

“VISION IN THE WORKPLACE”

Issue Thirty-eight, November 2008

In this edition of Vision in the Workplace, we look at the a recent Judgment of the Equity Division of the Supreme Court of New South Wales which implied a nine (9) months notice in lieu term into a Senior Manager’s contract and a Federal Court Judgment which restrained two (2) former employees who were using their former employer’s confidential information as a “springboard”. We also look at the first report of the National OHS Review Panel into Model Occupational Health and Safety Laws.

Implied Reasonable Notice Applied By the Equity Division of the NSW Supreme Court

In a recent case involving a Senior Manager, Her Honour Ms. Justice Patricia Bergin of the Equity Division of the Supreme Court of New South Wales (**“the Court”**) ordered an employer to pay nine (9) months notice in lieu of termination.

The Senior Manager had been promoted three (3) times prior to his termination. Upon his first promotion, the Senior Manager received a letter confirming his appointment and his previous terms and conditions. Upon his last promotion, prior to his termination, the Senior Manager received a letter confirming his appointment but without reference to any terms and conditions of employment.

Accordingly, the Court held that given the *“absence of an express term (such as notice of termination) it is appropriate to imply a term into the contract that the defendant would give reasonable notice”*.

Additionally, in considering *“reasonable notice”* the Court held that *“the contract provide[d] some guidance as to what may be reasonable because the parties considered that a package equivalent to nine(9) months salary was reasonable for... a redundancy”*.

Accordingly, employers should take care in employment contracts and when promoting employees to ensure that all necessary terms and conditions are expressed in writing. For assistance or review of your manager’s contracts of employment please contact Nick Stevens or Alicia Mataere.

STEVENS & ASSOCIATES

LAWYERS

invites you to a special breakfast seminar
at The Grace Hotel, Sydney on
28 November 2008.

“Where to now with Forward with Fairness?”

Free Breakfast Seminar

for our clients to discuss and review the latest
amendments to the Workplace
Relations Act by the Rudd Government.

Where: The Wilarra Room
The Grace Hotel
Level 2
77 York Street, Sydney

When: Friday, 28 November 2008

Time: 7:00am for 7:30am – 9:00am
Breakfast included

**Please contact David Wells on (02) 9222 1691
or email dww@salaw.com.au
by TUESDAY 25 NOVEMBER 2008
to book your seat.**

Hurry only a few seats left!

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Federal Court Imposes Restraint to Prevent Employee's Using a Confidential Information 'Springboard'

The Federal Court of Australia (**'the Court'**) has restrained two (2) employees from using the confidential information of their former employer in their new employment with a competitor.

The matter arose following the resignation of two (2) managers (**'the Employees'**) and their subsequent employment with a competitor of the former employer. Upon commencing employment with the Company, the Employees began to approach their former employer's clients using their former employer's confidential information, using information such as the individual rates clients were charged, as a "springboard" to gain such business.

The former employer was then able to obtain an affidavit (from one of the competitor employer's former employee's) which outlined the confidential information which the Employees brought with them and how that information was to be used for the benefit of the new employer. The former employer was then able to undertake searches of the Employees residential premises which uncovered further of its confidential information and commercial documents.

Accordingly, His Honour Mr. Justice Jessup restrained the Employees from communicating with a list of their former employer's clients and from doing anything that would assist their new employer in winning a lease or contract, until the matter is finally heard. Moreover, the Court restrained the Employees from approaching certain clients of their former employer, even though such clients were not specifically identified by the former employer as requiring protection.

For more information or assistance in protecting your company's confidential information please contact Nick Stevens or Alicia Mataere.

The National OHS Review Panel Releases its First Report

As you may be aware, from our earlier Vision Newsletter, the *Safe Work Australia Bill 2008* had passed by the Lower House and was about to embark upon a run in the Senate. Since then, the National OHS Review Panel has released its first report the "National Review into Model Occupational Health and Safety Laws" (**'the Report'**).

The Report makes recommendations on the priority areas of duties of care and the nature and structure of offences including defences. Specifically, the Report recommends "a *primary (general) duty of care imposed on the person conducting a business or undertaking (whether as an employer, self-employed person, principal contractor or otherwise) for the health and safety of:*

- i) 'workers' within an expanded definition; and*
- ii) others who may be put at a risk to their health or safety by the conduct of the business or undertaking..." ('the Duty').*

This redefinition of the Duty owed is designed so as to reach beyond the employment relationship. Moreover, in what would be a welcomed amendment by employers, the Report recommends that "reasonably practicable" be used to qualify the Duty and that "*the meaning and application of the standard of reasonably practicable should be explained in a code of practice or guidance material*".

The Report also recommends that breaches of the Duty "*only be criminal*" to emphasis the seriousness of the obligation and strengthen their deterrent value.

The final report, which is expected to cover a model Occupational Health and Safety Act, is due in January 2009.

For more information on the Report or advice on your OH&S obligations please contact Nick Stevens or Alicia Mataere.

If you would prefer not to receive further newsletters from us, please either email dww@salaw.com.au with "unsubscribe" in the heading, or telephone the number below and speak to Dave Wells and we will remove you from our mailing list. This publication is intended only as a general overview of legal issues currently of interest to clients and practitioners. It is not intended as legal advice and should only be used for information purposes only. Please seek legal advice from Stevens & Associates Lawyers before taking any action based on material published in this Newsletter.

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