

# H O R I Z O N S

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## COVER STORY

# Bullying, Harassment and Discrimination Claims by Employees



By Tony Cardillo

### What employers should know

Psychological injuries arising from bullying, harassment and discrimination in the workplace can have serious consequences for both employees and employers. Work-related psychological injury claims are continuing to increase in most jurisdictions and employers are continually caught off-guard by such claims.

Whilst psychological claims are fewer than physical claims the cost of each psychological claim is generally greater.

### What legal actions can be brought against employers?

If an employee suffers psychological injury as a result of bullying, harassment or discrimination by the employer or another employee the employer can face serious actions under a number of different laws, such as:

- Workers Compensation laws;
- Common Law;
- Anti-Discrimination laws;
- Industrial Relations laws;
- Workplace Health and Safety laws; and
- Criminal Law.

The penalties imposed on employers can be quite serious and include anything from fines for failing to provide instruction, training and supervision in relation to bullying, harassment and discrimination to punitive and compensatory damages. Importantly, directors and managers can be found liable under these laws and can face individual criminal fines and imprisonment.

### Don't fall into the trap

A common argument by employers in cases of psychological injury to an employee in the workplace is that the bullying, harassment or discrimination was only an example of employees playing 'harmless pranks or workplace high-jinks' or 'having fun at another's expense'. Workplace cultures of not acknowledging the damaging implications that bullying, harassment and discrimination can have on an employee or suggesting that employees need to 'harden up' offer no excuse to legal actions

for psychological injuries suffered by employees.

The 2006 case of *Webb v State of Queensland* demonstrates that employers cannot simply rely on having policies and formal complaint procedures in place to avoid liability. In this case, a Queensland Health worker alleged inappropriate touching, comments and emails against another employee and notified her employer of her concerns. Queensland Health argued they should not be liable because a formal complaint mechanism was not utilised by the employee and they therefore had no obligation to act. The Tribunal found that Queensland Health was under an obligation to be proactive in taking steps to prevent bullying rather than to just react to specific complaints. Queensland Health was ordered to pay damages to the employee.

### What should employers do?

Defending and/or being involved in an action by an employee for psychological injury can be extremely costly: legal fees, lost productivity and bad will in the workplace often ensue.

The best approaches employers can take to avoid legal action are:

- Have and implement a policy;
- Understand your obligations;
- Be proactive;
- Ensure employees know their obligations;
- Recognise risk;
- Manage situations immediately; and
- Have a means by which employees can discreetly report bullying, harassment and discrimination.

Complaints of psychological injury as a result of work-related bullying, harassment and discrimination by an employee can be resolved swiftly and with minimal damage and cost for all parties involved.

**If you would like further information please contact Partner Tony Cardillo or solicitor Emilia Cardillo on 02 4907 6300.**

Client Testimonials

What Our Clients Say...

Here's what some of our clients have had to say about us.

Matthew Smith
Managing Partner
- Commercial Law



Just wanted to thank you for your recent advices. They were great advices, succinct and very perceptive to what I required in each case. I had no hesitation allowing my senior executives to read the advice because it was so on point and client friendly. Thank you.

Stephanie Posniak
Partner
- Insurance Law



I would like to take this opportunity to commend and thank the fine team of people within your Partnership for the work they have done on my behalf. They are a credit to your firm and should be commended.



From the Managing Partner's Desk

Merry Christmas from Harris Wheeler



The end of 2011 is only days away and there is so much to reflect upon and so much to be grateful for. Most importantly thanks to you, our clients for your loyalty and support in 2011. We are so proud to be providing legal services to such quality clients across so many industries.

We welcomed a number of new members to the team this year including property lawyer Anna Bailey who provides property legal services to some of the firm's large institutional clients, lawyer Allis Ingram who will be servicing some of the firm's property and personal services clients, senior paralegal Julie Lambert who assists in conveyancing and property matters, and two graduate lawyers Paula Setz and Sarah Ivens. Paula will be assisting Partner Katrina Reye with property matters and myself with commercial transaction matters. Sarah will be assisting Partner Micah Jenkins with

commercial transactions and commercial litigation. The Partners are delighted with the quality of experience that our new members bring to the firm.

During 2011 we welcomed a number of new institutional clients to the Firm. These included Newcastle Permanent Building Society, University of Newcastle and the Roads and Maritime Services (formerly the RTA). We were also appointed probity adviser for Lake Macquarie Council's 3 Bin collection and processing system tender. These appointments in 2011 demonstrate the strong reputation we have in the Hunter as a provider of quality legal services. These are proud achievements for the firm as we look forward to continuing to provide our services to these new clients in 2012 and beyond.

On behalf of the Partners and staff, I wish you a very Merry Christmas and a safe and prosperous New Year, and I look forward to catching up with you in 2012!



Matthew Smith

Property Law

Have you ever supplied goods to someone without getting paid for them immediately?



By Katrina Reye

Or have you ever used a retention of title clause, hired or leased equipment, licenced intellectual property or granted or taken a fixed or floating charge?

Then the Personal Property Security Act ("PPSA") is going to affect you.

In the winter edition of Horizons we outlined the main impacts of the PPSA. In particular, we highlighted the broad effect it will have as many commonly used commercial arrangements for the supply, transfer or mortgage of personal property will become 'security interests' under the new regime. We outlined the importance for businesses of identifying their potential 'security interests' and establishing a process for managing their registration.

Introduction of the legislation has been deferred til 30 January 2012. Businesses should be making the most of this slight reprieve to conduct a thorough review of their contracts to identify security interests. However, identification of potential security interests is only the first step. The subsequent step of ensuring their protection is much more complex. It may not be as straightforward as just registering the security document on the new register.

For instance, there are certain legal requirements which a security interest must comply with in order to be registrable. There are also certain types of security interests, such as 'purchase money

security interests', which are affected by specific rules under the Act - and in some cases businesses may be able to specifically structure new security interests to take advantage of these rules. Where multiple parties have interests in the same property a deed of priority might be necessary for proper protection. There are also important confidentiality considerations to be taken into account, as there is some provision for documents creating security interests to be accessed by third parties under the Act.

In practical terms, businesses will also want to minimise their registration obligations for ongoing supply arrangements and take advantage of transitional arrangements to ensure existing interests are registered with the earliest possible date for establishing priority. They will also need to consider any registrations on existing registers - such as company charges registered with ASIC - as some existing registers are being automatically transferred to the new register and others are not.

These are just some of the considerations you will need to take into account when deciding how best to manage your business' security interests. Business should certainly be making the most of the additional time to identify their security interests and obtain the necessary advice to put in place effective strategies to ensure their protection.

If you would like assistance identifying your security interests or with any aspect of managing those interests please call Matthew Smith or Katrina Reye on 49 076300

## Property Law

## Changes to stamp duty for first home buyers

In a recent bid to stimulate both the economy and building industry, the New South Wales Government has announced that as of 1 January 2012 the First Home Plus Scheme will become the "First Home – New Home Scheme". As the title implies, the potential exemptions and reductions from stamp duty currently available to first home buyers will be limited to circumstances where the first home being purchased is:

- a new home up to \$600,000 (that is a home that has not been previously occupied or sold as a place of residence);
- a substantially renovated home up to \$600,000 (which has been defined as renovations in which all or substantially all of a building is removed or replaced and as renovated has not previously sold or occupied); or
- involves the acquisition of a vacant block of residential land that is intended to be used as the site of a first home up to \$450,000.

Under the new legislation a first home buyer will have to pay full stamp duty on the purchase of an existing dwelling.

The scheme is intended to make the purchase

of a new home more attractive than purchasing an existing dwelling. The assistance package that is currently available to first home buyers (the \$7,000 grant and a duty exemption of up to \$17,990 under the First Home Plus Scheme) will be reduced to just the \$7,000 First Home Owner Grant, should the purchase not fit into the three categories outlined above.

These new provisions will affect all agreements entered into on or after 1 January 2012. With this in mind, the expectation of the Government is that purchases of existing homes will be on the incline up until the new year as people try to get in before the tighter exemption criteria is triggered.

First Home buyers that are eligible for assistance under the First Home – New Home Scheme should note that the previous residency requirements will remain intact, requiring at least one of the first home buyers to occupy the home as their principal place of residence for a continuous period of six months. Occupation must commence within 12 months from the completion of the agreement for sale.

**For further information please contact Anna Bailey on 02 4907 6314.**

## Commercial Law

## Acquiring property using your self-managed superannuation fund

There are a number of investment options with attractive tax concessions to acquire residential property, shares and commercial property using your SMSF.

**Residential property and shares**

Limited recourse borrowing ("LRB") arrangements are an appealing option to increase the size of your investment portfolio while limiting the lender's recourse to the acquired asset. In the event of default, the SMSF's other assets are protected.

A trustee of a SMSF may borrow money under an LRB arrangement to acquire a single acquirable asset under the Superannuation Industry (Supervision) Act. Such assets may include real property or a collection of shares in a single company.

However, there has been some confusion surrounding LRB arrangements and the ATO has released the Commissioner's draft ruling clarifying the meaning of the key concepts of what constitutes a "single acquirable asset" and the distinction between "maintaining" or "repairing" the acquirable asset and "improving" it.

**Single acquirable asset**

Under the draft ruling, the restriction on what constitutes a 'single acquirable asset' has been relaxed such that a trustee of a SMSF may acquire:

- (a) an apartment with a car park on separate legal title; or
- (b) a commercial building on more than one title.

This ruling has clarified that these previously unavailable assets may be acquired under an LRB arrangement with a concessional stamp duty of \$50.00.

**Maintenance, repairs and improvements**

No amount that has been borrowed by the trustee of the SMSF under an LRB arrangement may be applied to improve the single acquirable asset. However, work may be done to prevent defects, damage or deterioration of an asset, or in anticipation of future defects, damage or deterioration provided that it merely ensures the functional efficiency of the asset is maintained in its present state.

It is possible that the asset may be improved using money from other sources, provided the asset does not become altogether a different asset.

Unfortunately, the laws which prohibit the acquisitions of assets from related parties apply to LRB arrangements. However, the exceptions against the acquisitions of assets from related parties, such as those allowing for the market value acquisition of listed securities or business real property, continue to apply.

**Business real property**

If acquiring business real property from a member of your SMSF for market value, concessional stamp duty of \$50.00 is available in certain circumstances.

**For further information please contact Micah Jenkins on 02 4907 6340.**

## a Christmas

## Delight



## Honey &amp; almond-crusted ham

**Ingredients (serves 8)**

- 6kg whole leg ham on the bone
- 1 cup (250ml) orange juice
- 3/4 firmly packed cup (165g) brown sugar
- 1 tbs Dijon mustard
- 1/2 cup (175g) honey
- 2 tbs Grand Marnier or other orange liqueur
- 1/4 cup (40g) slivered almonds

**Method**

1. Preheat oven to 180°C. Use a small sharp knife to cut around ham shank in a zigzag pattern. Carefully run knife under the rind, around the edge of the ham. Gently lift off the skin in 1 piece by running your fingers between the rind and the fat. Discard skin.

2. Using a small sharp knife, score the fat in a diamond pattern. Pour 1/2 cup (125ml) water in a large roasting pan. Place a wire rack in the pan and place ham on rack.

3. Combine orange juice, sugar, mustard, honey and Grand Marnier in a small bowl. Brush half the glaze over the ham, then bake for 30 minutes or until golden brown.

4. Add the almonds to the remaining glaze and stir to combine. Spoon the almond mixture over the ham. Return to the oven for a further 15-20 minutes or until almonds are lightly toasted and caramelised. Remove from oven. Rest for 15 minutes, loosely covered with foil, before carving into slices.



## Employee inventions in the workplace



By Emilia Cardillo

At common law, any intellectual property developed by an employee during the course of their employment is owned by the employer. This position has narrowed through recent court decisions.

### Negating Factors

In *UWA v Gray*, the Court considered whether there were sufficient factors to negate the implied term of employer ownership of employee inventions. In the case of *UWA v Gray*, some of the negating factors included that, Dr Gray was not bound by any terms of confidentiality, he was able to freely choose the areas of research he conducted and he was required to solicit funding (external to his employer) in order to carry out the research. These negating factors were not present in Dr Alexander's situation.

### The Australian Patent Office's determination

The Australian Patent Office did not find that there were factors which negated Dr Alexander's duty to invent. However, they did state that Dr Alexander's duty to invent was limited by his statement of duties so that he only had a duty to invent in circumstances which he could be reasonably expected to resolve a recognised problem. The duty also included research which he might pursue where there was a reasonable expectation the research would identify potential improvements in his area of work.

Ultimately, the Australian Patent Office held that the first invention (which was the improvement used to grow and inoculate viruses) was an area of research that Dr Alexander would be expected to investigate in order to identify improvements in his role as a Head Virologist, however, the second invention only related to the improvement of an existing device which was already effective in its design and it could not be considered reasonable for Dr Alexander to identify improvements.

### The current position of IP in the workplace

This matter demonstrates that applying the common law principle relating to ownership of intellectual property in the workplace needs to be adapted for each particular employee. If an employee has a duty to invent in the performance of their role, it is advisable that the contract of employment contains a clear assignment of any rights to the intellectual property, and sets out what circumstances the employee will have a duty to invent.

**If you would like further information please contact Partner Tony Cardillo or solicitor Emilia Cardillo on 02 4907 6300.**

### The Royal Children's Hospital [2011] APO 94

The Royal Children's Hospital ("RCH") lodged a dispute with the Australian Patent Office after its employee, Dr Alexander Head of Virology at RCH, made application for 2 patents for inventions developed during his employment.

The first of Dr Alexander's inventions related to improvements in the means used to inoculate and grow viruses in culture. The second invention was an improvement in the design of a standard tool used in clinical diagnostic testing.

RCH argued that it was an implied term of Dr Alexander's contract of employment that intellectual property developed by Dr Alexander, during the course of that employment, belonged to them.

### Duty to invent

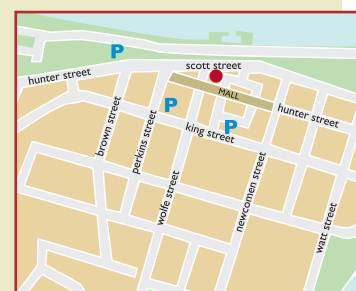
The case of *University of Western Australia v Gray (No 20)* [2008] FCA 498 ("*UWA v Gray*") held that where the implied term applies the employee's employment must require the employee to "*utilise his or her inventive faculty in an agreed way for an agreed purpose, and for the benefit of, or to further the purposes of, the employer.*"

Dr Alexander was responsible for the quality and efficiency of the viral diagnostic work at RCH and his statement of duty contained a statement to "*identify potential areas for improvement in the diagnostic service*". The Australian Patent Office considered that this statement of duty meant that Dr Alexander had a positive duty to invent in order to identify potential areas for improvement.

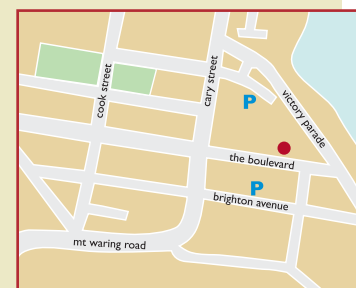


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The information contained in this publication does not constitute legal advice. We recommend you seek out professional advice before acting on the information provided.



Liability is limited by a scheme approved under Professional Standards Legislation

## Public Holiday closure

Harris Wheeler will be closed from 12noon on Friday 23 December 2011 and will re-open on Tuesday 3 January 2012.

*The Partners and staff wish you a very Merry Christmas and a happy and safe New Year!*

