience of the newly appointed replacement employee. After lodging a dispute, LinkedIn took over the account and then gave access back to Ms Eagle, who then commenced proceedings against Edcomm. The US District Court found that this conduct amounted to an invasion of privacy, a misappropriation of identity and an unauthorised use of name. However, the employee failed to establish that she had suffered any loss and was therefore not awarded any damages.

**Social media policies**

There is an increasing trend for employers to have social media policies in place which set out the conduct that is expected of employees whilst using LinkedIn and what is to happen to a LinkedIn account once the employee leaves the organisation. Whilst these policies will not be determinative of a dispute that may arise, they do establish and manage the expectations of both parties throughout the employment relationship to ensure that an employee is not taken by surprise when their former employer claims that it is the owner of the employee’s LinkedIn account or connections.

**What steps can a business take to assist it in retaining connections after termination?**

If LinkedIn connections and groups are an important asset to an organisation and are vital to its future survival, there are a number of steps that it can take to assist it in retaining ownership after termination of employment:

- Consider implementing a workplace policy or inserting terms into employment contracts that set out the obligations of an employee to hand over their LinkedIn account (or alternatively, to delete it altogether) upon them leaving the organisation and whether there are any other post-employment obligations concerning LinkedIn that they must comply with.
- Establish expectations throughout the employment relationship, reinforcing to employees that they will be required to surrender their LinkedIn account when they leave the organisation and the reasons why this is required.
- Consider paying for an employee’s Premium LinkedIn account. The LinkedIn User Agreement for premium accounts states that the party paying for the premium service controls the account and may terminate any other person’s access to it. The ongoing cost of this would be significantly lower than legal costs should it be necessary to commence legal proceedings against an ex-employee who misuses LinkedIn connections or groups.
4.4. Post-Employment Restraints

Protecting the interests of a business, including confidential proprietary information and customer relationships, is increasingly challenging for business owners. The law offers some overarching protection of confidential information. However, in the modern context, in which information is more vulnerable than it has ever been, it is important to ensure that your employees are subject to an enforceable contractual obligation.

Concerning a business’s goodwill, there is nothing at common law or statute to prevent a former employee from poaching your customers. Post-termination restraint clauses have therefore become essential for many employers to protect their valuable and hard-earned proprietary interests.

Are restraints enforceable?

A common misconception is that post employment restraints cannot be enforced. This is not true. The common law provides that a covenant in restraint of trade will be presumed to be unenforceable, however a clause will be enforceable if the employer can prove that it is reasonable, and no more than is reasonable, to protect a legitimate business interest. The classes of ‘interest’ that are regarded as protectable are generally limited to confidential information, customer connection, and in some cases employee cohesion or ‘team glue’.

These interests have led to four primary types of clause. ‘Non-solicitation’ clauses prevent employees from soliciting, or accepting, work from a client of the employer; ‘non-disclosure’ clauses prevent employees from disclosing specified information, and ‘non-poaching’ clauses prevent the solicitation of former colleagues. In some instances, ‘non-compete’ clauses can also be used, which prevent an employee from directly competing with the former company. However, a non-compete will only be held to be reasonable if it the employee’s engagement in the competitive activity will inevitably lead to a breach of confidential information or loss of customer connection. If a non-solicitation or non-disclosure clause is regarded as sufficient for the protection of the employer’s interests, then a non-compete is not likely to be regarded as reasonable. Avoiding legitimate competition from someone that you have employed, with nothing more, is not a protectable interest.

Some key considerations when drafting restraints

Confidential information
An employer’s ability to enforce non-disclosure and non-compete covenants will often depend upon the nature of the confidential information in question. It is essential that the
Contractual document defines the confidential information that the employer seeks to protect with an appropriate level of detail. Often this will need to be done specifically for each class of employee. Many employers attempt to define confidential information in very broad ‘catch-all’ terms across an organisation, only to find that such clauses are unenforceable as they have not properly tied the definition to the legitimate business interests the employer seeks to protect. Alternatively, it is another common mistake for employers to be specific about what is being covered, but include information which does not genuinely have the requisite character of confidentiality. This can also cause a restraint to fail.

**Contract formation date**
The ‘reasonableness’ of a restraint is assessed by a court at the time the contract was made, not at the time that it was breached. Therefore, what experience or seniority that was gained during the employment and what work was ultimately performed by an employee is not relevant to whether a restraint provision is enforceable. Whether a restraint will be enforceable depends upon what was in the minds of the parties when the contract was signed. Was it envisaged that the employee would have a client facing role? Was it contemplated that they would be significantly promoted? Was it known that they would become the face of the business? If the answer to any of these is negative, then a restraint seeking to prohibit the solicitation of clients or other activities for a period post-employment is very likely to fail.

For employees with a long and varied career within one company this distinction can be crucial. We recommend that employers consider the scope of the restraint clause each time an employee is promoted or changes duties. Whether or not an employee is issued with a fresh contract, could dictate whether the employer is protected at the end of employment.

**The length of the restraint**
In relation to non-compete and non-solicitation clauses, it is important to be realistic about what period of restraint will be required to sufficiently protect an interest. In the case of all but the very most senior employees, a three-month non-compete and a six-month solicitation is generally the most that a court will consider reasonable.

**Garden leave**
For senior employees, involving strong customer connections or highly sensitive information, consider a longer notice period, which allows the employee to be placed on garden leave. This can be used instead, or in concert with, an unpaid period of restrain. Courts have recognised that it is significantly more reasonable to restrain an employee if they are being paid their normal wage. Where the potential damage to the employer’s interest is material, then this is generally a small price to pay for protection.
How big or small an area?
Some argue that geographical locations are no longer relevant to restraint clauses in a tech savvy and mobile world. However, most businesses still operate in a particular region, country, state, city or suburb. For non-competes, it is therefore still necessary to identify the scope of the area to be restrained.

When deciding how big or small the location covered, be reasonable. Whilst it might be tempting to cover off a large territory such as the Asia Pacific Region, you need to set your sights on something that will hold up if tested. Typically, the states or cities that clients, suppliers and/or direct reports will be based in and that the employee will be communicating with must form the basis of the area set. For more junior, or localised sales

What happens if the contract of employment fails?
Very few employers set out deliberately to breach their contractual obligations. However, it is nevertheless prudent to plan for the worst-case scenario. In *Northern Tablelands Insurance Brokers Pty Ltd v Howell [2009] NSWSC 426*, the NSW Supreme Court held that once a contract was repudiated by an employer, and the repudiation was accepted by the employee, their contractual obligations against solicitation and competition would be extinguished.

For this reason, those employers serious about protecting their interests may wish to think about a separate deed containing the post termination obligations. This will be unaffected by a repudiation of the employment contract. Deeds will be greatly strengthened by a payment of specific consideration in addition to the normal remuneration under the contract of employment. It is also worth considering vesting shares or share options to the employee rather than cash, as this has the added effect of giving the restraint a commercial element. Commercial arrangements have long been recognised as holding a higher threshold of enforceability than mere employment relationships.

Jurisdiction
It should also be noted that employers in New South Wales have a distinct advantage over employers in other states. The *Restraint of Trade Act 1975* (NSW) allows a clause, if considered unreasonable, to be ‘read-down’ to a reasonable level. In other states, the entire reach of the provision is assessed, and if it goes beyond what is reasonable, the entire clause will fail.
For those operating outside of New South Wales, we recommend the use of severable, cascading clauses, which identify ranges of activity, time, and geographical area. If the more ambitious clauses are held to be unenforceable, then these can be ‘blue penciled’ from the contract, leaving the remaining clauses enforceable. For national employers, if it is possible to make New South Wales the governing law of the contract, then this is strongly advisable.
Summary

Employees moving on is inevitable. When planning to protect your proprietary interests in this situation, the key considerations are:

- Be reasonable about your expectations on restraint, and focus on protecting the company’s interests, rather than punishing the employee for leaving. Restraints should not be taken as an opportunity to be vindictive towards a departing employee, even in situations where the departure is suspicious, or acrimonious. This achieves little, and an attempt to be too broad in a restraint will almost always lead to the clause failing, or unnecessary legal expenses arising.

- Identify the confidential information and / or customer connection you are seeking to protect realistically and with as much particularity as possible.

- Re-assess your restraint provisions any time that an employee is promoted, or significantly changes the nature of their role.

- For employees with access to customers or sensitive information, provide a longer notice period to allow for garden leave when an employee resigns, and consider drafting a separate deed for post termination restraints.

- For senior employees, offering shares or equity as part of the remuneration package may also increase the reasonableness of longer restraints.

In this highly technical area of law, prevention is better than cure. Careful planning at the contract stage, and a small investment in a specialist legal advisor, can potentially save you thousands in legal fees and lost revenue should a restraint clause be either disputed or held to be unenforceable.
Part 5 – Managing Change
Part 5.  Managing Change

5.1. Final Warning v Termination

When does an employee’s behaviour warrant termination of their employment and when should they, instead, be issued with a final warning? This poser has landed many an employer in hot water, facing credible allegations of unfair dismissal or breach of contract. So, here is a dissection of the topic and the key considerations for you to weigh when facing this decision.

Termination without warning

Termination without warning can be made, legally, only in limited circumstances. Under the Fair Work Act a person earning under the high income threshold ($138,900 from 1 July 2016) can be terminated only if they have committed serious misconduct.

Serious misconduct is defined in the Fair Work Regulations 2009 (Cth) to have its ordinary meaning. It is further set out under the regulations to be ‘wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment.’ It is also described as ‘conduct that causes serious and imminent risk to health and safety of a person or the reputation, viability or profitability of the Employer’s business.’ At first glance this test may appear to be relatively easy to meet. However, many employers are too quick to complain that an employee’s behaviour, in, for example, repeatedly turning up very late to work, has been damaging to their profitability or reputation. The mistake that is commonly made is assuming that everything an employee does can be considered ‘intentional’ or ‘wilful’ when in fact this element can be very hard to prove.

One example of clear serious misconduct is where an employee intentionally causes work health and safety risks for themselves or others. In the matter of Singh v Fenner (Australia) Pty Ltd [2015] FWC 5583 a mill operator did just that by intentionally placing his hands close to the rotating drum of a machine in breach of the company’s safety rules. His employment was terminated for serious misconduct and he failed in an unfair dismissal claim because the Commission found: ‘Mr Singh’s actions were a serious breach of its safety protocols and requirements and placed him at risk of serious injury by potentially becoming entangled, entrapped or crushed by the machine.

It concluded he could no longer be trusted to act safely in the workplace and the significance of his actions warranted summary dismissal.’ It was found that a warning
would not have been sufficient in this case, especially as it was clear that the employee knew the safety rules.

Other examples of serious misconduct could include intoxication in the workplace, stealing or other criminal acts related to work, setting up a competing business while still employed and intentionally damaging workplace property. Rather than rushing to make a decision an employer can place an employee on paid leave whilst investigating and deciding whether certain acts constitute serious misconduct. Importantly, to ensure the termination is lawful the employee must also be told of the valid reason and given an opportunity to respond with a support person present.

Employees that earn above the high income threshold may be lawfully terminated without notice only in accordance with their contract of employment and common law principles. A contract may include specific instances of when an employee can be terminated without warning, such as if convicted of a crime or seriously breaching workplace policy. Alternatively, many written contracts simply state that if an employee carries out ‘gross or serious misconduct’ such a termination may be made. In Innes v Willis Aus Group Services Pty Ltd (No 2) [2014] NSWDC 250 it was found that ‘formulation of the test of gross misconduct is whether the misconduct is sufficiently serious as to manifest an unwillingness to be bound by or honour the obligation of the contract.’ Similar considerations will apply here to those which arise under the Fair Work Regulations, but subject to the provisions of the contract.

Final warning

In situations where an employee’s behaviour does not warrant being labelled serious misconduct an employer may instead decide to issue a final warning. Warnings can be issued for a variety of reasons including:

- poor performance;
- inappropriate workplace behaviour;
- failure to follow instructions; and
- breach of workplace policies.

In an unfair dismissal case involving a tram driver terminated for serious misconduct for deliberately driving slowly to delay the tram, the employer was found to have unfairly terminated the employee. In Langdale v KDR Victoria Pty Ltd [2015] FWC 4613 the employer alleged that Mr Langdale had caused serious and imminent risk to the reputation and profitability of the company by ‘dragging the road’. The Commission did not agree that the employee’s acts were serious misconduct because it was held that there were other potential reasons for the delay beyond him deliberately causing them. Although the employee had previously been issues with a final warning about delays this was over a decade ago and so the Commission found that this could not have been used to justify
termination of his employment, even if notice had been given to him. In this case the Commission held that the employer should have issued only a formal warning.

No strict legal obligation requires an employer to issue more than one warning before terminating employment. Despite this, depending on the circumstances and a workplace’s policies, it may not always be appropriate for a warning to be final. The sudden issuing of an underperformance warning to an employee who has been employed for a long period and who has never been subject to such a warning before could be viewed as too harsh. Further, depending on the severity of the issue, such as one instance of lateness, a final warning would, very likely, be considered inappropriate if brought into question in a dispute over termination.

Although employees earning over the high-income threshold may be issued with a final warning they can be lawfully terminated on notice for any performance issues or concerns, unless prohibited by a written contract. It is therefore not uncommon for termination on notice to occur without any warning as this gives employers the freedom and flexibility to shape their team as they see fit.
Weighing the risk

The legal risks of an unfair dismissal claim or a breach of contract case are only one issue for employers to weigh when deciding what steps to take. A variety of other commercial and legal risks may, of course, also be relevant. Sometimes these other factors, such as loss of business or of other employees, may far outweigh the risks of an unfair dismissal or breach of contract claim due to terminating employment for serious misconduct. Employers should enter such situations, if they do arise, in full knowledge of all relevant risks and ready to negotiate a settlement.

Some important considerations to weigh up in this context include:

- **How much might the employee be awarded in compensation and entitlements** (including possible long service leave pro-rata if the conduct is found not to be serious misconduct);
- **What are the likely legal costs for both sides in litigating the matter** (although, significantly, the unfair dismissal jurisdiction is a non-costs area, meaning an employer is not required to pay the employee’s legal costs if they were to lose); and
- **What non-monetary benefits could be offered to the employee**, such as a statement of service or an agreed resignation.

Employers should proceed carefully when considering whether to terminate employment without notice for serious misconduct or whether to issue a final warning. A little extra caution and consideration can avoid or successfully manage legally – fraught situations.
5.2. Consultation

Modern awards include a provision that requires employers to consult with employees when a ‘definite decision’ has been made within an organisation. These include major changes on a number of issues that are to be introduced and will see structural or organisational changes likely to have significant effect on employees. One example of a significant change could be a genuine redundancy.

The Fair Work Act permits employers to terminate the employment of their employees on the grounds of ‘genuine redundancy’. A dismissal on the grounds of a genuine redundancy will not be ‘unfair’ and will not attract the jurisdiction of the Commission. Establishing that a dismissal was on the grounds of a genuine redundancy can save employers from the expense and difficulty of unfair dismissal proceedings.

The Fair Work Act defines the concept of ‘genuine redundancy’ in section 389 of the Act as:

☐ the employer no longer requires the person’s job to be performed by anyone due to changes in the operational requirements of the enterprise; and
☐ the employer complies with any obligation under a modern award or enterprise agreement; and
☐ redeployment of the employee in another position with the organisation (or an associated entity of the organisation) is not reasonable.

Importantly, the Act does not impose a separate obligation on the employer to consult with the employee – it merely requires the employer to comply with any such obligation to consult about the redundancy. This raises the threshold question for employers of whether or not any such obligation exists.

Does an obligation exist to consult about the redundancy?

It is entirely possible that the employee in question will not be employed under the terms of a modern award or enterprise agreement. For example, the Commission has found that a staff member at a managerial level, not covered by an award or agreement, will not be entitled to consultation about a possible redundancy; Reid v Quayclean [2013] FWC 31. If an enterprise agreement covers the employment, it must still be found to contain obligations to consult regarding redundancy. If no such obligations exist in the agreement, then the agreement will be taken to include the ‘model consultation term’.

To view the model consultation term, see the Fair Work Regulations 2009 (Cth).
The Modern Award – “Consultation regarding major workplace change”

This clause in the modern award confirms the requirement of the employer to consult with any employees affected by a major workplace change including the decision to make positions with the organisation redundant.

The modern award provisions impose a series of obligations on employers. They are:

1. The employer must make a definite decision to introduce major changes. No obligation to notify or consult will arise prior to that ‘definite decision’.
2. If the major changes involved are likely to have a significant effect on employees, then the initial obligation is to notify the employees who may be affected.
3. The relevant employees may appoint a representative who must be recognised by the employer.
4. The employer must discuss with the relevant employees:
   a. the introduction of the changes;
   b. the effects the changes are likely to have on the (affected) employees;
   and
c. the measures to avert or mitigate the adverse effects of changes. The employer must also promptly consider matters raised by the employees in relation to the proposed changes.

5. The employer is required to provide all relevant information in writing to the affected employees including:
   a. the nature of the changes;
   b. the expected effects of the changes; and
   c. other matters likely to affect employees.

6. However, the employer is not required to provide confidential information to the employees contrary to the employer’s interests.

7. The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.

When must these steps be taken?

The modern award provides that the discussions must take place ‘as soon as practicable’ after the ‘definite decision’ is taken. Clearly the written information necessary to facilitate discussions must be provided earlier. Consideration of employee concerns must be undertaken ‘promptly’. This is arguably more objective and no delay should generally be permitted between the consultation and the consideration of the issues raised in the consultation.

The concept of consultation

Although clause 8 uses the term ‘discuss’ rather than ‘consult’ in its substantive text, it is clear that the obligation is a consultation obligation; Maswan v Escada Testilvertrieb T/A Escada [2011] FWA 4239.

Generally, consultation involves more than informing someone of a decision that has been made. Consultation should entail all relevant parties engaging in dialogue to provide input at the formative stage of a proposal i.e. prior to the final decision being made.

This statement notes consultation must involve:

“a bona fide opportunity to influence the decision maker”; Community and Public Sector Union v Vodafone Network Pty Ltd (C2001/5739) per Commissioner Smith.
Failure to acknowledge this fundamental obligation is the most common mistake made in consultation – where advice or notice is confused with consultation.

Making the consultation relevant to each employee

One of the important concepts that filters through clause 8 of the modern award is that of the ‘affected’ or ‘concerned’ employee. Generally, it will not be sufficient to inform staff of the problems or concerns giving rise to a redundancy. The information and consequences must demonstrably concern the affected employees, even if it is not individualised. For example, in White v Kabi Organic Golf Course [2011] FWA 8348, staff were advised of the decision to close the business down (and impose redundancies) and were given opportunities to seek information about their own circumstances. The Commission held that this was sufficient in the circumstances. In Pankratz v Regional Housing Limited [2013] FWC 1259 there were significant meetings about the dire situation of the employer and employees were left in no doubt that changes would need to be made. However, it was never made clear to the employee that his position was specifically threatened. The Commission held, therefore, that the consultation was insufficient to satisfy the requirements of clause 8 of the modern award.

The consequences of a failure to consult

A failure to consult in accordance with the award or agreement will not automatically expose the employer to liability for unfair dismissal, although it will permit the employee to have the claim fully heard.

For example, in Maswan, the Commission held that there had been no consultation as Mr Maswan had merely been advised of the outcome and had been denied an effective opportunity to influence that outcome. However, the Commission held, when considering the criteria for harshness under section 387 of the Fair Work Act, that ‘if the outcome of consultation was less predictable the failure to consult over proposed changes could render the termination unfair’ (at [37]). The more certain the outcome, the more excusable a lack of consultation may be. This position was supported by the Full Bench of the Fair Work Commission in UES (Int’l) Pty Ltd v Harvey [2012] FWAFB 5241.

The requirements of the Act and the nearly ubiquitous modern award provisions may appear complex. Any employer faced with significant change which may have adverse impacts on employees should consider these carefully. However, the most important requirement for employers to consider is whether or not they have given employees a bona fide opportunity to influence the employer in making the decision. Employers would be well advised to keep this standard at the forefront of their redundancy planning and implementation.
5.3. Redundancy

Effecting redundancies

Redundancy raises a number of issues for employers. Unfortunately, the availability of redundancy is all too often used as an easy façade for terminating an under-performing employee. Properly planned and executed, redundancy allows businesses to effect changes in operations and maintain or enhance market position. Indeed, in considering redundancies, courts will often openly take into account business considerations such as efficiency and profitability.

A genuine redundancy is defined in section 389 of the Fair Work Act as a dismissal occurring when:

\[\text{'the person’s employer no longer require[s] the person’s job to be performed by anyone because of change in the operational requirements of the employer’s enterprise'}\]

In order to be a genuine redundancy, the employer must have complied with any obligation arising under an award or enterprise agreement to consult about the redundancy – this consultation will often occur with unions and employees. Additionally, the employer must show that it was not reasonable in all the circumstances for the person to be redeployed within the employer’s enterprise or the enterprise of an associated entity. If such a redeployment would have been reasonable, then the redundancy would not have been a genuine redundancy.

Provided these three conditions can be met, the dismissal will constitute a genuine redundancy and the employer will be protected from any claim of unfair dismissal by the affected employee or employees.

A number of circumstances can give rise to redundancies under the Act including:
a. bankruptcy or insolvency affecting the employer;
b. business downscaling due to a downturn, falling profitability, exchange rates, market conditions or other economic circumstances
c. business relocation;
d. business restructures; and
e. technological change (such as increased automation).

Importantly, redundancies cannot directly arise from poor job performance. It is tempting for employers to use redundancy as a smokescreen to avoid the difficulties of managing the performance of (or even terminating) underperforming employees. However, unless it can be demonstrated that a real change in the operational requirements of the business was the reason for the dismissal, employers may be exposed to claims for unfair dismissal and possibly general protections claims.

**Selecting employees for redundancy**

Where a redundancy involves a significant number of employees, employers are permitted to choose the best method for selecting the staff to be retrenched. Common alternatives include:

a. a last on, first off policy (where redundancies are effected in order of juniority);
b. a first on, first off policy (where redundancies are effected in order of seniority);
c. an assessment system based on job performance or potential.

There are significant potential issues with each of these approaches. The first step is to determine – independently of the capacity or individual characteristics of the employees concerned – whether or not the operational reasons giving rise to the redundancy require a particular method to be chosen.

Approaches which effect redundancies on the basis of juniority or seniority may fall foul of anti-discrimination legislation. Selection based on job performance or the potential of particular employees can appear to be sham redundancies, particularly if the affected employees have not been provided with performance management (including warnings about poor performance, training or opportunities to demonstrate their potential). Employers who are faced with the possibility of implementing larger scale redundancies should consider:

a. obtaining professional advice and supervision of the process;
b. effecting redundancy selection through an independent third party consultant; and
c. ensuring that all reasons are fully expressed, justified and documented.
Whilst these steps will not insulate employers from legal challenge, they will assist employers to defend any proceedings based on unfair dismissal or discrimination.

Employers may also consider using voluntary redundancies. However, there are pitfalls here – if the employer offers too mean a package, there will be no takers; if the package is too generous, the employer may be faced with a mass exodus. Choosing who is allowed to go can then raise the potential discrimination and performance management issues that arise in forced redundancies. Often the volunteers for voluntary redundancies are the most experienced staff in the organisation. The loss of these staff can often be damaging to a business.

**The continued existence of the job**

In many cases of redundancy, the work performed by an employee will no longer need to be performed by anyone. For example, if a business moves to an online payment system, manual accounts staff will no longer be required because the work will no longer need to be performed by anyone. However, redundancies can also arise where that work is outsourced to a third party or the work is brought within another employee’s role.

In *Kekeris v A Hartrodt Australia Pty Ltd t/as a.hartrodt [2010] FWA 674* for example, a supervisory team for an import cargo firm was restructured following technological advancements in freight management. As a result, there were three supervisors performing the work previously undertaken by four supervisors. The remaining supervisor was made redundant. In holding that this was a genuine redundancy, the Fair Work Commission found that the issue was not whether the duties survived, but whether or not the job survived. The duties did survive but, subsequent to the restructure, only required three people to carry them out.

**Redeployment**

The second important requirement of a genuine redundancy is that it must not have been reasonable in all the circumstances for the person made redundant to have been redeployed in the employer’s enterprise or in an associated entity.

The leading case is *Ulan Coal Mines Limited v Honeysett and others [2010] FWAFB 7578*. Ulan Coal was an associated entity of Xstrata, an international mining company which ran a number of mines across New South Wales and Australia. A group of 14 miners were retrenched. The Full Bench considered the obligation of redeployment. There were vacancies at nearby mines (100 km away), however, the retrenched workers were given no preferential treatment and had to compete for the positions. The Full Bench noted that some of the employees did not actively pursue other opportunities, but also noted that Ulan
and Xstrata did not take active steps to make alternative employment available. The Full Bench noted that requiring retrenched employees to compete with outside applicants may not be sufficient. The Full Bench also noted that redeployment must be considered within the associated entities if the companies that are members of a business group are subject to the overall managerial control by one member of the group, as Ulan Coal was within the Xstrata group.

The Full Bench however referred back to the requirement of reasonableness and held that the possible redeployment must be reasonable at the time of the dismissal having regard to:

‘the nature of any available position, the qualifications required to perform the job, the employee’s skills, qualifications and experience, the location of the job in relation to the employee’s residence and the remuneration which is offered’.

A broadening of the redeployment obligation?

Several decisions of the Fair Work Commission indicate that the Commission may be broadening the redeployment obligations on employers. In Aldred v J Hutchinson Pty Ltd [2012] FWA 8289, the Commission decided that an employee who was retrenched in Victoria should have been offered a position in the Queensland operation. The Commission dismissed the employer’s argument that the operations were managerially distinct and noted that the business had a national character and that the concepts of ‘employer’s enterprise’ and ‘associated entity’ should be given a broad meaning. The Commission explicitly noted and adopted an increasing trend towards labour mobility.

In Jenny Craig Weight Loss Centres Pty Ltd v Margolina [2011] FWAFB 9137, the Full Bench of the Fair Work Commission considered the position of an employee working at a Regional Manager level (on $60,000 per year) who was made redundant. The employer did not offer a Centre Manager role (at $38,000) which was available because it seemed “like an insult”. However, the retrenched employee provided evidence that she would have been happy to take on that role and was looking for less responsibility and a better work/life balance. The Commission held that the role should have been offered to the employee and that, accordingly, the redundancy was not a genuine redundancy.

The clear trend of decisions is that redeployment should be undertaken proactively with the affected employees and that all possibilities should be put on the table, even when they involve lesser pay or relocation. Retrenched employees should not be required to compete for roles.
Consultation

The final requirement for a genuine redundancy is that the employer has complied with any applicable requirement in an award or enterprise agreement to consult about the redundancy.

It is important to note that consultation does not require securing agreement. It will be sufficient if accurate and comprehensive information is provided in accordance with the award or agreement requirements and that objections, alternatives and suggestions from unions are heard and considered. The consultation should be reasonable, but it does not have to permit employees or unions to exhaust all avenues of discussion or persuasion; White v Kabi Organic Golf Course [2011] FWA 8348. Consultation will still be found to have occurred if the discussions are curtailed by the anger or hostility of the employee; Lindsay v Department of Finance and Deregulation [2011] FWA 4078.

Importantly, it is not essential that sensitive business information is provided – confidentiality does not have to be broken for effective consultation. In Hennessy v Break Thru People Solutions [2012] FWA 7887, the Commission considered whether or not the employer’s failure to provide its business case for the redundancy left it in breach of its obligation to consult. The Commission held that there was no obligation to provide confidential information contrary to the employer’s interests.

In the June edition of workplace culture matters, we will examine the entitlements arising from redundancies. The important issue underlying the complex area of redundancy is that early planning, preparation and communication are vital. Using redundancy as a quick fix will often be a risky and unsuccessful approach.

Redundancy pay

A standard feature of redundancy systems over the past 30 years has been the availability of compensation for redundancy (or redundancy-specific entitlements). From the initial Redundancy Case 1984 the redundancy pay has represented compensation for the hardship and inconvenience suffered by employees arising out of redundancy rather than a replacement of lost income or entitlements.

The compensation – or entitlements - available to employees on redundancy will usually depend on the instruments which regulate the employee’s employment. Awards, agreements, contracts and policies will often make provision for redundancy entitlements. In some cases, these amounts may significantly exceed the entitlements available under the National Employment Standards. Redundancy entitlements arise under the National Employment Standards as well as under more particular instruments.
The National Employment Standards prescribe minimum entitlements arising on redundancy by reference to a period of continuous employment as follows:

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<td>12 weeks</td>
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<tr>
<td>8 years</td>
<td>13 weeks</td>
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<tr>
<td>9 years</td>
<td>14 weeks</td>
</tr>
<tr>
<td>10 years</td>
<td>16 weeks</td>
</tr>
</tbody>
</table>

(section 119 of the Fair Work Act)

The reference to weeks refers to the base rate of pay for ordinary hours worked not including overtime, penalty rates, bonuses, allowances or similar payments (see sections 16 and 119 of the Fair Work Act).

Importantly, redundancy pay will not be available for employees whose period of continuous service is less than 12 months or employees of small business employers (and other situations defined by an award); see section 121 of the Fair Work Act. However, some employee entitlements may be preserved even in the case of insolvency under the *Fair Entitlements Guarantee Act 2012* (Cth), which supercedes the General Employee Entitlement and Redundancy Scheme.

The tax treatment of termination or severance payments is a particularly complex area. Usually a lump sum payment will comprise outstanding employment entitlements, notice, payments arising from the fact of redundancy (Genuine Redundancy Payments) as well as Employment Termination Payments (which may include Life and Death Benefit Termination Payments). The tax and superannuation treatment of these payments will depend upon a number of factors including the date of employment and termination and the age of the employee. In preparing for redundancy, employers should ensure that amounts are correctly and accurately categorised and obtain professional assistance where necessary.

**Reduction of entitlements under the Fair Work Act**

Although the Fair Work Act prescribes minimum payments in relation to redundancies, the Act gives the Commission scope to reduce or eliminate redundancy payments because the employer ‘obtains other acceptable employment for the employee’ or ‘cannot pay the amount’; see section 120 of the Fair Work Act.
In *Datacom Systems Vic Pty Ltd v Khan and another [2013] FWC 1327* the Fair Work Commission ordered reductions to redundancy pay under section 120 of the Fair Work Act. The employees concerned had worked for Datacom at the time that GE, a major client of Datacom decided to ‘insource’ the work back to GE resulting in a significant change to the business circumstances of Datacom. The employees were successful applicants when GE advertised the positions. It was common ground that there was significant cooperation between the parties in relation to the business transition.

The Commission held that it was clear that Datacom had ‘obtained’ suitable alternative employment for the employees, even though the employees had been required to engage in an application process. It was also immaterial that the salaries enjoyed at GE were at variance (in both directions) with those enjoyed at Datacom. The Commission determined that reductions of about 25%-30% were appropriate having regard to several factors: the fact that GE would not recognize prior service, the lack of hardship associated with a relatively direct transition to the new positions and the lack of additional project work and variance in salary experienced by one employee and additional payments made to the employees for insourcing.

In most situations where employees transition to new jobs in business transfer situations, reductions should be available, although as is clear from Datacom a range of circumstances concerning the new position and the applicable entitlements will affect the amount of any reduction.

**Overview – planning for redundancy**

During the course of this calendar year, workplace culture matters has examined some of the key processes surrounding business transfers and redundancies. The Fair Work Act imposes a range of obligations on employers involved in business transfers and redundancies which are technical and involved. In any matter involving a redundancy it is important to minimize the risk of legal error, particularly where multiple employees are involved or there is a transfer of the business. Amongst other things, businesses involved in these situations should take several steps.

1. **Define exactly the outcome that is being sought and define the reasons why that outcome is the best outcome for your business.**

   In a redundancy situation this will often lead to a reality check – is the redundancy process in fact being used to ‘get rid’ of under-performing or even disliked employees (and ‘redundancy’ is a suitable smokescreen?) or is the position itself truly not needed.
In a transfer of business situation, both vendors and purchasers should define these outcomes before engaging in the process, particularly in relation to the key employees and positions of the target business. Consider:

- What are the drivers of the business that is being sold/purchased?
- What are the key positions and who are the important employees within those positions?
- What restrictions should be placed on the vendor and the purchaser and key employees (if possible) after the sale is completed.
- Can any protection be provided to ensure that key employees remain with the business?

Identifying all this information will obviously be more difficult for a purchaser, but should be an early part of the due diligence process, either carried out before exchange or carefully protected within the negotiated sale contract.

2. **What are the underlying legal obligations affecting these key employees?**
   It is important to identify key policies, contracts of employees and provisions of agreements and awards and understand their effect before embarking on the process.

3. **It is important that professional assistance is obtained, either from internal HR staff or from an external professional.**
   Often professional assistance is only sought when ‘problems’ emerge, even though those problems could have been foreseen by an experienced lawyer and managed early. If the process of redundancy is poorly managed, significant compensation may be payable to employees - for unfair dismissal or in adverse action proceedings. Late problems that emerge in business transfer or restructuring situations can result in claims for breach of contract or even court orders requiring completion of the sale. The legal costs associated with any of these types of matters is usually significant and sometimes catastrophic.

4. **Managing information flow is also significant.**
   Ideally, until a clear plan has been developed, communication with affected employees should be limited. This is not to say that the decision to implement the plan needs to be final – or that the plan is beyond reproach. However, rumour and innuendo combined with incomplete and on-the-fly planning usually ends in disaster.

Principally, businesses engaged in business change processes affecting employees should focus on developing clear objectives and early planning to minimize the risk of derailment or litigation.
5.4. Transfers of Business

The management of staff issues during periods of transition is fundamental to the success and growth of businesses. Business transfers and restructures can be crippled from the start by the failure to understand and implement appropriate strategies to manage staff issues.

Transferring control or transferring the business?

Transfers of business may occur in two discrete ways. The first involves a change in control of the corporate entity that runs a business (usually through the sale or issue of shares). Importantly, although under different ownership, the owner of the business – and the employer of its staff – remains the same legal entity. Generally, such a change of control will not constitute a ‘transfer’ of the business and, generally, employees will have no complaint that, in essence, its employer has different shareholders.

It is important, however, for purchasers acquiring businesses in this way to find out, before exchange, whether key employees have ‘change of control’ clauses which may enable those employees to obtain compensation if their positions are affected.

However, the more usual ‘transfer’ occurs when the assets (tangible and intangible) of a business are transferred from the vendor to a different owner and the new owner then operates the business. The sale process is generally a complex one, usually involving pre-exchange due diligence, preparation of contracts, finance and security, searches and settlement. This process is often conducted with the aid of standard form conditions. It is imperative that purchaser and vendor obtain legal advice and representation throughout
the process. Whilst the ‘transfer’ of employees can be one of the thorniest issues, the whole process has many pitfalls even in superficially straightforward situations. Furthermore, it is rarely a routine and familiar process for businesses.

Are employees like other assets?

Under general law, employees are employed pursuant to a contract of service with their employer. Courts have repeatedly emphasized that employees’ contracts of service are not ‘assets’ which flow with the business, but that, in a transfer of a business, the employment with the vendor is terminated. As such, employees may have entitlements consequent upon the termination of their employment. Whilst this is the underlying legal position, standard form contracts for the sale of business and relevant industrial instruments anticipate and treat employment as being ongoing. The Fair Work Act also makes significant provision for ongoing employment in transfer of business situations.

Preparing to transfer a business

One of the most important obligations on employers is the maintenance of accurate employee records. Unfortunately, businesses – especially small businesses without dedicated HR staff - often coast without maintaining proper records. Whilst the business can survive and operate without accurate records, poor practices can damage the capital value of a business. For example, contracts may not be accurately drawn and records of entitlements may not have been kept. Not only can this pose direct costs and risks in the sale process, but this can destroy confidence in other assertions and projections that may lie at the heart of the saleable value of the business. These matters should be rectified before any sale process is started. If this cannot be done it is usually preferable to address record keeping deficiencies openly in the sale process.

The purchaser of a business should, likewise, undertake due diligence before any contractual step is taken. Whilst this due diligence will cover all aspects of the business being acquired, it is important that adequate attention is given to staffing matters, including:

- Identifying management structure, key roles and the staff filling them;
- Identifying key operational personnel and ensuring (by means of special conditions permitting rescission, if necessary) their continued employment after transfer;
- Identifying restraints of trade applicable to key personnel who are not continuing;
- Conditions, pay and applicable industrial instruments affecting all staff, including properly drawn and applicable contracts;
- Record of insurances and incidents and availability of work safety information (including compliance with industry specific standards, where relevant);
• Records of disputes and claims and incidents (including sexual harassment) together with identification of contributing factors to those disputes; and
• Compliance with staff training/certification requirements e.g. child protection checks and training for child related businesses.

One of the most important practical steps for purchasers is to find out who the key employees are. Such employees are often the drivers of business success and also possess important business know-how. They may have a close relationship with the outgoing vendors and may not wish to continue. In this case, appropriate restraints should form part of the purchase contract. Where possible key employees should be encouraged to stay and as much protection as is commercially possible should be included in the purchase contract.

**Should employees be involved in the process?**

An important early issue for a vendor to consider is whether or not employees should be consulted or even informed about an impending transfer of business. The only formal notification required will be the Fair Work Information Statement that the purchasing employer will be required to give to continuing employees after completion of the contract.

Whilst every situation will differ, it is important to consider whether the involvement of the employees will add value to the sale e.g.:

- If employee co-operation is required to get the business ready for sale – for example by formalizing informal employment relationships;
- If additional work is required to add value, for example by developing potential new business leads or products that may make the business more attractive to purchasers.
- If employees intend to leave upon the sale, then assisting with and training continuing staff.

However, where employees may take the opportunity to leave or feel under threat by the sale, less information may be preferable.

Whichever course is taken, it is important that the vendor controls the flow of information rather than allowing rumour and innuendo to drive the behaviour of staff ahead of the business transfer.