

Moral Rights?

The *Copyright Act 1968* (Cth) ("CA") was recently amended by the *Copyright Amendment (Moral Rights) Act 2000* (Cth) ("Amendment Act") to establish certain moral rights for individual authors and creators. The establishment of such rights may have significant impact for employers.

The Amendment Act came into operation on 21st December 2000 and provides for three specific moral rights for authors of literary, dramatic, musical and artistic works and for authors of films who are defined as the principal director, principal producer (if a natural person) and the principal screenwriter.

The specific moral rights are:

- the right of attribution of authorship (the right to be identified as author)
- the right not to have authorship of a work falsely attributed
- the right of integrity of authorship of a work (the authors right to object to derogatory treatment of his or her work which prejudicially affects his or her honour or reputation).

One important characteristic of moral rights is that they are personal rights and not economic rights. Only individuals may possess moral rights. Moral rights can also not be assigned, disposed of by will nor can they devolve by operation of law. Moral rights are therefore not proprietary rights like, for example, copyright.

Of particular relevance in an employment situation is that, by virtue of Section 195AWA of the CA, an employee can give a comprehensive consent concerning the non-infringement of moral rights for the benefit of his or her employer in relation to "all or any acts or omissions" occurring before or after the consent is given and in relation to all works made or to be made by the employee, provided only that the works made are in the course of the employee's employment.

Section 195AZA(1) of the CA provides authors with a number of civil remedies with respect to infringements of their moral rights, including injunctive relief and the power to award damages. The Court may also order that the infringer make a public apology for the infringement.

Employers may need to review the terms and conditions of employment contracts with a view to incorporating a consent for non-infringement of moral rights.

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This bulletin is intended to keep readers abreast of current developments in the field of human resources and employment law. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers.

The Employee/Contractor Distinction Revisited

Impact of a recent High Court decision upon the distinction between an independent contractor and employee.

Employers and employees have been experimenting with alternatives to the traditional employers/employee relationship – for example – retaining former employees as independent contractors. This has often been done with a desire to promote greater flexibility, opportunities and efficiencies.

The High Court's recent decision in *Hollis v Vabu Pty Limited* has called into question the traditional distinction between independent contractor and employee.

Hollis was a courier with a firm known as Team Courier who, on 22 December 1994, was leaving a building in Ultimo which he had attended to pick up an envelope when he was struck by a cyclist and was knocked to the ground. That cyclist was not identified but was wearing a green jacket with the words "Crisis Couriers" on it. Hollis suffered a personal injury which required surgery and resulted in a period of unfitness for work and a 25% payment impairment in his knee.

Hollis claimed that Vabu was the employer of the courier and was consequently vicariously liable for any injuries that he suffered. Vabu claimed that the courier was an independent contractor and consequently there was no employment relationship. The trial judge initially entered a verdict for Vabu, on the basis that the bicycle couriers

were independent contractors rather than employees and that the doctrine of vicarious liability did not apply to make Vabu liable in respect of the actions of one of its independent contractors. This decision of the trial judge was confirmed by the New South Wales Court of Appeal.

The High Court, however, found in favour of Hollis and held that the relationship was that of employer/employee. The High Court judgement can be summarised as follows:

- the modern doctrine of vicarious liability of employers has been a matter of policy, based on the principle that conduct by persons representing an enterprise creates an obligation to third persons to bear the cost of injury or damage to them which may be said to be characteristic of the conduct of that enterprise.
- with regard to the application of the "control" test, the court found that on the facts of the case the couriers were not running their own enterprise because:
 - (a) they were not providing skilled labour or labour which required special qualifications;
 - (b) they would not be able to generate any goodwill as bicycle couriers;
 - (c) they had little control over the manner

of performing their work;

(d) they were presented to the public as uniformed representatives of Vabu;

- the Court also paid attention to the means by which Vabu produced pay summaries and that the couriers did not negotiate as to their rate of remuneration and also that Vabu imposed pay deductions for failing to return uniforms and for damaging equipment.

It should be noted that in reaching this decision, the High Court did not overrule the decision of the Court of Appeal in *Vabu Pty Limited v the Federal Commissioner of Taxation* since leave to appeal was not granted in that case. This means that the decision in that case to exclude principals who engage independent contractors from the obligations to make superannuation guarantee charge contributions for them continues to apply.

On a broader level, the High Court's decision serves to remind us that wrong assumptions about the nature of an employment relationship can have costly consequences. Accordingly, principals should ensure that appropriate insurance is effected to guard against (say) third party personal injury claims.

The "independent contractors" may also seek to impeach the nature of the relationship. If, for example, the contractor

suffers an injury during the course of his/her employment and does not have worker's compensation insurance, then the contractor may seek to argue that he/she really was an employee for the purposes of making a worker's compensation claim. Serious legal problems regarding compliance with the *Workers Compensation Act 1987* could arise if the principal does not have workers compensation insurance.

Further, as a result of this decision, an independent contractor may seek to overturn the relationship within the context of industrial award entitlements. This could arise if the contractor, over the period of the contract, is paid less than what he or she would have otherwise earned under an award. In such circumstances, the contractor could commence proceedings against the principal arguing that an employment relationship existed in order to recover entitlements pursuant to the award.

Parties entering into principal/contractor relationships and wanting to avoid the risk of legal challenges should ensure that they consider the completeness of the relationship and analyse its terms carefully.

For example the contractor may suffer an injury during the course of his/her employment for which he/she does not have insurance cover.





New Termination Laws Commence (Fed)

Changes to the termination of employment provisions of the Federal Workplace Relations Act 1996 (the WPR Act) commenced on 30 August 2001.

The most significant changes are as follows:

1. New employees must be employed for a period of 3 months before they can bring an unfair dismissal claim under the WPR Act although this period may be increased or decreased by written agreement in advance of commencing employment. This replaces the prior position that excluded employees for a probationary period if the parties agree to it in writing before hand. Any longer period must be "reasonable having regard to the nature and circumstances of the employment". It should be noted that this exclusion period does not apply to claims of *unlawful* as distinct from *unfair* dismissal claims.

2. The Industrial Relations Commission must take into account the different sizes of businesses when assessing whether their dismissal procedures were reasonable. It will be necessary for the Commission to consider the degree to which the absence of dedicated human resource management expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination.

It would seem these changes have seen been made with the intent of making procedural requirements easier for smaller business that are less likely to employ human resources personnel.

3. In a move to reduce the number of "constructive dismissal" claims employees who are demoted but remain in employment without suffering a "significant" reduction in remuneration or duties will not be able to make a claim for unfair dismissal. The provision was changed to include "duties" as well as pay.

Further, the Commission now also has powers to dismiss a claim following an initial conciliation hearing if it has no reasonable prospect of success and dismiss a claim if the dismissed employee fails to attend hearings.

The Commission has also been given a greater scope for the making of costs orders against parties who act unreasonably in pursuing or defending claims.

New Regulations under the federal *Workplace Relations Act 1996* were Gazetted on 30 August 2001.