University Matters

Sparke Helmore Lawyers

2016 SOUL Annual Conference special edition

Data security and service agreements

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If you would like to receive a soft copy of future issues, please send an email to kristy.wilson@sparke.com.au

Cover: Pictured on the cover is the Gold Coast, Australia—the location of this year's SOUL Conference.

Looking over the horizon

I am pleased to welcome you to the 2016 edition of *University Matters*—a publication for the Society of University Lawyers (SOUL) Annual Conference, discussing legal issues affecting the university sector in Australia. Sparke Helmore has a proud history of working with universities and currently works with 10 institutions across the country.

In this issue, we discuss best practice data security for universities, particularly in circumstances where your data is in the hands of a third party service provider.

We take a closer look at casual employment contracts and how continuous periods of service can, in some cases, be considered as tenure toward termination and redundancy payments.

Next month, the unfair contract terms regime will be extended to standard form small business contracts, potentially impacting the way universities contract with suppliers. We look at what this change may mean for universities.

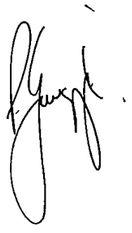
Commercial agreements often contain obligations for a party to use "reasonable endeavours" or "best endeavours". We give an overview on how these types of obligations have been construed by the courts and provide tips for contract drafting.

We examine penalties in light of the High Court reaffirming the "out of all proportion" test to determine whether a stipulation—requiring a payment to secure a party's performance of a contractual obligation—is unenforceable as a penalty in *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28.

Contrary to expectations, the anti-bullying jurisdiction under the *Fair Work Act 2009* (Cth) has not brought about the number of anti-bullying applications and orders initially anticipated. We explore how the courts have taken a restrained approach in handing down anti-bullying orders and the hurdles for applicants seeking such orders.

I hope you enjoy reading this edition of *University Matters* and welcome your feedback.

Sincerely,



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Data security and service agreements: what constructs should be in place?

By Richard Chew

Australian universities hold vast repositories of financial, personal and academic information as well as valuable research and commercialisation information on premises and in cloud-based systems. This makes them a target for data security attacks.

It is easy to see how any data leakage or data compromise could significantly affect a university and its reputation. Inadequate data security processes and measures, particularly in a decentralised administrative environment, place the integrity of the operational, research and teaching activities of a university at risk. For this reason, universities need to work with their technology service providers to effectively manage the legal risks relating to data security in their third party service agreements—particularly where the third parties collect, hold, process or store data. We look at the key constructs universities should have in their service agreements to protect the integrity and security of university data.

What data should be covered?

A university's data set, which is ordinarily covered in the data security provisions of a service agreement, should be broadly defined and may include:

- personal information (e.g. relating to employees and students)
- student data and educational records
- the data of any affiliates of the university
- trade secrets
- research information and statistics
- intellectual property
- financial information
- medical records, and
- any other operational and business information relating to the university.

While a broad definition may result in overlapping coverage with other obligations of the supplier in a service agreement (for example, those relating to confidentiality and privacy), additional data security requirements should provide greater protection.

Which legal constructs should be included in the agreement?

Universities should consider including provisions in their service agreements to cover data security constructs that relate to compliance with standards, obligations to notify the university of any data breach as well as general data security compliance obligations.

Compliance with standards

Suppliers should be obliged to acquire and maintain any licences, authorisations, consents, approvals and permits required to enable them to provide the services under the agreement.

Suppliers should also be required to comply with all applicable university policies, laws, standards, and other performance-related regulatory and industry standards.

Obligation to notify regarding a breach

Suppliers should be required to notify the university of any actual, alleged or suspected breaches of data security. Additionally, they should be required to take steps to rectify a breach, investigate the cause of the breach and to implement appropriate remedial measures.

Data security compliance obligations

To avoid any issues with proprietorial rights in or to the university's data that is held by or on behalf of the supplier, the university must include a clear provision that the data is the university's property.

The services agreement should also include provisions that:

- limit access to and use of the data, and require personnel who have been assigned to perform the services to be notified that the data is the property of the university and must only be accessed and used in the manner agreed

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- limit the ability to transfer the data from a specified location to a different location, other than for the purpose specified in the agreement or with the prior consent of the university
- prohibit circumventing any security system or security measure of the university, while requiring them to establish and maintain safeguards (which are no less rigorous than those maintained by the university) against destruction, loss, alteration or prohibited access to the data. They should be required to notify the university of any unauthorised use or access to the data and permit the university to conduct regular reviews, testing and validation of the security measures taken, including penetration testing, where required
- give the university the right to reasonably request further information in connection with the supplier's security controls and measures, an express right to access the data at any time, and the right to establish back-up security for the data, and
- restrict the creation of any lien, charge, mortgage, security interest or encumbrance on or over the data.

The supplier should ensure all subcontractors have obligations in respect of the university data that are at least as onerous as the supplier's obligations in the service agreement, and that the university has the same rights against any subcontractor as it does against the supplier, in respect of data security and compliance. The university should also include provisions that require the supplier to (at the university's discretion) return or destroy the data upon termination or expiry of the agreement, coinciding with the supplier ceasing its services to the university.

Conclusion

It is increasingly important for universities to implement and maintain data security policies. These policies should be accompanied by appropriate measures and data security instruments that enable the university to continually test and ensure compliance. If a university engages a third party service provider, the university should take steps to ensure there are appropriate and adequate provisions in the service agreement, including provisions that cover the constructs described in this article, to protect any university data that will be collected, held, processed or stored by the supplier.

We would like to acknowledge the contribution of Claire Arthur to this article.

Unfair contract terms regime to extend to small business contracts

By Darren Rankine

In November, the unfair contract terms regime that currently applies to standard form consumer contracts will be extended to standard form small business contracts. This will potentially impact the way in which universities contract with suppliers of work, services and goods. Now is an opportune time for universities to undertake a review of their standard contracts and take any necessary action to ensure compliance with the new requirements.

When will the amendments commence?

The amendments will come into effect on 12 November 2016. They will apply to standard form small business contracts entered into or renewed after this date, as well as to individual terms of existing standard form small business contracts varied after this date.

What does this mean?

As a consequence of the passing of the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth), amendments will be made to the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and to Schedule 2 of the *Competition and Consumer Act 2010* (Cth), otherwise known as the Australian Consumer Law (ACL), to extend the existing unfair contract terms regime that applies to standard form consumer contracts to standard form small business contracts.

As a result of the amendments, unfair terms in standard form small business contracts will be void. A contract will remain binding as long as it can still operate without the void term.

It is important to note that it is not an offence to include an unfair term in a contract. However, if a person attempts to apply, rely on or enforce a provision that is unfair, remedies can apply, including the granting of injunctions, orders to compensate persons who have suffered damage or orders preventing or reducing the loss or damage suffered by both parties.

The ACL unfair contract term provisions that are being extended will apply to contracts for the supply of goods or services and contracts for the sale or grant of an interest in land. The application of the provisions to standard form small business contracts will mean that services agreements, works agreements, supply agreements, leases and many other standard type contracts that a university would enter into on a regular basis could be affected.

The ASIC Act unfair contract term protections apply to contracts for financial products or contracts for the supply, or possible supply, of financial services.

It is noted that this article does not focus on the impacts of the ASIC Act unfair contract term protections, but focuses on the impacts of the ACL protections.

What is the test for an unfair contract term?

First, the contract must be a small business contract, meeting the following criteria:

- it is for a supply of goods or services, or a sale or grant of an interest in land
- at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons (including full-time employees, part-time employees and casual employees who work on a regular or systematic basis), and
- either of the following applies
    - the upfront price of the contract does not exceed $300,000, or
    - the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1 million.

Second, the contract must be a standard form contract, which generally means it was pre-prepared by one party and provided to the other party on a "take it or leave it" basis with no effective opportunity to negotiate the terms. There is no set definition of a standard form contract, although factors that must be considered in assessing if a contract is a standard form contract include:

- whether one of the parties has all or most of the bargaining power relating to the transaction
- whether the contract was prepared by one party before any discussion between the parties relating to the transaction had occurred
- whether another party was required to either accept or reject the terms of the contract in the form in which they were presented
- whether the party was given an effective opportunity to negotiate the terms of the contract, and
- whether the terms of the contract consider the specific characteristics of the other party or the particular transaction.

Note, an inability to negotiate the upfront price is not an indicator that the contract is a standard form contract.

Third, the term must be unfair, meeting the following criteria:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

All three factors need to be satisfied. In determining whether a term is unfair, courts can consider such matters as deemed relevant, but must also take into account the extent to which the term is transparent and the contract as a whole. Any term that is reasonably necessary to protect the legitimate interests of the party to be advantaged by that term, will not be deemed unfair. However, a term is presumed not to be reasonably necessary unless proven otherwise. The legislation provides a number of examples of the kinds of contract terms that may be unfair, but it is not exhaustive and is also subject to the discretion of the Court on a case-by-case basis.

What should you do now?

Most universities are likely to use contracts that could be defined as standard form contracts and engage with the type of contractors, suppliers or service providers who satisfy the small business criteria. It would be prudent to conduct a review of any contracts that potentially fit these criteria before 12 November 2016 to ensure compliance with the amendments when these come into effect.

Visit ASIC's website, www.asic.gov.au, to find out more about the impacts of the amendments.

Regular casual employment counts for notice and redundancy payments

By Sara McRostie

A Full Bench of the Fair Work Commission has held that permanent employees are entitled to have prior periods of regular and systematic casual employment count toward the calculation of notice and redundancy pay entitlements under the National Employment Standards (NES). This is despite the fact the employees were paid a casual loading when they were casuals, to compensate for not having these entitlements.

The decision of *AMWU v Donau Pty Ltd* [2016] FWCFB 3075 has wide-ranging implications, particularly for the tertiary sector, which has twice the workforce casualisation rate of the general workforce.

Background

The case involved a dispute between the Australian Manufacturing Workers' Union (AMWU) and Forgacs Engineering (now known as Donau). Donau is a large engineering company, which builds blocks for the Australian Submarine Corporation.

In 2015, Donau made a large number of workers redundant. Some workers started as casual employees but became permanent employees through a conversion program under the employer's enterprise agreement.

When calculating the employees' redundancy termination payments, Donau:

- recognised prior contiguous periods of casual service for the purpose of long service leave
- did not recognise prior contiguous periods of casual service for calculating termination notice, and
- did not recognise prior contiguous periods of casual service for the purpose of redundancy pay.

The AMWU notified a dispute to the Commission, arguing that the employees' prior casual service should count toward the calculation of the employees' total period of service for the purposes of notice and redundancy pay.

The Commission's decision

The Commission rejected the AMWU's argument. Commissioner Riordan said the 25% casual loading the employees received when they were casuals compensated them for notice and redundancy entitlements provided to permanent employees.

The AMWU appealed the decision.

The Full Bench's decision

The Full Bench was clear that employees who are casuals at the date of the termination of employment are not entitled to redundancy payments.

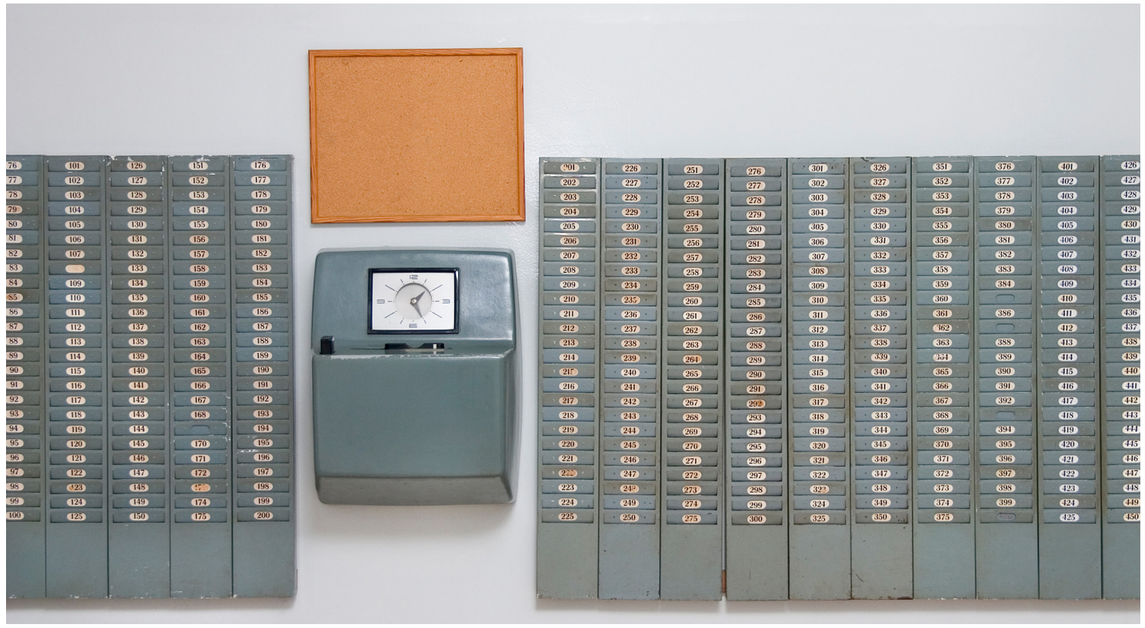
However, employees who started as casuals and had no break between their period of regular and systematic casual employment and their transition to permanent employment, were entitled to have their casual service count toward the calculation of their redundancy pay.

The majority observed the decision was about the proper construction of the enterprise agreement as well as the interpretation of the *Fair Work Act 2009* (Cth) (the Act), because the enterprise agreement incorporated the provisions of the NES.

The majority noted that the entitlement to redundancy pay under the enterprise agreement was to be calculated by reference to the employee's period of continuous service. A period of continuous service is defined by s 22 of the Act to include a period of regular and systematic casual employment.

The majority observed there were no words in the enterprise agreement or the Act excluding any period of regular and systematic casual employment from the calculation of service for redundancy pay.

The majority acknowledged there might be industrial injustice for an employee who has



received a casual loading for a period of casual employment to have that period of employment also count toward the accrual of redundancy pay—however, this did not alter the majority's conclusion.

Commissioner Cambridge dissented. His view was that s 22 of the Act must be confined to permanent employment. He observed that any arrangement of casual employment does not count as service, nor does it attract service-related benefits unless the terms of a specific instrument prescribe otherwise.

Commissioner Cambridge also warned the practical effect of the majority's interpretation could retrospectively activate NES entitlements (like annual leave) for employees who transition from casual to permanent employment.

What does this mean?

This decision means that the calculation of years of continuous service for notice and redundancy pay includes a period of regular and systematic casual employment where:

- the employee has transitioned to permanent employment before the termination date, and
- there is no break between the period of regular and systematic casual employment and the transition to permanent employment.

Separate earlier periods of employment are excluded from the calculation.

However, employees who remain as casuals are not entitled to notice and redundancy pay.

Given the wide-ranging implications of the decision, it may be appealed. The Australian Industry Group has asked the Fair Work Commission to reject the finding as part of the Commission's four year review of modern awards, which is dealing with the casual conversion right and service recognition.

What should tertiary sector employers do?

Employers in the tertiary sector need to be aware of this decision and what it means in terms of notice and redundancy payments for employees, as well as to be across future developments in this area.

For now, it is important to keep in mind that the impact of this decision turns on the wording of your enterprise agreement. If unsure, it is worth seeking advice on how this decision affects the notice and redundancy pay provisions in your agreement.

Reasonable endeavours and like obligations

By Rachel Watts

In commercial agreements, phrases such as "reasonable endeavours" and "best endeavours" are commonly used to qualify what would otherwise be absolute obligations, for example, obtaining finance, registering documents, obtaining warranties from third parties and negotiating the resolution of disputes.

Why include obligations of this nature?

These types of obligations may be included for a variety of reasons, including:

- the outcome to be worked toward involves a third party or circumstances beyond the control of the promisor, and
- the steps required for performance cannot be sufficiently detailed in the agreement because they are not known or because of time pressures during negotiation.

Are these types of obligations enforceable?

Enforceability depends on the particular contractual provision and the context. *Coal Cliff Collieries v Sijehama Pty Ltd* (1991) 24 NSWLR 1 established that the obligation must be "clear and part of an undoubted agreement between the parties". It must not be illusory, vague or uncertain. If the court is unable to "fill in the remaining blank spaces" to determine how performance of the promise should be measured, whether by reference to a readily ascertainable external standard or the language of the provision itself, the provision will be unenforceable.

In *Baldwin v Icon Energy Pty Ltd* [2016] 1 Qd R 397 it was held that provisions in a memorandum of understanding requiring the parties to use reasonable endeavours to negotiate an agreement by a particular date and to "work in good faith, to progress the … [agreement] in the manner contemplated" were unenforceable. The promise did not have sufficiently certain content as there was no existing contractual relationship between the parties and nothing to measure a standard of reasonableness or good faith against. The court noted that a standard of reasonableness was inapt and uncertain in contractual negotiation (a self-interested commercial activity in which parties adopt adversarial positions).

Interpretation of endeavour provisions

The basic principles of contractual interpretation apply. These were recently outlined in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, where the High Court observed that the rights and liabilities under a contractual provision are to be determined objectively by reference to its text (language used), context (entire text of the contract and any documents or statutory provisions referred to in it) and objects or purpose. This requires asking what a reasonable businessperson would have understood the terms to mean.

Is there a difference between reasonable endeavours and best endeavours?

In *Stepping Stones Child Care Centre (Act) Pty Ltd v Early Learning Services Ltd* (2013) 95 ACSR 179, it was suggested that an obligation to use "reasonable endeavours" is not as onerous as an obligation to use "best endeavours or "all reasonable endeavours". However, the argument before the High Court in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 proceeded on the basis that these terms impose substantially similar obligations. This was also the view expressed in the recent decision in *Ugrinovski v Naumovski and Ors* [2016] VSC 555.

Discharging the obligation

Subject to any standard of reasonableness included in the agreement, the promisor must do all that can reasonably be done in the circumstances to achieve the contractual object: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. To ascertain what can reasonably be done, it is necessary to have regard to the nature, capacity, qualifications and responsibilities of the promisor viewed in the light of the particular contract: *Transfield Pty Ltd v Arlo International Ltd* (1980) 30 ALR 201.

The interests of the promisee are not always paramount. A promisor may consider circumstances that affect its business: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. It may also have regard to its own financial position, provided this does not amount to bad faith or constitute a breach of an express term of the agreement: *Optus Vision Pty Ltd v Australian Rugby Football League Ltd* [2003] NSWSC 288.

In *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 it was held that a gas supply agreement, which required the suppliers to use reasonable endeavours to make available additional gas beyond a stipulated daily quantity, did not require the suppliers to supply additional gas at the contract price when its own business interests favoured the supply of that gas at the higher market price. The agreement contained a provision stating the suppliers could consider "all relevant commercial, economic and operational matters" in determining whether they were "able to supply" additional quantities of gas. Fundamental to the decision was the High Court's finding that this constituted an internal standard of reasonableness, which applied to the reasonable endeavours obligation.

Duration of obligation

In *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135, the court upheld a trial judge's finding that an obligation to use reasonable endeavours, with no timeframe or sunset date, continued until the promisor "should reasonably judge in the circumstances that further efforts would have such remote prospects of success that they are simply likely to be wasted". This reasoning was adopted in *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd* [2009] NSWSC 788, where the trial judge held that an obligation to use reasonable endeavours continued (despite there being no more reasonable endeavours to take at a particular time) because it may become reasonably practicable in the future to achieve the objective to which the endeavours were directed. This was upheld on appeal.

Drafting tips

It is best to limit the use of endeavour type obligations in agreements to situations where it is not possible or appropriate for a party to commit to an absolute obligation. Where such obligations are to be included, you should consider including parameters that can be objectively assessed, such as:

- a timeframe for performance or a sunset date, so it is clear when the obligation ceases
- a list of non-exhaustive steps that must be taken, and
- an internal standard of reasonableness.

You should also consider including a provision that defines the rights that accrue to a party if the contractual object is not achieved.

Consistent language should be used—don't require a party to use "reasonable endeavours" for one obligation and "best commercial efforts" for another, unless you intend for there to be different standards of performance.

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The prevailing position on penalties

By Martin Taylor and Michelle Larin

The High Court recently considered the law on penalties for the first time since its decision in *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30.

In *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28, the High Court determined that late payment fees, which are charged by banks on consumer credit card accounts, are not penalties. The decision not only affects banking contracts, but all contracts, including many entered into by universities.

Key points

The High Court has reaffirmed the "out of all proportion" test as the overriding test to determine whether a stipulation requiring the payment of money to secure a party's performance of a contractual obligation is unenforceable as a penalty. Where the monetary amount is out of all proportion, it will be deemed a penalty and the claimant will be left to rely on damages at law.

The Court broadened the types of losses included in assessing whether an amount of money stipulated in a contract to secure a party's performance of an obligation is, or is not, "out of all proportion"; such losses going beyond the types of damages recoverable in an action for breach of contract to encompass other financial "injuries" deemed "too remote" to be compensable under the rules in *Hadley v Baxendale* (1854) 9 Exch 341.

It also confirmed that, where it is difficult for a party to estimate or determine the value of a potential loss, the failure to undertake a genuine pre-estimate of that loss at the time of entering into a contract will not necessarily render a sum stipulated in that contract to secure a party's performance of an obligation as a penalty.

Background

The majority (4-1) of the High Court dismissed an appeal by Paciocco from the Full Court of the Federal Court of Australia, after considering the following questions:

- whether ANZ's contractual stipulation for a late payment fee is unenforceable as a penalty at common law, and
- whether ANZ's contractual stipulation for, or the enforcement of, a late payment fee contravenes applicable statutory norms prohibiting ANZ from engaging in "unconscionable conduct" and from entering into and enforcing contracts that are "unjust" and "unfair".

Is ANZ's late payment fee unenforceable as a penalty at common law?

The High Court upheld the Full Court's decision that late payment fees charged by ANZ are not penalties.

As first established by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, the payment of money stipulated in a contract to secure a party's performance of an obligation is only enforceable (and considered not to be a penalty) if it is a "genuine pre-estimate of loss" and not "out of all proportion" to the loss suffered by the affected party.

In earlier proceedings, ANZ admitted its late payment fees are not genuine pre-estimates of its damage. However, Justice Kiefel of the High Court (with Chief Justice French concurring) took the view that a sum stipulated will not necessarily be a penalty if no pre-estimate is made at the time the contract is entered into. Following a re-examination of the doctrine of penalties, she accepted the difficulty in measuring the loss suffered by ANZ as a result of late payment, noting:

> "[I]t also needs to be borne in mind that this task is not one which calls for precision. The conclusion to be reached, after all, is whether the sum is 'out of all proportion' to the interests said to be damaged in the event of default."

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Accordingly, Justice Kiefel applied the out of all proportion test to determine whether the late payment fees imposed by ANZ are penalties, holding:

> "Consistently with *Clydebank, Dunlop, Ringrow* and *Andrews*, the relevant question in this case is whether the Late Payment Fee is out of all proportion to the ANZ's interest in receiving timeous payment of the minimum Monthly Payment. Applying this test, the appellants did not establish that the Late Payment Fee was a penalty."

In applying the test, Justice Keifel emphasised that the types of losses to be considered are not limited to the damages that ANZ can recover in an action for breach of contract, but extend to those costs that reflect injuries to its financial position and the effects upon its financial interests by default.

Does ANZ's late payment fee contravene statutory norms?

The High Court rejected Paciocco's argument that the late payment fees are "unconscionable", "unjust" or "unfair". It upheld the decision of the Full Court, with Justice Keane stating:

> "Given that the appellants did not suggest that ANZ dealt with Mr Paciocco in any way less favourably than he would have been treated by any other supplier of credit card facilities, and in the absence of an allegation that the market in which this state of affairs prevailed was itself brought about by unlawful conduct, or an allegation that Mr Paciocco was driven to agree to ANZ's terms by financial pressures of which the bank was aware, the appellants' statutory claims take on an air of unreality."

Justice Keane concluded the late payment fee was an expense Paciocco "chose to risk as more convenient to him than paying his account on time".

Final thoughts

Liquidated damages clauses are critical provisions in university contracts and are often subject to extensive negotiation. The law on liquidated damages is relatively settled but is under regular challenge from parties seeking to avoid contractual liability on the basis that such clauses constitute a penalty. Universities need to ensure they understand the legal principles underpinning the law of penalties if they intend to rely on liquidated damages in their contractual arrangements.

We would like to acknowledge the contribution of Grant Parker to this article.

Anti-bullying orders–the story so far

By Roland Hassall

The introduction of the anti-bullying jurisdiction in the *Fair Work Act 2009* (Cth) brought fears of a wave of applications. This has not occurred. From 1 January 2014 to 31 December 2015, the Fair Work Commission made only 11 anti-bullying orders, despite receiving 1,052 applications.

We briefly discuss below some of the hurdles for applicants seeking anti-bullying orders.

Reasonably believes that he or she has been bullied at work

An applicant must prove that the conduct complained of actually occurred—and on a repeated basis—to constitute bullying. Whether the conduct is bullying will depend on the circumstances or context.

In *Rachael Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston* [2015] FWC 6556, the Commission found the following alleged incidents constituted bullying by the manager:

- delays in actioning work submitted for approval by the Applicant
- speaking in a belittling, rude and hostile manner
- ignoring or speaking to the Applicant in an abrupt way
- removing her as a Facebook "friend" immediately after a workplace disagreement, and
- generally treating her differently to other employees.

A risk to health and safety

There must be a causal link between the behaviour and the risk to health and safety.

In *Ms SB* [2014] FWC 2104 and *Amie Mac v Bank of Queensland; Locke* [2015] FWC 774, the Commission confirmed applicants must demonstrate that conduct gave rise to a risk to health and safety (as opposed to actual detriment being suffered), which is not a particularly high threshold.

Reasonable management action

The Commission often finds conduct is not bullying, because it is reasonable management action, such as performance improvement. Even when a performance improvement process is not implemented in line with best human resources practice, the shortcomings will not necessarily reach the required level to be unreasonable and constitute bullying.

Ongoing risk of bullying

There must be an ongoing risk that the bullying will continue before an order can be made. The Commission has refused to make orders where:

- the applicant or person found to have engaged in bullying has left the workplace: see *KM* [2016] FWC 2088, or
- changes have been implemented by management, significantly reducing the risk of bullying continuing: see *Ms LP* [2016] FWC 6602 and *Ms LP* [2016] FWC 763.

Removal of a bully or applicant from the workplace may give rise to claims against the employer, such as claims for unfair dismissal. Therefore, before any such action is taken, the claim should be thoroughly investigated and appropriate disciplinary action considered.

Implementing changes to reduce the risk of bullying will not necessarily be sufficient. In *Rachael Roberts*, the Commission rejected the employer's claim that an order was unnecessary because it introduced an anti-bullying policy and reference manual.

Where does this leave the bullying jurisdiction?

While employees are making applications to the Commission for anti-bullying orders, they are not doing so in the expected numbers. This may be due in part to the lack of the Commission's jurisdiction to order compensation or concerns about how an application may affect the employment relationship. Where applications are made, many do not proceed past conciliation conferences or meet the criteria for an order to be handed down.

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Grant Parker, Partner
Grant brings over 25 years' experience in contract drafting, negotiation and administration to the university sector, often on innovative projects involving emerging forms of contracting. He also works on projects seeking environmental sustainability outcomes and has worked in sectors transitioning to greater private sector provision of infrastructure.

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