KENNEDY STRANG LEGAL GROUP

EMPLOYMENT LAW

THE IMPLICATIONS OF WORKCHOICES FOR SUPERANNUATION

STEPHEN GODDING, Partner

The implications of the WorkChoices legislation for superannuation have been significant, even though they have not, to date, received either media coverage or detailed scrutiny. Implications for superannuation arise in relation to:

- superannuation fund choice
- award provisions dealing with superannuation
- superannuation contributions in excess of the SGC Act minimum, and
- salary sacrifice to superannuation.

SUPERANNUATION FUND CHOICE

The WorkChoices legislation converted State Awards to Federal instruments (described as NAPSAs) with effect from 27 March 2006, so far as those awards applied to employees of incorporated employers. It follows that the exemption from superannuation fund choice granted in Section 32C(8) of the SGC Act in relation to employees who are subject to State Awards no longer applied from this date.

The Commonwealth Government amended the Superannuation Guarantee (Administration) 1992 Act (SGC Act) so as to continue the exemption from superannuation fund choice for employees who were subject to NAPSAs, but only until 30 June 2006.

The SGC Act was also amended to continue the exemption arising in relation to contributions under or in accordance with the terms of federal instruments, including pre-reform certified agreements and Australian Workplace Agreements. Amendments also continued the exemption from choice in relation to Preserved State Industrial Agreements.

An issue of importance in New South Wales is section 124 of the *Industrial Relations Act* 1996 (NSW). This section permits an employer to agree with employees that superannuation contributions be made to any complying fund despite the provisions of an industrial award or agreement prescribing a particular fund. This section will continue to allow unincorporated employers to offer fund choice even where State

Awards or Industrial Agreements provide for employer contributions to be made to a prescribed superannuation. This will not apply for incorporated employers who are subject to NAPSAs or Preserved State Industrial Agreements because these now are federal instruments and no longer subject to the State Act.

MEANING OF ORDINARY TIME EARNINGS

The *Superannuation Laws Amendment (2004) Measures No. 2) Act* 2004 is already enacted from effect from 1 July 2008. This amendment will require all employers to use the employee's ordinary time earnings as defined in the SGC Act for the purposes of calculating the minimum SGC Act contributions for employees. Alternative earnings bases stipulated in industrial instruments such as Awards or Industrial Agreements or superannuation fund trust deeds will no longer be applicable.

This will eliminate much of the complexity which has been the subject of litigation and significant confusion in relation to the correct earnings base for certain types of employees particularly in relation to the meaning of "ordinary time earnings" for employees who do not work "standard" hours. It will also presumably eliminate the predecessor fund provisions in the SGC Act which allow alternative earnings bases other than ordinary time earnings to be preserved indefinitely by the successor fund process.

Continued on page 2

INSIDE

The Implications of WorkChoices for Superannuation	1
Agreement making under WorkChoices	2
Child and Young Workers' Code of Practice 2006	4
WorkChoices Record Keeping Requirements	5
New Federal Independent Contractor Laws	6
Restraint of Trade Clauses - Has the Pendulum Swung?	7

SUMMER 2006 ISSUE

SUPERANNUATION CONTRIBUTIONS IN EXCESS OF THE SGC ACT MINIMUM

Under the WorkChoices legislation, provisions in pre-reform awards relating to superannuation will cease to have effect as from 1 July 2008. Any new Federal Awards cannot deal with superannuation. Accordingly, only Workplace Agreements or common law employment contracts can provide contributions in excess of the SGC Act minimum

This will include benefits such as defined benefits and additional contributions in excess of the SGC Act rate made on a salary sacrifice or other basis. Also, provisions dealing with additional member contributions and the frequency when contributions are made by employers will need to be included in such documents. From a legal perspective, it is generally correct to state that all superannuation contributions whether at the SGC Act level or otherwise are already the subject of common law contracts, since most written employment agreements contain express provisions for same and in oral agreements an implied term arises that the employer will pay superannuation at the level agreed with employees being the amount actually paid. In either case an enforceable contractual obligation arises in addition to any statutory provision which operates to impose a tax penalty on the employer under the SGC Act.

An interesting and possibly unintended result of the WorkChoices legislation is that by eliminating the use of awards for the purposes of prescribing superannuation entitlements, some employees will potentially lose superannuation benefits which are dealt with in awards but not in the SGC Act. These are persons who earn less than $450 per month, employees over age 70 or employees under 18 working less than 30 hours per week.

SALARY SACRIFICE ARRANGEMENTS

The WorkChoices legislation creates a system of minimum entitlements known as the Australian Fair Pay and Conditions Standard (AFPCS). Rates of pay are included in the AFPCS in place of rates of pay in federal awards. The conditions established by the AFPCS operates by providing that the AFPCS prevails over a Workplace Agreement or a contract of employment that operates in relation to an employee where, in a particular respect, the AFPCS provides a more favourable outcome to the employee. To facilitate salary sacrificing, the Workplace Relations Regulations provide that the AFPCS does not provide a more favourable outcome if the employee gives the employer a written election separate to a Workplace Agreement or contract of employment for a salary sacrifice arrangement and the guarantee of the basic periodic rate of pay would be satisfied if the amount of the salary sacrifice were instead paid to the employee.

Although this arrangement does not apply only to superannuation contributions but may also apply to other benefits such as fringe benefits, it clearly provides a scope for salary sacrificing of employer superannuation contributions which was not available for award employees prior to WorkChoices. Previously, it was not possible to pay salary less than an award minimum wage unless there was a specific provision contained in the relevant award authorising this to occur or where it was permitted under an industrial agreement including an Australian Workplace Agreement.

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AGREEMENT MAKING UNDER WORKCHOICES

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Introduction

The Federal Government's WorkChoices legislation came into effect on 27 March 2006 setting out a number of significant changes to the national workplace relations system. This article provides an overview of workplace agreements under the new legislation.

The following are now the most common workplace agreements implemented under the Workplace Relations Act 1996 (“the Act”) in the majority of industries:

- Union Collective Agreement;
- Employee Collective Agreement; and
- Australian Workplace Agreements.

An important change to the Act is that a workplace agreement now displaces any former Federal or State Award, therefore you must ensure that the workplace agreement includes all necessary terms and conditions of employment.

Choosing an Agreement

Parties may choose to implement one particular workplace agreement, a combination of different agreements for various employees or no workplace agreement at all.

All employers should review their current agreements and decide which type of agreement to implement or maintain in the future under the new legislation. The decision will be dependent upon any existing agreement which has already been implemented, the industry and the workplace. Whichever is chosen, the agreement itself must comply with the new legislation.

Content of Workplace Agreements

A workplace agreement must deal with certain matters, particularly the nominal period of operation, dispute resolution and protected allowable matters.

The protected allowable matters include:

- Rest breaks;
- Incentive-based payments and bonuses;

- Annual leave loading;
- Public holidays (excluding union picnic day) or any gazetted day in lieu of a public holiday;

Monetary allowances for:

- expenses incurred in the course of employments;
- responsibilities or skills not taken into account in rates of pay of employees; or
- disabilities associated with the performance of particular tasks or work in particular conditions or locations.
- Loadings for overtime or shift work; and
- Penalty rates.

Protected allowable matters can be modified or removed by specific provisions in the agreement. Therefore, where a workplace agreement is silent regarding any of the above matters, the protected allowable matters will automatically apply.

A workplace agreement must also contain provisions which are at least equal to the Australian Fair Pay Commission Standard (AFPCS) and must not contain any "prohibited content".

The AFPCS sets out the following minimum requirements:

- The applicable basic periodic rate of pay determined under the Australian Pay and Classification Scale or the applicable casual loading;
- Four weeks paid annual leave per year (five weeks for shift employees);
- Ten days paid personal/carer's leave per year and two days compassionate leave per occasion;
- Up to 52 weeks unpaid parental leave; and
- A maximum of 38 ordinary hours of work (which can be averaged over twelve months) and reasonable additional hours.

A workplace agreement cannot include prohibited content. Prohibited content is set out in the Act and includes the following :

- Deductions from pay for union fees;
- Leave to attend union training;
- Leave to attend union meetings;
- Dispute resolution with mandatory union involvement;
- Union right of entry;
- Limitations or prohibitions on the engagement of independent contractors and labour hire employees;
- Cashing-out of annual leave except in accordance with the Act;
- Encouragement of union membership;
- Industrial action;
- Remedies for unfair dismissal;
- Restrictions on the use of AWAs; and
- Matters which do not pertain to the employment relationship.

A workplace agreement can also "call up" other industrial instruments, however, employers must be extremely careful not to include any content which is in breach of the Act. Employers must also ensure that the content which is called

up makes sense in the context of your workplace agreement. Wherever possible, former award terms should be expressly consolidated with the terms of agreements.

Negotiations

The Act also prevents the parties from engaging in any duress or coercion or any behaviour which is false of misleading in order to get another person to agree, or not to agree, to make, approve, lodge or terminate a workplace agreement.

The rules in relation to discrimination between unionists and non-unionists and the freedom of association provisions also act to prevent discrimination by one party against the other on the basis of membership of a particular organisation.

Checklist

Prior to commencing to negotiate a workplace agreement, we recommend that you carry out the following:

- Obtain professional advice about the most appropriate form of workplace agreement, the process, content of agreements, conducting negotiations, and managing the risk of industrial action;
- Decide on an appropriate form of workplace agreement;
- Plan negotiations;
- Prepare a draft workplace agreement;
- Ensure that the draft document contains all required provisions, all necessary terms and conditions of employment and no prohibited content;
- Ensure that all industrial conditions from other instruments which are to be called up in the workplace agreement are appropriate to be included;
- Nominate a contact person to be involved in negotiations and take notes; and
- Ensure that none of the parties engage in any inappropriate behaviour when negotiating a workplace agreement.

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CHILD AND YOUNG WORKERS' CODE OF PRACTICE 2006

The Code commenced as of 1 July 2006. It provides guidelines for safety at workplaces where children might be working or in attendance. **STEPHEN HUGHES**, Partner

The Code is issued under the Workplace Health and Safety Act ("the Act") and applies to all areas in Queensland defined as a "workplace" where children are working or likely to be present.

The Act provides an overarching obligation on a range of entities, from employers to property owners and persons in control of property, plant or equipment to protect the safety of all persons attending at a workplace; including workers, visitors and other non workers, including children. The only defence to a prima facie breach of that obligation (i.e. a person has been injured) is to show that all reasonable and responsible steps to manage all risks have been taken by following the relevant Code or adopting an alternative method which gives the same or greater level of protection than the Code.

Accordingly, where children are either working at or present at a workplace, the Children's Code must be adopted or an alternative equivalent or greater standard needs to be implemented.

The Act defines a "workplace" as any place where work is, or is to be performed by a worker or a business. Whilst this definition includes places obviously recognised as workplaces, such as farms, feedlots, shops, factories, construction sites etc, it also includes less obvious workplaces such as a vehicle supplied for use by a worker in the performance of their work.

Examples given under the Code of when a child may be on a workplace include participation in a work experience program, attendance at a parent's workplace at any time, e.g. during school holidays, attendance to receive treatment in a hospital or medical centre, live on a farm or other workplace, ride in a truck, tractor or other vehicle used for work, help with farm work, help in a family shop or business; and enter a home, shed or work area used by a person who works from home.

Section 4 of the Code sets out matters that need to be addressed by duty holders where children are likely to attend a workplace. It is reiterated that the normally adventurous behaviour of children means that they are more likely to play on equipment, climb heights, enter and hide in restricted areas, play in excavations, and experiment with substances they may find. Accordingly, duty holders are obliged to repeatedly question themselves as to how and when children could gain access to the workplace, what they are likely to find, and what they are likely to do.

All persons/ entities owing duties under the Act should work through the risk management process set out in Section 5 of the Code; which sets out a 5 stage process to manage exposure to risks involving:

1 Identification of hazards;

2 Assessment of risks that may result because of the hazards;

3 Decisions on appropriate control measures to prevent or minimise the level of risk;

4 Implementation of the determined control measures; and

5 Monitoring and review of the effectiveness of the chosen control measures.

Whilst acknowledging that child supervision is necessary, the Code emphasises that this is only an aspect of controlling the exposure to risks and that elimination of the hazard is always the best option.

It is also acknowledged that this is not a "one off" process but requires revision and refinement on an ongoing basis because hazards might arise or change, the appreciation of risk might alter due to subsequent events or statistical analysis, and better or alternate control measures might be identified or come into existence.

The Code provides an example of a risk assessment in Appendix 1, however it is incomplete. The example refers to estimates of the likelihood of the risk, the consequences of the risk, and a rating of the risk using a risk priority chart. The requisite point scoring chart has not been supplied and does not form part of the Appendix. Thynne & Macartney has two versions of a risk analysis chart which could be used in the circumstances.

Appendix 2 of the Code makes it clear that the Children's Code places particularly onerous responsibilities on owners and managers of rural workplaces for children visiting or living on rural properties. Matters raised include:

- whether children have sufficient mental and physical development to operate machinery controls;
- children must wear hearing protection when they operate or are near noisy machinery;
- children must wear appropriate personal protective equipment, such as helmets, when on horses, bikes and ATVs;
- children must wear seatbelts when riding in vehicles and do not ride in the back of utes or trailers;
- all chemicals and explosives are to be locked away from access;
- workshops must be locked, with child access only under adult supervision;
- childproof fencing to separate children from animals, vehicles, moving machinery and road traffic;
- securing storage bins, silos and underground tanks to prevent child access; and
- prohibiting children from entering animal enclosures and paddocks without close adult supervision.

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WORK CHOICES RECORD KEEPING REQUIREMENTS

WorkChoices requires employers to record and retain certain information regarding employees and to detail certain information in writing on employee's pay slips. **SONIA BOLZON**, Partner and **FIONA LEE**, Senior Associate

Employers must keep these records for at least seven years or risk fines of up to $2,750 per breach, of failing to keep appropriate records.

On 22 September 2006, just five days before the record keeping requirements were due to commence, the Federal Government released an amendment to the WorkChoices regulations, effectively delaying the commencement of the record keeping requirements until 26 March 2007.

While employers will now not be penalised for failing to keep appropriate records until 26 March 2007, prudent employers should take steps to ensure compliance with the legislation as soon as possible.

The key requirements of the legislation are detailed below.

6.1 Record Keeping Requirements

The WorkChoices legislation requires employers to record and keep the following details for each employee:

- The employer's name;
- The employee's name and date of birth;
- The names of any industrial instrument which covers the employee (eg an award, collective agreement or AWA);
- The employee's classification under that instrument;
- Whether the employee undertakes part-time or full-time work and whether they are engaged as a permanent, temporary or casual employee;
- If the employee is full-time or part-time, the specified number of hours to be worked each week;
- The number of hours worked each day and any breaks taken by the employee (only where the employee's base salary ie excluding super, bonuses, loadings etc is less than $55,000 p.a) where the employee is a casual or irregular part-time worker;
- If the employee is entitled to overtime or penalty rates - finishing times and any overtime worked;
- If the employee has agreed to an averaging of hours, a copy of the written agreement;
- If the employer and the employee have agreed to cash out leave, a copy of the written agreement;
- The employee's rate of pay (including the gross and net amounts paid and any deductions);
- Any allowances, penalties, loadings, bonuses or incentive-based payments;
- The date of payment and period to which the payment relates;
- Leave taken and leave accrued and details of leave which the employee has elected to forego;
- Superannuation fund name and contributions if these are provided for in the award or agreement which covers the employee (excluding those made to defined benefits superannuation funds);
- The termination of the employee's employment including:
  a. The name of the person who terminated the employment;
  b. The reasons for the termination;
  c. How the termination took place;
  d. The date of termination.

6.2 Pay Slip Requirements

The WorkChoices legislation requires employers to include the following information on employee's pay slips:

- The employer's name;
- The employee's name;
- The employee's classification under the award or agreement;
- The date of payment;
- The period of payment;
- The gross and net amount of payment;
- Any allowances, bonuses, incentive-based payments or other separately identifiable entitlement paid;
- For employees not paid an hourly rate - the remuneration at the time expressed as an hourly rate;
- Details on any overtime, penalty rates or loadings;
- All deductions from an employee's pay must be authorised in writing by the employee;
- Employer's who are required to make superannuation contributions for the benefit of employees (except employers who contribute to a defined benefits scheme) should also include the following details on pay slips:
  - The amount of each superannuation contribution the employee makes;
  - The amount of each superannuation contribution the employer makes during the pay period;
  - The name of the superannuation fund into which the superannuation contributions are made.

Pay slips must be issued to each employees within one day of the payment being made.

Employees, former employees and other authorised persons, including government inspectors, have the right to access time and wages records. Reasonable assistance must be given to an authorised person seeking to inspect and copy a record and failure to do so may result in a penalty being applied. Employers have the right to ask a person for reasonable proof that they are authorised to inspect records.

For further information regarding record keeping or pay slip requirements (including a copy of a template record keeping book and pay slip) please contact:

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NEW FEDERAL INDEPENDENT CONTRACTOR LAWS

PAUL RONFELDT, Partner

The federal government has made a further move within the sphere of industrial relations reform with the proposed introduction of the *Independent Contractors Bill* 2006 and by making consequential changes to the *Workplace Relations Act* 2006.

Broadly speaking, the changes aim to protect genuine independent contractors through a system of regulation that is separate from laws regulating employment relationships.

Many businesses will be affected by these reforms, as approximately 10% of the Australian workforce are classed as self-employed contractors.

The laws passed the House of Representatives on 23 September 2006. At the time of writing, the laws were awaiting debate in the Senate. It is not known when the Government will seek to have the Bills passed by the Senate.

Once in operation, the new laws will:

- exclude the operation of State industrial laws outside of Victoria that deem certain groups of independent contractors to be employees for the purposes of industrial awards and other employment benefits such as annual leave and parental leave - importantly, other State and federal laws that treat independent contractors akin to employees, such as laws relating to superannuation, workers compensation, occupational health and safety and discrimination are unaffected by these changes;
- establish a three year transitional period during which existing independent contractor arrangements that are subject to State 'deeming' provisions will continue in order to allow the parties to adapt their contracting arrangements;
- exclude independent contractors from the operation of NSW and Queensland unfair contracts laws;
- give independent contractors greater access to federal unfair contracts laws by allowing the Federal Magistrates Court, as well as the Federal Court of Australia, to hear applications to review allegedly unfair or harsh independent contractor arrangements - in determining whether an independent contractor arrangement is unfair the Federal Magistrates Court or the Federal Court may have regard to a number of factors including:
  - the relative bargaining power of the parties;
  - whether undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract;
  - whether the contract provides total remuneration that is less than that of an employee performing similar work.
- protect outworkers in textile, clothing and footwear industries including by the provision of a default minimum rate of pay;
- impose penalties of up to $33,000 on an employer who:
  - describes an employment relationship as an independent contractor relationship;
  - offers work, which in fact would involve an employment relationship, on the basis that it entails an independent contractor relationship;
  - dismisses an employee for the sole or dominant purpose of re-engaging them as an independent contractor;
  - knowingly makes false statements to induce an employee to accept an engagement as an independent contractor.

Significantly, the unfair contracts provisions apply to both independent contractors who perform work as individuals and incorporated independent contractors where work is performed in connection with a contract for services by a director of the corporation or a member of the director's family. This change, together with the conferral of a jurisdiction on the Federal Magistrates Court to review independent contractor agreements and the elimination of the NSW and Queensland unfair contract laws, will generate a strong growth in claims by independent contractors under the unfair contracts provisions.

A significant exclusion from the new laws has been created to allow for the continuation of Victorian and New South Wales laws regulating owner-drivers. The federal government has indicated that it will conduct a review of the operation of those laws before implementing further reforms.

Implications

The changes will affect many different types of work relationships in many different industries.

Organisations engaging independent contractors should take the following steps in responding to these very significant changes:

- assess whether any individuals have been incorrectly characterised as independent contractors rather than as employees and where necessary renegotiate the engagement so that the individual is properly treated as an employee;
- establish clear guidelines to avoid incorrectly engaging persons as independent contractors and to prevent the unlawful conversion of employees to independent contractors;
- audit current independent contractor engagements to ensure that they comply with both these new laws and existing laws relating to taxation, superannuation, occupational health and safety, workers compensation and discrimination laws;
- review independent contractor agreements to ensure that their terms are not unfair or harsh.

Importantly, the new laws will not define the term "independent contractor" beyond its meaning under the common law. The courts use a multi-factor test to determine whether a person is an employee or independent contractor. The courts look particularly at:

- a principal's right to control and delegate work and the manner in which the work is performed;
- the mode of remuneration;
- the provision and maintenance of equipment;
- the hours of work and the provision for holidays; and
- the deduction of income tax.

There will remain many cases where uncertainty exists about whether a person is working as an independent contractor or an employee. Accordingly, legal advice is recommended when reviewing the implications of these changes.

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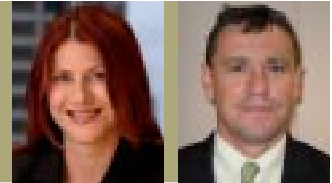
RESTRAINT OF TRADE CLAUSES - HAS THE PENDULUM SWUNG?



In *Cactus Imaging Pty Limited v Glen Peters* [2006] NSWSC 717, the New South Wales Supreme Court was asked to consider the enforceability of clauses in an employment contract which sought to restrain a former employee from disclosing confidential information, and for a period of 12 months, from soliciting former customers and from enticing or recruiting a former employer's employees. The case could have significant implications for employers seeking to enforce post termination restraint clauses.

LISA BERTON, Partner and **RUSSELL BALDWIN**, Solicitor

The Facts

Glen Peters commenced employment with Cactus Imaging Pty Limited ("**Cactus**") in 1999 as a salesman. In 2003, Mr Peters became Cactus' New South Wales Sales Manager and held that position until he resigned on 28 September 2005 to take up employment with a company that was not in competition with Cactus. However, approximately 5 months later, Mr Peters accepted a position with Metro Media Technologies Inc ("**Metro**") a company which was Cactus' main competitor in the grand format printing market business which involves the production of images for display on large outdoor advertising billboards.

***Restraint of Trade Act* 1976 (NSW)**

The employment contract was governed by the *Restraints of Trade Act* 1976 (NSW) ("the Act'). At common law, a restraint of trade is generally void on the grounds of public policy unless it is reasonable with reference to the interest for which protection is sought and the scope and duration of the restraint. However, in New South Wales, a restraint is valid to the extent that it is not against public policy. The reasonableness or otherwise of a restraint is judged at the time the employment contract is made.

In Cactus, his Honour restated the three stage approach that applies in New South Wales. Firstly, the Court is required to consider whether the alleged breach (independently of public policy considerations) does or will infringe the terms of a restraint clause. Secondly, then determine whether the restraint is void on the grounds of public policy and thirdly, if not, then the restraint is valid unless the Court considers that it is necessary to make an order pursuant to section 4(3) of the Act which allows the Court to "read down" the restraint provision.

Confidential Information

It is axiomatic that an employer has a legitimate interest in protecting certain identifiable forms of confidential information. However, a plaintiff must be able to specify the relevant information for which protection is sought. In Cactus, there was no evidence that Mr Peters had deliberately purloined confidential information.

Importantly, the Court heard evidence that Mr Peters in his capacity as State Sales Manager had acquired detailed knowledge of Cactus' internal production costs, pricing parameters, quoting methods and scheduling software and that such information would provide Cactus' competitors with a commercial advantage. The Court found that Cactus had a legitimate interest in the protection of that information provided the information remained current.

The Court then considered whether the duration of the non-solicitation restraint was reasonable and in doing so reviewed the "customer connection" that Mr Peters had established with Cactus' clients during the course of his employment.

Customer Connection

In considering the non-solicitation restraint his Honour restated the following principles:

(i) that an employer's customer connection is prima facie, an interest which can support a reasonable restraint of trade particularly in circumstances where the employee has become, from the client's perspective, the "human face" of the business or the person who represents the business to the customer,

(ii) while an employer is not entitled to be protected against "mere competition" by a former employee, the employer is entitled to be protected against unfair competition arising from the use by a former employee of the customer connection which the employee has established during the course of the employment,

(iii) the goodwill inherent in the customer connection belongs to the employer and not the former employee.

The Court heard evidence which established that although markets were price sensitive, very often the most critical element involved in obtaining and retaining business was the personality and knowledge of the sales representative from the client's perspective. In examining Mr Peter's role with Cactus, the Court noted that Mr Peters had direct access to client account managers and had acquired knowledge of the client's particular needs, requirements and "idiosyncrasies".

The Court found that the non-solicitation restraint was not only supported by the protection of the customer connection but was also supported by the protection of confidential information.

Duration of Restraint

Having assessed the application of the restraint, the Court then examined what would be a reasonable restraint period. In making this assessment, Brereton J noted that the test of reasonableness, in circumstances where the customer connection restraint is supported by a confidentiality provision, is how long would it take a reasonably competent replacement employee to show his or her effectiveness and to establish a rapport with customers. Also relevant was the length of time the

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former employee's influence would subsist and, how long the confidential information remains current and commercially advantageous.

In determining that a 12-month period was reasonable, the Court had regard to the following indicia:

- the restraint period that had been agreed
- the volume of customer contact
- the period of time it would take a new employee to prove his or her competence and to develop client rapport
- the nature of the confidential information that the employee has retained and whether the employer has a legitimate interest in the protection of that information

Non-Recruitment Covenant

Cactus also sought to restrain Mr Peters for a period of twelve months from soliciting or enticing Cactus' employees, consultants or contractors. His Honour considered the restraint in the context of the goodwill of the business and stated that:

"Staff connection constitutes part of the intangible benefits, which may get a business value over and above the value of the assets employed in it and thus comprises part of the goodwill. It is amenable to protection by a covenant in a manner solely to customer connection even in the absence of protectable confidence".

The Court considered the following factors were relevant in assessing whether the staff connection restraint was reasonable:

- The seniority of the employee.
- The length of time that the ex-employee's influence over the other employees would remain.
- The term of the employment contract, and the notice period in the employment contract.

The Court found that Mr Peters was in a position to use his influence to "arrange the defection of the state sales team to a competitor" and enforced the 12 month non recruitment restraint.

Summary

Although the Cactus decision may be limited to its own facts, it is significant as it demonstrates that the Courts in New South Wales are prepared to take a robust approach to the enforcement of carefully drafted restraint provisions particularly if the restraint is accompanied by a provision which seeks to protect specified confidential information.

The decision also confirms that business goodwill is a legitimate interest which can be protected insofar as maintaining a stable workforce increases the value of the goodwill of the business. Importantly, the non-solicitation restraint applied to customers that Mr Peters had not previously had a business connection with.

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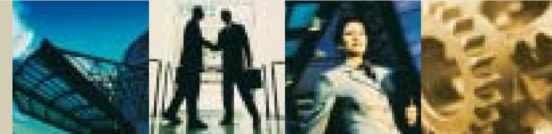

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