



Anderson Rice News Winter 2007 Edition 2

In this Edition:

Workplace Relations Update: Three recent cases consider the Genuine Operational Reasons exemption to the unfair dismissal laws pursuant to the Workplace Relations Act.
Chris Pollard - Senior Associate, Workplace Relations & Litigation
Nicole Baker - Lawyer, Commercial Litigation & Insurance Law

Article: Migration Law Update - Changes to the law commence as of 20 August 2007
Lily Ong - Lawyer, Migration Law

Article: Why use a Finance Broker?
Joe Terlato - Acceptance Finance

**This bulletin is for general information purposes only and should not be used or relied upon as an alternative to obtaining detailed legal advice. Anderson Rice disclaims liability of any kind whatsoever to any reader of this bulletin who acts in reliance wholly or partly upon these contents.*

Editor

Nicole Baker

Lawyer, Litigation & Insurance

ANDERSON RICE | Newsletter

Tel (03) 9672 2666
Street
Fax (03) 9642 0271
Australia
Email lawyers@andrice.com.au

www.andrice.com.au

8001

Melbourne

Level 10, 555 Lonsdale

Melbourne Vic 3000

PO Box 14099
Melbourne Mail Centre

AUSDOC DX 177



Workplace Relations Update *Genuine Operational Reasons Exception*

Chris Pollard and Nicole Baker

Three recent cases look at the scope of the Operational Reasons exception to the unfair dismissal laws pursuant to ss 643(8) and 643(9) of the *Workplace Relations Act 1996* (Cth).

[Great Southern E-vents Pty Ltd v Peskops](#)
[2007] NSWSC 382 (Hamilton J) 13 April 2007

Ms Peskops was employed as a sales and marketing manager for Great Southern E-vents Pty Ltd. Her employment contract provided that she was restrained from using any confidential information obtained during the course of her employment after her employment agreement terminated. Ms Peskops was dismissed in March 2007, after which she commenced her own events management company in competition with Great Southern E-vents.

However, at the time her employment agreement was entered into, Ms Peskops and her employer came to a mutual agreement whereby there would be no other restraint of trade clause entered into her employment contract restraining Ms Peskops from entering into competition or soliciting Great E-vents' clients after her employment ended.

Despite this, Great E-vents sought a court order preventing Ms Peskops from dealing with five specific clients until the end of 2007, on the grounds that those dealings would inevitably involve the use of confidential information.

The relevant test for the court was whether there was a serious question to be tried and whether the balance of convenience favoured the employer in granting the injunction.

The court found evidence that there had already been substantial dealings between Ms Peskops and one of the five specified clients, but it could not be said that those dealings would result in the use of confidential information. Accordingly, no relief was to be granted in respect of that client.

However, in respect of the four remaining clients, the Court held that the balance of convenience favoured granting interlocutory relief because there was evidence that Great E-vents' business would be damaged by the loss of those clients and there was no evidence that granting an injunction would stop Ms Peskops earning a living.

It was noted that Great E-vents' had not been able to refer to any case where an injunction against poaching of clients had been founded solely upon a clause prohibiting the use of confidential information. However, the Court found that there was a serious question to be tried and that Ms Peskops could not realistically deal with the specified clients without using Great E-vents' confidential information.

The court ultimately granted an interlocutory injunction restraining Ms Peskops from having any dealings with four of the five clients until 31 December 2007 or until the final hearing.

Following the decision of *Carter v Village Cinemas Australia* [2007] AIRCFB 35, in which the scope of the operational reasons exemption to unfair dismissal laws was considered by the Australian Industrial Relations Commission (AIRC), two further cases have tested the scope of the exemption.

ANDERSON RICE | Newsletter

Tel (03) 9672 2666
Street
Fax (03) 9642 0271
Australia
Email lawyers@andrice.com.au

www.andrice.com.au

8001

Melbourne

Level 10, 555 Lonsdale

Melbourne Vic 3000

PO Box 14099
Melbourne Mail Centre

AUSDOC DX 177



[*Cruickshank v Priceline Pty Ltd*](#) [2007] AIRC 292 (17 April 2007)

In this case, Mr Cruickshank was employed by Priceline Pty Ltd as a space planner. Following a well-publicised discrepancy in its accounts and two hostile takeover bids, Priceline conducted a review of its organisational structure and operations, subsequently leading to 32 employees, including Mr Cruickshank, being made redundant. Following the termination of his employment Mr Cruickshank saw his job advertised.

Mr Cruickshank made a claim for unfair dismissal on the grounds that his termination was a "sham", on the basis that he had been replaced by another employee performing the same duties. He argued that the real reason for his termination was cost reduction, not a restructure.

Priceline relied on the operational reasons exemption to the unfair dismissal laws pursuant to ss 643(8) and 643(9) of the *Workplace Relations Act 1996* (Cth) ("**the Act**"), which essentially provides that an employee is prevented from pursuing a claim on the basis that his or her dismissal was harsh, unjust or unreasonable if his or her employment was terminated for genuine operational reasons. Priceline claimed that Mr Cruickshank's termination arose out of a restructure due to the company's financial difficulties.

The Commission accepted that Priceline terminated Mr Cruickshank's employment for operational reasons within the meaning of s 643(8) of the Act. In making this finding, the Commission considered the decision of *Village Cinemas v Carter* and held that Mr Cruickshank's termination fell within the test set out in that case. In *Village*, it was held that where an employee's termination does not need to be an 'unavoidable' consequence of operation requirements for the exemption to apply. The Commission also considered that the termination was not a sham, but rather resulted from a decision by Priceline to reorganise its business.

Summary

This case confirms that the concept of an operational 'reason' under the Act is much broader than the pre-Work Choices idea of an operational 'requirement', and is consistent with the full bench reasoning in *Village*. However, an important factor in this case was the financial difficulties Priceline faced which led to the restructure. Further, any employer who terminates employment on the basis of the cost of wages in circumstances where the employee is covered by an industrial instrument may contravene the freedom of association provisions in ss 792 and 793 of the Act.



[Owens v Whyalla Aged Care](#) [2007] AIRC 245
(12 April 2007)

In this case, Ms Owens was employed as the Manager of Community Services at Whyalla Aged Care ("WAC"), and reported directly to the CEO. Ms Owens was dismissed following an investigation by WAC into reports that she bullied and harassed other staff members. WAC initially considered whether Ms Owens could be employed in another position, however, none was available and thus her employment was terminated.

Ms Owens subsequently brought a claim for unfair dismissal. WAC argued that Ms Owen's employment was terminated for genuine operational reasons because it had to consider its existing management structure to determine whether it could accommodate Ms Owens within that structure. The employer submitted that the alleged victim of the bullying had already resigned and, if Ms Owens had retained her position of manager community services, it was likely that there would be further losses of staff. Therefore, the employer contended, Ms Owens' termination was for an operational reason of a structural nature. The employer also contended that as it had to take into account the occupational health and safety of its other

employees, the continuation of Ms Owens' employment would have been unworkable.

The Commission held that WAC could not rely on the operational reasons exemption as provided in s 643(8) of the Act. It held that the structure of the organisation had not changed, only the identity of the person within the structure and that the resignation or potential resignation of employees was not a reasons for the termination of employment, but a consequence of bullying. The Commission went on to find the true and genuine reason for the termination of Ms Owens' employment was exclusively misconduct comprised of alleged bullying behaviour and misconduct is not a genuine operational reason within the meaning of the Act.

Summary

This decision sets limitations on the scope of the genuine operational reasons exemption, in that it demonstrates that it will be difficult for employers to terminate employees for misconduct and then rely on the operational reasons exemption.

For further information contact:



Chris Pollard
Senior Associate
cjp@andrice.com.au



Nicole Baker
Lawyer
njb@andrice.com.au

ANDERSON RICE | Newsletter

Tel (03) 9672 2666
Street
Fax (03) 9642 0271
Australia
Email lawyers@andrice.com.au

www.andrice.com.au

8001

Melbourne

Level 10, 555 Lonsdale

Melbourne Vic 3000

PO Box 14099
Melbourne Mail Centre

AUSDOC DX 177



Migration Law Update

Lily Ong

Migration Amendment (Employer Sanctions) Act 2007

EMPLOYING OVERSEAS WORKERS

The Howard government has overseen a large expansion in the Australian programmes for skilled migration. Over 102 800 places have been provided for 2007-2008. The rise in the use of temporary overseas workers to alleviate shortages in the Australian workforce has also motivated continued reform in the area. Recent developments are outlined in this update.

Changes to Visas Requirements for Temporary Overseas Workers

Skilled temporary overseas workers' visas (subclass 457) have been scheduled for several changes by the Minister for Immigration Kevin Andrews. The Department wishes to send a message to employers that accessing foreign overseas labour is a privilege which should not be abused or taken for granted.

Changes include new civil penalties for employers breaching sponsorship obligations; arrangements to fast-track applications for employers with proven records of compliance with the Department of Immigration; and higher English language requirements for prospective workers.

New Sanctions against Employers

In February this year, federal Parliament passed the *Migration Amendment (Employer Sanctions) Act 2007*. It will come into force on 20 August 2007, unless Parliament proclaims an earlier date.

The new Act aims to make it easier to enforce visa work conditions by creating new offences for anyone allowing illegal workers to work.

Under the Act, a person who allows an illegal worker to work, or refers an illegal worker for work to another business will be guilty of an offence. Illegal workers are defined as non-Australian citizens without a visa or with a condition on their visa forbidding work.

Employers will now have an obligation to ensure they are not "reckless" in allowing illegal workers to work. This may mean checking prospective workers work rights with the Department of Immigration. The Department has advised that employers should conduct checks if they operate in a high risk industry (described as: hospitality, agriculture, manufacturing, construction, transportation, retail, or sex industries), or which have already been issued a warning notice, or if employers have in their possession information suggesting an employee may be an illegal worker.

Companies found guilty of these offences risk fines of up to \$66 000. Individuals are subject to fines up to \$13 200 as well as imprisonment for up to two years. Penalties are higher in "aggravating circumstances" where a worker is used for forced labour, sexual servitude or slavery, and the employer knows or is reckless to this. In these circumstances, maximum penalties rise to \$165,000 for companies, and \$33,000 and five years jail for individuals.

Employers should be aware that checking people's work rights simply because they are not Caucasian or speak a foreign language could constitute discrimination under the *Racial Discrimination Act 1975*. Employers need to treat all employees equally regardless of race or other attributes.

[Top](#)

ANDERSON RICE | Newsletter

Tel (03) 9672 2666
Street
Fax (03) 9642 0271
Australia
Email lawyers@andrice.com.au

www.andrice.com.au

8001

Melbourne

Level 10, 555 Lonsdale

Melbourne Vic 3000

PO Box 14099

Melbourne Mail Centre

AUSDOC DX 177



Pay Rates for Overseas Workers

Minimum pay rates for overseas workers continue to be set by the Minister for Immigration rather than by the Australian Fair Pay Commission.

The current minimum rate remains at \$41,850 annually (for a 38 hour week) and this sum must exclude:

- Salary packaged items
- Accommodation/rental assistance
- Incentives, bonuses, commissions
- Shares
- Travel, holidays, health care and insurance
- Vehicles or vehicle allowances
- Communications packages
- Living-away-from-home allowances (LAFHA)
- Superannuation contributions (voluntary and compulsory)
- Other non-salary benefits and deductions.

Some occupations such as in Information and Communication Technology have higher minimum salaries specified.

If awards or other workplace agreements demand a higher salary, this must be paid.

Watch this space for further changes which are on the agenda such as labour market testing, salary levels and training requirements, among other issues presently being discussed to be dealt with post election.

Temporary residents have a pathway to permanent residence and should seek advice as to whether or not they are currently eligible. This obviates the need for the employer to be further liable for future sponsorship undertakings.

SUPPORT FOR DIRECT INVESTMENT

An often overlooked scheme for foreign companies investing in Australia is Invest Australia, a government initiative to encourage investment in Australia by foreign corporations. Invest Australia offers a Supported Skills Program for companies to move staff to Australia to establish operations in Australia.

Companies that make a significant investment in Australia will have three-year agreements to bring managerial and specialist staff who are essential to starting business in Australia into the country.

More information can be found at www.investaustralia.gov.au. Lily Ong Solicitors has experience with business clients in this area and can assist with any enquiries.

GENERAL SKILLED MIGRATION

The Australian government has continued to report prospective changes to the General Skilled Migration Programme through press releases and related policy changes.¹

Changes are expected to affect skilled visas leading to permanent residency such as the Skilled Independent visa, State Nominated, and Sponsored skills visas.

The current points system, including point score, points bonus, and sponsorship requirements are all areas marked for change. A new skilled graduate visa has been suggested, as have changes to visa categories.

A formal announcement by the Department of Immigration is yet to be made. Changes are scheduled for 1 September 2007, but currently no legislation or draft documents are before Parliament or available to the public. These changes will likely be gazetted in July.

¹ See Bob Birrell, *Evaluation of the General Skilled Migration Categories* (March 2006).



We urge skilled migrants eligible under the current regime to apply as possible.

NEW CITIZENSHIP LAW

The *Australian Citizenship Act 2007* has passed through federal Parliament (assented to on 15 March 2007) and is expected to commence on 1 July this year.

The following key changes have been made:

1. Australia allowed dual citizenship in the last round of changes. Under the new Act, any person who previously lost their citizenship as a result of the old s.17 provision may now resume their citizenship. This means that persons who lost their Australian citizenship when another was voluntarily acquired by themselves or their parents are

now able to apply to re-acquire Australian citizen status.

2. A longer residency requirement of four years instead of two will be required for grant of citizenship; and, absences of less than 12 months in the 4 years, as well as less than three months in the 12 months period prior to application. However migrants should be comforted that the Department has the discretion to treat periods of lawful temporary residence in Australia of up to 3 years provided that 12 months as a permanent resident is included in the 4 years prior to lodgement of the citizenship application.

Note that current permanent residents who apply before the commencement of the new Act will not be affected by the new provisions.

For further information contact:

This article is brought to you by Lily Ong, Migration law solicitor and barrister. Lily Ong Solicitors is a boutique legal practice specialising in migration matters. Lily Ong has been a commercial lawyer for over 17 years and specializes in business migration. Lily Ong can be contacted on 9642 1668 or you can email her at lilyong@lilyong.com.

[Top](#)



Why use a Finance Broker *When it pays to take out a loan*

Joe Terlato

These days, with interest rates moving up and so many different loans and lenders in the market, you should rely on a finance broker to do all of the investigative legwork for you.

A good finance broker will be able to source the most suitable loan for your circumstances at the most competitive interest rate available. Special deals with the majority of banks and financial institutions are available - it is just a matter of seeing if you qualify for them.

Confused about buying a mobile phone? Which plan is the best? Leasing and mortgage products have become just as complicated and deliberately so. Financial institutions know it is becoming more and more intimidating to consider reviewing or even refinancing your loan facilities.

“Legwork” - that’s what home buyers appreciate most about finance brokers, according to the latest Mortgage Industry Association of Australia (MIAA) Home Finance Survey.

This national survey shows 80 per cent of clients consider time saving one of the most important benefits of using a finance broker, followed by access to a wide range of loans (78 per cent) and the level of expertise brokers offer (77 per cent). The survey shows a high awareness of finance brokers (89 per cent) among clients. Mr Phil Naylor, MIAA CEO, says the survey also shows customer satisfaction levels are extremely high and customers are willing to buy other loan related services from finance brokers.

“Finance brokers are clearly living up to their reputation for providing expert and professional assistance to clients.” “It’s not surprising that brokers are the fastest growing

source of loans. They offer a unique service to clients who are looking for a product that best suits their needs.”

Even a small difference in the interest rate can make a big difference to the amount you pay. For example, take two mortgage loans, one charging 7.15% per annum, and the other charging 7.65% per annum. The half a per cent (0.50%) difference on a \$150,000 home loan over 25 years, can cost you an extra \$14,579.00.

Let’s go back to basics....

What is a finance broker?

A finance broker is your intermediary between you and the end lender who your loan facility is arranged with.

How much does a finance broker cost?

It will depend on which finance broker you use. There are 3 types:

1. Finance brokers who do not charge you a fee. The lender will usually pay them a fee once the loan has settled and an ongoing fee for the length of your loan (called "trailing commission"). Finance brokers (including Acceptance Finance) often operate this way.
2. Finance brokers who charge you a fee (or commission) and also receive a one-off commission and a trailing commission from the lender.
3. Finance brokers who only charge you a fee and do not receive any payment from the lender for introducing the loan. This type of finance broker is not as common as the other two types.

[Top](#)

ANDERSON RICE | Newsletter

Tel (03) 9672 2666
Street
Fax (03) 9642 0271
Australia
Email lawyers@andrice.com.au

www.andrice.com.au

8001

Melbourne

Level 10, 555 Lonsdale

Melbourne Vic 3000

PO Box 14099
Melbourne Mail Centre

AUSDOC DX 177



Finance brokers should be able to provide you with great value and find you a loan that suits your needs with a competitive interest rate and an appropriate structure to suit either your tax or investment strategies. For most people this service and access to industry knowledge can be invaluable, not only saving a lot of time and effort in shopping around for a loan but also maximising opportunities to achieve your financial goals.

Always ensure you are dealing with someone who is a member of the MIAA.

The world of loans, leases or mortgages, is vast and complex. There are so many providers, so many products, and complicated tax and accounting implications. Who knows what will work best for you?

I invite you to call and pick our brains. It won't cost you a cent, but it could save you a fortune.

TOP TEN LOAN TIPS

1. Arrange finance approval prior to purchasing.
2. Use your equity to borrow.
3. Win rate discounts for bulk business / professional packages.
4. Look for flexibility.
5. Don't rely solely on comparison rates.
6. Compare loan features, not just rates.
7. Look beyond the banks.
8. Beware fixed rates.
9. Can't get a standard loan? There are alternatives.
10. Make sure you have confidence in the firm managing your finances.

For further information contact:

This article is brought to you by Joe Terlato of Acceptance Finance. Acceptance Finance will be regularly contributing to the Anderson Rice newsletter by providing updates on mortgages and leasing. Acceptance Finance can be contacted on 9854 3500 or you can visit their website at www.acceptancefinance.com.au.

[Top](#)

ANDERSON RICE | Newsletter

Tel (03) 9672 2666
Street
Fax (03) 9642 0271
Australia
Email lawyers@andrice.com.au

www.andrice.com.au

8001

Melbourne

Level 10, 555 Lonsdale

Melbourne Vic 3000

PO Box 14099
Melbourne Mail Centre

AUSDOC DX 177