

April 2009

Business News

Legal Issues update for Canberra Businesses

Snedden Hall & Gallop
43 - 49 Geils Court
Deakin ACT 2600

Changes to Business Sponsorship for Migration Purposes

Canberra businesses that sponsor, or are considering sponsoring, overseas employees to fill gaps within their businesses will need to be aware of significant recent changes to the law surrounding temporary sponsorships.

While sponsoring overseas employees remains a great opportunity for businesses to potentially grow their workforce and improve their productivity, recent reports conducted on behalf of the Department of Immigration and Citizenship (DIAC) have raised a series of issues about the integrity of the current system.

In response, DIAC has changed its policy in relation to overseas sponsorships. These changes have two key impacts on Canberra businesses:

English Language Requirements

On 1 April 2009, the government announced an increase to the minimum English language requirement to a band score of 5 on the IELTS, the international English test. This applies to all occupations classified as tradespersons, clerical, sales and service workers. While it does not apply to managers, professionals and associate professionals, it does apply to chefs and head chefs.

The obvious implications of this, and the apparent targeting of the restaurant industry, are that employers looking to sponsor chefs, cooks and any other tradespeople or service workers, will need to make sure their employees can speak English or fall within one of the few exceptions.

Other Policy Changes

Other recent changes to the 457 visa regime include the implementation of the *Worker Protection Act 2008* and the introduction of draft regulations outlining employers' sponsorship obligations. DIAC is attempting to reinforce employers' obligations to keep adequate records, cooperate with DIAC, pay the minimum salary and cover various travel and government costs in relation to their sponsored employees.

In February 2009, the government also announced that it had revised the minimum salary level and reassessed the requirement for overseas sponsorships to be of benefit to Australia. These changes recognise the shift in the employment rate due to the economic downturn. It is now necessary for employers to provide empirical and clear evidence that an overseas sponsorship is preferable to any Australian employment or that such Australian employment is not available for the specific position. In relation to the minimum salary, employers now have an onus to prove that their proposed salary is at a market rate and is not simply the DIAC gazetted minimum salary.

The abovementioned changes are significant for any Canberra business looking to sponsor overseas employees. While the government still recognises the important role that overseas sponsorships can play in Australian business and the benefit they can bring to the Australian economy, increased scrutiny is being applied and care must be taken in all applications.

Nick Tebbey (MARN 0533386), Senior Associate, 6285 8056

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Changes to Your Employment Arrangements under the FairWork Act 2009

The Labor Government has been successful in legislating to remove the former Work Choices legislation and replace it by the *FairWork Act 2009*. This will set up an entirely new industrial relations system for Australia, and, while it retains some features of Work Choices, it certainly picks up on a number of important policy issues, which were extensively debated in the last election.

All components of the Act will become law on 1 July 2009, except for the imposition of new national employment standards, and modernised awards which will commence on 1 January 2010.

The key areas where the *FairWork Act* will make significant changes are:

- Unfair dismissal - the Act has removed the 100 employees or less threshold to unfair dismissal claims. Small businesses are given special treatment and a 'fair dismissal code', has been created.
- Enterprise Agreements - the Act provides no distinction between union and non-union agreements and encourages the development of collective enterprise agreements between employers and employees.
- A relevant union can now be covered by an agreement and union related matters (previously prohibited) can be included in agreements.
- Unlawful content still exists but it is limited to such things as discriminatory clauses and clauses that are inconsistent with the unfair dismissal regime, freedom of association, industrial action and OH&S.
- Greenfields Agreements for new businesses are encouraged.

All agreements should include an 'individual flexibility arrangement', which allows modified terms of employment to override award provisions, e.g. by an averaging of hourly rates to subsume penalties and overtime.

All agreements must pass the 'better off overall test' by comparison to the relevant award.

New Bargaining Regime

The Act introduces the concept of compulsory bargaining and good faith bargaining. Orders can be made to compel parties to negotiate to resolve disputes regarding employment agreements or industrial action.

Bill Andrews, Director, 6285 8087

For further information regarding this newsletter,
or for any of your legal needs, call
Snedden Hall & Gallop Lawyers: 6285 8000

Free Employment Seminars

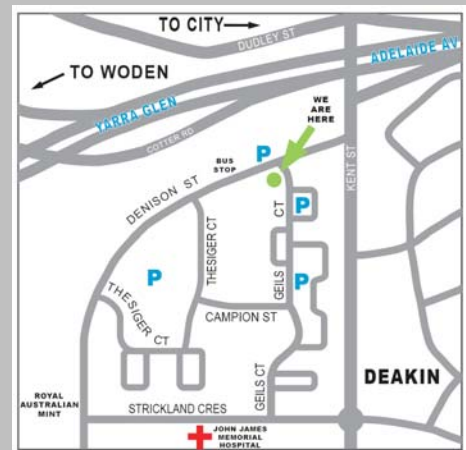
To discuss these FairWork issues and answer any questions you may have, we will be holding two **free seminars** in the coming weeks for your benefit. We look forward to seeing you there.

Mon 11 May, 5.30pm
Snedden Hall & Gallop Offices
43 – 49 Geils Court
Deakin ACT

OR

Thur 14 May, 5.30pm
Tuggeranong Community Centre
Cowlshaw Street
Tuggeranong ACT

To book a seat at one of these two seminars, please call Laura on **6285 8000**. Bookings are essential.



Restraints of Trade for High Level Employees

Often we are asked by employers to insert a 'restraint of trade' in employment agreements to limit a retiring employee's capacity to work in competition.

Essentially, restraints of trade are invalid at common law because they are regarded as being contrary to public policy. However in New South Wales, legislation has changed this position. The *Restraint of Trade Act 1976* may deem the restraint as valid to the extent that it is not contrary to public policy.

In a recent New South Wales Court of Appeal decision in *Miles v Genesys Wealth Advisers Ltd [2009] NSWCA25*, a former managing director was validly restrained from competing with his former employer for a period of 30 months. The restraint prohibited the former employee from engaging in conduct that may have led to disclosure of confidential information and so the restraint was valid in order to enable the employer to protect its assets, that is, its intellectual property, client lists etc. Thirty months was considered a reasonable period to protect this interest.

Bill Andrews, Director, 6285 8087