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GCSJ, RFD, ED**

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PRESIDENT'S MESSAGE

Dear Members

The Committee of Management will soon be distributing detail in respect of various seminars and the Annual Patron's Breakfast. In addition, members will be provided with detail of a Special General Meeting and the Annual General Meeting, to be held on the same day consecutively. At the Special General Meeting, members will be asked to approve updated and modernised Rules of the Society (which will be distributed beforehand) and consider and vote on the possibility of a change of name of the Society to the Australian Labour and Employment Relations Association, South Australia (ALERA SA); the option of remaining as the Industrial Relations Society of South Australian and trading as ALERA SA; or, naturally, as to no name change whatsoever. I hope to see as many of you as possible at a future seminar or the Special and/or Annual General Meeting.

Best wishes,

Craig Stevens
President, IRSSA

Lessons for employers: beware of triangular sham contracting arrangements

By Kylie Dunn, Committee Member, and Jason Leonardis, DMAW Lawyers

The High Court decision in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors* [2015] HCA 45 serves as a timely reminder of the distinction between employees and independent contractors and the flow on effects from the chosen form of engagement of a worker.

Distinction between employees and independent contractors

The law distinguishes between an employee on the one hand who is engaged under a contract of employment (contract of service) and an independent contractor on the other hand who is engaged under a commercial contract to provide services (contract for services).

In *FWO v Quest*, the High Court found that an employment relationship was unlawfully disguised as an independent contracting arrangement in contravention of the sham contracting provisions in the *Fair Work Act 2009* (Cth) (**FW Act**).

Sham contracting provisions

Under the FW Act, an employer must not:

- misrepresent to an employee that their engagement is an independent contracting arrangement when in fact it is an employment relationship; or
- dismiss, or threaten to dismiss, an employee and then re-engage them as an independent contractor to perform the same, or substantially the same, work.

Background to the High Court decision

Quest South Perth Holdings Pty Ltd (**Quest**) employed housekeepers to provide housekeeping services in its serviced apartment accommodation business. Under the applicable modern award, housekeepers were entitled to be paid an hourly rate of between \$17.97 and \$32.34 depending on when work was performed.

Quest decided to implement a labour hire arrangement with a separate business called Contracting Solutions Pty Ltd (**Contracting Solutions**). Quest dismissed its housekeeping employees and they were immediately re-engaged by Contracting Solutions as independent contractors to perform the same housekeeping services for Quest. Contracting Solutions paid the housekeepers directly and Quest paid a flat rate to Contracting Solutions in consideration for the labour hire services supplied.

The housekeepers continued to perform work under the control and direction of Quest and there was, in reality, no change to the nature of their work. *Continues over...*

DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.



IRSSA is now calling for articles for its quarterly newsletter. Articles can be on any topical industrial relations matter and typically should be approximately 400 -500 words. If you are interested in submitting an article for the June newsletter please contact Justin Ward, IRSSA Newsletter Editor. Justin's email is justin.ward@sa.gov.au.

High Court decision

The Fair Work Ombudsman commenced proceedings in the Federal Court of Australia against Quest alleging that it had breached the sham contracting provisions under the FW Act. The proceedings were first heard in the Federal Court and subsequently appealed to the Full Court of the Federal Court, and then to the High Court.

The High Court found that there was a ‘triangular contracting’ arrangement between the parties whereby Contracting Solutions purported to engage the housekeepers as independent contractors to perform the exact same services as they had previously performed as employees of Quest.

The Court went on to find that, as a matter of law, the housekeepers were at all times employees of Quest and not independent contractors and that Quest’s misrepresentation to the housekeepers that they became independent contractors contravened the sham contracting provisions in the FW Act.

The High Court confirmed that the purpose of the sham contracting provisions is to protect individuals who are in truth employees from being misled as to the nature of the engagement.

The High Court remitted the matter back to the Federal Court on the issue of penalty (which is yet to be determined). The penalty for contravention by a corporation of the sham contracting provisions is \$54,000 per breach.

Implications for business

In light of the High Court’s decision, it would be prudent for businesses to take steps to:

- consider whether workers have been properly engaged and that there has been no misrepresentation as to the status of the worker’s engagement;
- review existing arrangements to determine whether any contractors may, at law, be employees, which may expose the business to liability for breach of the National Employment Standards and other minimum employee entitlements; and
- ensure that contracting arrangements are properly documented and that the parties’ conduct accurately reflects a true independent contracting relationship.

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Standardisation of Core Employment Conditions in the South Australian Public Sector – Craig Stevens, Executive Solicitor, Crown Solicitor’s Office and President IRSSA

For the past nearly three years, I have been leading a project which aims to standardise core employment conditions across the South Australian Public Sector; insofar as is appropriate and possible. I have been ably assisted by Ms Natalie Morris, from the Office for the Public Sector.

The principle aim of the project is to expand the application of Part 7 of the *Public Sector Act 2009* (PS Act) widely across the public sector which will be achieved by a series of amendments to the *Public Sector Regulations 2010* (PS Regs) (see section 40 of the PS Act and regulation 13 of the PS Regs). Part 7 of the PS Act contains a range of core employment conditions that traditionally have principally applied to employment in the South Australian Public Service (and not the wider public sector).

A premise of the project is that there are a number of employment categories that ought to remain subject to specific employment regimes. These include police officers, fire fighters, medical officers, nurses and paramedics, for example. Aside from those employment categories, where employees are performing the same or substantially similar duties, they ought to be governed by as consistent employment conditions as is possible.

The changes to regulation 13 of the PS Regs arising from phase 1 of the project will be operative from 1 July 2016. These changes will apply Part 7 of the PS Act (in modified form) to what can essentially be described as administrative employees in the Department for Health and Ageing and the Department for Education and Child Development employed under the *Health Care Act 2008* and *Education Act 1972* respectively.

Subsequent phases of the project will explore the application of Part 7 of the PS Act to other employment throughout the public sector to which the relevant provisions do not currently apply.

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Recent resources & initiatives available from the Fair Work Commission

Unfair dismissal Benchbook updated

The Commission has published an updated version of the Unfair dismissal benchbook. The benchbook is a plain English guide to the principles of unfair dismissal law under the Fair Work Act and how these have been applied in Commission decisions. The updated version incorporates added subject areas and recent case law, and is currently available as a downloadable PDF (with an online version under development).

Practice notes

The **Appeal proceedings practice note** provides a general explanation of appeal rights, and sets out the procedures followed by the Commission when listing, hearing and determining appeals.

The **Fair hearings practice note** provides procedural guidance and information about the conduct of hearings before the Commission, including the responsibilities of Commission Members, applicants, respondents and their representatives.

The **Unfair dismissal proceedings practice note** relates to matters not being dealt with in South Australia, and provides procedural guidance regarding the scheduling and conduct of proceedings relating to unfair dismissal applications which do not settle at or which do not proceed to conciliation conducted by conciliators.

Each of these resources is available from the Commission's website: www.fwc.gov.au