

# Macrossan & Amiet

news update

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S O L I C I T O R S

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# Enterprise Agreements

By Andrea Green

*The Fair Work Act 2009 (Cth)* ('the Act') has applied to a great majority Queensland's employers since 1 January 2010 when the Queensland Government referred its industrial relations powers to the Commonwealth.

It should be a concern of Queensland employers that their employment contracts and agreements may be null and void. After the enactment of the Act, the following workplace agreements will continue to apply until they expire, or are terminated under the now repealed *Workplace Relations Act 1996*:-

1. Pre-Reform Certified Agreements and Australian Workplace Agreements ('AWA's'); and
2. Post-Reform Collective Workplace Agreements, AWA's and Individual Transitional Employment Agreements.

AWA's may be replaced by an Enterprise Agreement made under the Act. Eventually AWA's will be whittled out and the three new methods of governing an employment relationship under the Act will continue to emerge:-

1. Enterprise Agreements;
2. Modern Awards; and
3. The National Employment Standards ('the NES').



Andrea Green

Basically the NES is a skeleton of employment standards that Modern Awards and Enterprise Agreements must not deviate from. These are provisions such as: full-time permanent employees are entitled to 4 weeks accrued annual leave per annum and must not be required to work more than 38 hours per week. No employee's employment conditions can make them worse-off than those contained in the NES. Although arguably it may be acceptable if, for example: an employee gets half the amount of holiday pay but twice as much annual leave.

The Commonwealth has created a range of Modern Awards that capture employees working in every industry, which set out employment standards, in addition to, or that supplement

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Local people. Local expertise. Industry leaders.

# Changing your name - How does it work?

By Francesco Maconi

If you are thinking about changing your name, you need to be aware of the legal requirements and implications that are involved in this process. In Queensland the law that regulates name changes is Part 3 of the *Births, Deaths and Marriages Registration Act 2003* (Qld) (“the Act”).

From the outset it is important to note that if you were born outside of Queensland or ordinarily reside in a different State, you will need to apply elsewhere to change your name. The process for adult applicants to change their name is different from that of child applicants.

Adult applicants follow a relatively simple process. They must complete the relevant application form, provide sufficient proof of identity and pay an application fee of \$140.00. After lodging the application, the Registrar will consider the request for the change of name and then provide a response.

The Registrar requires all applicants to prove their identity in three different ways. First, the applicant needs to provide a document that links the applicant to his or her current identity (acceptable documents include a driver’s licence, current passport or 18+ card). Second, the applicant must show he or she is actively involved in the community (acceptable documents include Medicare Cards, Bank Cards or Student Identification). Third, the

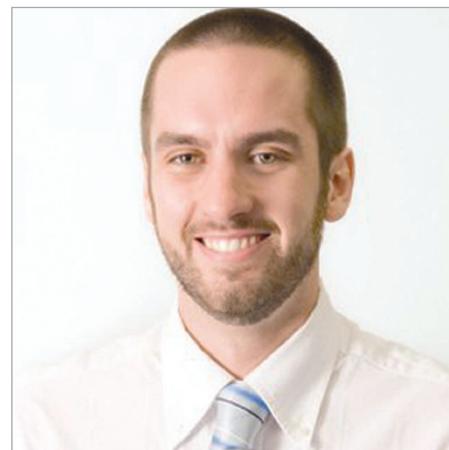
applicant must prove that he or she ordinarily resides in Queensland (acceptable documents include household bills, bank statements or a letter from the Australia Electoral Commission etc.).

If the applicant was born overseas, the applicant will need to provide further identity documents including:-

1. A certified copy of the applicant’s Birth Certificate; and
2. Evidence the applicant has lived permanently in Queensland for at least 12 consecutive months (for example, a letter from your employer, medical practitioner or educational institution).

For child applicants the process is slightly different. Applications made by underage people, or on behalf of children, can proceed in one of two different ways:

1. The first is when both of the applicant’s parents or guardians consent to the change of name. Once consent has been given, the applicant must follow the process described above for Adult Applicants (if there is only one parent or guardian for a child, this requirement will be waived).
2. The second is when one or both parents do not agree to the name change. In this case, the child applicant or person



Francesco Maconi

making the application for a child will need to apply for an Order of the Magistrates Court. Section 17 of the Act states that a Magistrate will need to be satisfied that the proposed change of name is not a ‘prohibited name’. A Magistrate will also need to be satisfied that the change of name is in the child’s best interests.

Section 18 of the Act suggests that a child must consent to a change of name. If the child does not consent and is sufficiently capable of understanding, a Magistrate will not allow a change of name. However, if the child is incapable of understanding what is occurring (for example, when the child is an infant) then a Magistrate may still allow for a change of name.

Another thing to keep in mind is that child applicants can only change their name once, before becoming an adult. An adult applicant can change their name once every 12 months.

If you are interested in changing your name, please visit the website for the Department of Justice and Attorney-General or contact your Solicitor.

# Safety on the Water

By Sarah Smith

With the recent hot weather and local dams at maximum capacity, people are flocking to our waterways to enjoy the last of the warmer weather before winter kicks in.

With so many boats on the water it is as important as ever that boat owners and operators are aware of their responsibilities when it comes to safety.

## Alcohol & Boats

One third of all boat fatalities are alcohol related. This is an alarming statistic and a reminder to all boat drivers that drinking on the water is no joke.

Water Police conduct random breath tests on boat drivers and the rules are the same as those for road users - drivers must have a blood alcohol content of less than 0.05. Boat drivers caught over the legal limit will lose both their boat and driving licences. The driver is also responsible for the safety of passengers, which includes their alcohol consumption.

While most people logically know that drinking and driving don't mix, most don't understand the enhanced effect that alcohol can have when they're out on the water. The sun, wind, waves and constant motion of the boat make for a dangerous combination when mixed with alcohol. So, while having a few cold beers to quench your thirst might sound tempting, it is not always a wise choice and can have consequences.

## Jet Skis

To operate a jet ski you must hold a personal watercraft licence in addition to a recreational marine

drivers licence, or have a licensed person on board with you.

The safe riding of jet skis requires skill and a responsible attitude, unfortunately however, some riders believe that a jet ski can be ridden anywhere and in any fashion without considering the consequences.

The thrill of riding a jet ski is to ride fast, turn quickly and jump waves and wash, however it is vitally important that you always keep a look out for other boats, people and hazards in the water and maintain an appropriate distance. Serious accidents have occurred from collisions because the rider has misjudged distance or misread another rider's intentions.

## Towing Water-skiers

With local dams at maximum capacity, many people are taking the opportunity to have a go at water-skiing. Water-skiing can be a lot of fun however it is essential that drivers make safety their number one priority when towing someone behind their boat.

The owner/operator of a boat is responsible for the safety of



Sarah Smith

others and has a general obligation to:

- Ensure the driver of the boat used for towing someone else is appropriately licensed;
- Make sure the boat is safe and capable of towing skiers;
- Take all the right safety equipment for the skiers and passengers and ensure it's used correctly;
- Carry an observer (more than 12 years of age) onboard who is competent to watch the skier at all times.

Getting out on the water is about having fun and enjoying time with friends and family so get out there and enjoy everything our beautiful waterways have to offer.

The best way to have fun on the water is to do so safely and always remember - if you're the skipper you're responsible!



# Internet Bullying - What can you do?

By Paul Formosa

Bullying has long been present in various aspects of our society. It is a common occurrence in school yards and workplace environments. Bullying and harassment commonly occur where someone repeatedly and intentionally abuses their 'power' over another by troubling, annoying or persecuting that person. Victims of bullying can feel isolated, helpless and are often reluctant to seek help or alert others to their situation. Bullying is a very dangerous activity and can have serious physical and emotional health implications for victims. With the growing popularity and increase in use of the Internet, it follows that a new form of bullying has emerged.

Face-to-face bullying can exist in a number of different forms. These can include physical, verbal, social and psychological bullying. Physical bullying involves a person, for example, repeatedly and intentionally hitting or pushing another, or damaging their belongings. Verbal bullying can include repeated use of negative words such as insults, racist or homophobic comments, or teasing. Social bullying will occur where a person or group of people continually lie or spread rumours about a victim or intentionally exclude them from activities. Psychological bullying can happen where a person repetitively uses actions or words which cause a victim mental harm. This form of bullying can include using

intimidation against another or repeated stalking.

Internet Bullying is the most recent form that bullying has taken on. The current increase in Internet bullying can be attributed to greater adolescent access to the Internet. Perhaps the most alarming issue regarding internet bullying is the ease in which it combines verbal, social and psychological bullying and, with technology, inflicts it upon a victim.

Given the Internet is in its infancy, Internet bullying is still a relatively new issue facing users. Internet bullying can occur in various locations such as social networking sites, email, chat rooms, instant messaging services and blogs. Perhaps the most alarming feature of Internet bullying is its accessibility and anonymity. Bullies and victims now often have 24hour access to the Internet and as such even the home is no longer a safe place for victims.

The limited research undertaken in relation to internet bullying suggests that the main targets and perpetrators of Internet bullying are adolescents rather than younger children, given they often use Internet technology to communicate with peers. Of the limited research done, current estimates on the occurrences of Internet bullying suggest that between one in four and one in five adolescents have been subjected to this type of bullying.



Paul Formosa

So far, the law in Australia has failed to keep up with the advances in technology and has largely failed to address the problem of Internet bullying. It is unclear whether as yet a case specifically relating to Internet bullying has reached a court in Australia. In early 2010 a landmark decision was handed down in relation to 'cyber bullying' using a mobile phone in the Melbourne Magistrate Court. The accused was convicted of one count of stalking after he sent multiple threatening text messages to a victim who later committed suicide. The perpetrator avoided jail and received an 18-month community based work order.

Although there is no single piece of legislation dealing with bullying in Queensland, there are still several possible ways to deal with a complaint of Internet bullying. Although a complaint of Internet bullying would appear to constitute an assault under Section 245 of the *Criminal Code Act 1899 (Qld)* ("the Code"), this is not the case. The definition of assault under Section 245 will be satisfied where an offender has:-

- a) attempted or threatened to apply force of any kind to another;
- b) without that person's consent; and
- c) where the person has an actual or apparent ability to carry out the threat.

## Internet Bullying - What can you do?

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However under this section reference is made to 'threats by bodily act or gestures' and this would not be satisfied by internet posts or threatening emails. This provision overrides the common law position decided in *R v Ireland* where it was held that a series of silent phone calls could amount to an assault at common law.

The other possible avenue of pursuing a complaint of Internet bullying could be made out under Section 359B and 359E of the Code relating to Unlawful Stalking. Unlawful stalking is conduct that:-

- a) is intentionally directed at the person being stalked;
- b) is engaged in on one or more occasions;
- c) consisting of one or more of the following acts -
  - ii) contacting a person in any way, including for example, by telephone, mail, fax, email or through the use of any other technology;....
  - v) giving offensive material to a person directly or indirectly;
  - vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence ;
  - vii) an act of violence or threat of violence against the property of anyone;....
- d) would cause the stalked person reasonable apprehension or fear of violence to the stalked person or their property.

A problem faced in making a criminal complaint about Internet bullying involving school students may hinge on whether the bully is deemed to be criminally responsible for their actions. At common law, the age of criminal responsibility is 7 years. This has

been increased by legislation in Australia to 10 years. So a child under 10 years of age will never be criminally responsible. Children aged between 10 and 14 years can be criminally responsible if it can be shown beyond reasonable doubt that they knew they should not have committed the serious offence. Children aged 14 years and over will be deemed to have the requisite capacity and be criminally responsible for their actions.

Another avenue for taking action against a bully could be by way of civil action. The argument behind such a claim would highlight that harm suffered by the victim should be compensated by the perpetrator or a third party deemed responsible to prevent the behaviour of the bully, such as an employer or a school. This was the successful argument in *Cox v NSW* where the NSW Education Department was deemed to have failed its duty of care owed to a student by not adequately preventing bullying. A victim could make a common law claim for damages and loss suffered as a result of incurring a psychological injury from bullying.

It could also be by way of claim for damages under the tort of assault. Such an action has similar requirements to the criminal law equivalent - that is, an act by a perpetrator that the victim reasonably believes will result in immediate contact with the victim. The perpetrator must have a present means of carrying out the threat. In the case of *Barton v Armstrong*, a victim was entitled to apprehend immediate physical violence where threats are made by way of telephone. It could be argued that this case could similarly be applied to emails or internet posts.

The final possible avenue for redress against a bully would be to make an application against an employer under the *Workplace Health and Safety Act 1995* (Qld) which places on employers a broad duty to ensure all employees have a safe place of work. The case of *Maddaford v Coleman* held that an employer will be liable for bullying that occurs in the workplace where it is reasonably foreseeable. It is insufficient for an employer to take a reactive stance on workplace bullying.

As such, there are clearly numerous ways to approach the issue of Internet bullying. If your children are being bullied on social networking websites or via email, talk to them about the bullying and highlight to them that they are not to blame for the bullying. Notify your child's school immediately and demand that they take action to stop the bullying. Let them know that if the bullying is not dealt with sufficiently you will be pursuing the issue further. Alternatively, if you feel you are being bullied or harassed in your workplace, notify your manager or the owner of the business immediately. Ask them what they intend to do about the situation. Point out to them that if they do not adequately deal with the bullying they risk being liable for the actions of the bullying employee.

If you feel that your children's school has not adequately dealt with issues of Internet bullying of which your child is a victim or if your employer has not stopped bullying in your workplace following a complaint, then do not hesitate contact our office.

# Rights and Responsibilities for cyclone affected Landlords and Tenants

By Danielle Fitzgerald

After a natural disaster such as the recent Cyclone Yasi, it is important for tenants and landlords to understand their respective renting rights and responsibilities.

## Residential Tenancy Agreements

Generally, Residential Tenancy Agreements continue to be enforceable until the agreement is formally ended by a tenant or landlord. However, in Queensland, Residential Tenancies Legislation allows the tenant to terminate the tenancy agreement in circumstances where the premises become uninhabitable as a result of an outside factor. Tenants and landlords are discharged from their respective obligations, particularly the responsibility of paying rent, on the grounds of frustration or excessive hardship.

The consequences of a cyclone are beyond the control of both the landlord and tenant and may render the premises wholly or partly uninhabitable. In circumstances where the premises are considered uninhabitable or cannot be used as a lawfully useable residential premise, the tenant may give immediate notice of termination to the landlord prior to the end of the term of tenancy agreement.

A tenant or landlord has one month from the date of damage to notify the other party on grounds of non-liveability. However, if your home is

affected you should give notice immediately so that you can ensure you are relieved of your obligation to pay rent as soon as possible.

At the termination of the tenancy agreement the tenant should seek to have their bond refunded. The landlord must agree to the refund of rental bond before the Residential Tenancies Authority will release the sum. Dispute Resolution processes are available where an outcome or agreement cannot be reached between the parties. For example, where the tenant refuses to vacate or the landlord wishes to enforce the tenancy agreement.

In the alternative, the tenant and landlord may come to an agreement as to a reduced rental price. The rent decrease will apply where the premises are destroyed or partly uninhabitable and will remain in force until the premises are returned to the condition it was in prior to the event. Generally, it is the obligation of the landlord to maintain the premises. In the event of a cyclone that responsibility remains. The tenant bears the burden of notifying the landlord of the damage and it is then the duty of the landlord to ensure the repairs and maintenance are undertaken and the property is in a liveable state in accordance with health and safety regulations. Goods and possessions within the premises are to be thoroughly



Danielle Fitzgerald

cleaned by the tenant but for the remainder of the property the landlord is liable. Entry to the premises in order to complete these tasks must be negotiated between the parties.

## Commercial Leases

In most commercial leases, destruction clauses outline the rights of the tenant and landlord in circumstances where the premises or building has been damaged and considered impracticable. Such a clause will generally apply where there has been significant damage to render the premises wholly or partly inaccessible or inoperative.

The wording of the destruction clause is to be carefully examined in determining the tenants and landlords respective rights with respect to terminating the lease, particularly its application and the procedures involved. If the destruction clause is applied successfully, the tenant may not be obliged to pay rent from the date the disastrous event occurred to when the premises is functioning and clearly accessible.

It is important for tenants and landlords to ensure that they understand the provisions of their commercial leases or tenancy agreements.

## Our March chuckle: *We like to have a laugh at ourselves...*

### Frozen Crabs & the Blonde Stewardess

A lawyer boarded an airplane in New Orleans with a box of frozen crabs and asked a blond stewardess to take care of them for him.

She took the box and promised to put it in the crew's refrigerator. He advised her that he was holding her personally responsible for them staying frozen, mentioning in a very haughty manner that he was a lawyer, and proceeded to rant at her about what would happen if she let them thaw out.

Needless to say, she was annoyed by his behavior. Shortly before landing in New York, she used the intercom to announce to the entire cabin, "Would the lawyer who gave me the crabs in New Orleans, please raise your hand."

Not one hand went up .... So she took them home and ate them.

#### Two lessons here:

1. *Lawyers aren't as smart as they think they are.*
2. *Blondes aren't as dumb as most folk think.*

the NES. You can view these at the Fair Work Ombudsman's website: [www.fairwork.gov.au](http://www.fairwork.gov.au).

The Enterprise Agreement is an agreement made between the employers and the employees that is intended to cover basic terms and conditions of employment and matters which are more specific to the employer's business. The benefits of which include:-

- both the employee and employer are afforded bargaining power and must bargain in good faith;
- ensures employees are 'better off overall' than they would be under the relevant Modern Award; and,
- ensures that the Enterprise Agreement is reviewed prior to it coming into effect by having to obtain approval from Fair Work Australia in a streamlined process.

#### **The Enterprise Agreement: Pre-Approval Steps**

Before an employer can request Fair Work Australia ('FWA') to approve an Enterprise Agreement a prescribed process must be followed. The process, in broad terms, involves the following:-

- a) The employer must give employees a copy of the proposed Enterprise Agreement. The employer must also take reasonable steps to explain the Enterprise Agreement to the employees;
- b) The employer is also required to give notification to their employees of their rights to be represented by a bargaining representative. A bargaining representative could include a relevant union;
- c) The Enterprise Agreement must be put to a vote. The vote can only occur once 21 days have passed after steps (a) and (b) have been completed;

- d) An Enterprise Agreement is made when the majority of employees vote in favour of the Enterprise Agreement. However, the Enterprise Agreement does not come into force until after it is approved by FWA; and,
- e) An application must then be made to FWA within 14 days for approval of the Enterprise Agreement.

#### **Approval of Enterprise Agreements**

There are a number of conditions that must be satisfied before an Enterprise Agreement can be approved by FWA. FWA must be satisfied that:-

- a) The Enterprise Agreement was entered into genuinely;
- b) The terms of the Enterprise Agreement do not breach the NES;
- c) That the Enterprise Agreement passes the "better off overall" test;
- d) If not all the employees are intended to be covered, the group of employees covered by the Enterprise Agreement was chosen fairly;
- e) There are no unlawful terms in the Enterprise Agreement;
- f) The Enterprise Agreement has a defined expiry date which cannot be more than 4 years after it was entered into;
- g) There is a term about settling disputes; and
- h) There is a flexibility clause in the Enterprise Agreement allowing employers and employees to vary, by written agreement, certain issues covered by the Enterprise Agreement.

#### **Unlawful terms are defined as terms which:-**

- a) Are discriminatory;
- b) Are objectionable;
- c) Which confer an entitlement that is unfair;

- d) Which exclude the unfair dismissal provisions under the Act; and those
- e) Which are inconsistent with industrial action provisions of the Act.

#### **Consequences of not having an Enterprise Agreement**

If an employee is not "covered" by a duly approved Enterprise Agreement or any of the workplace agreements not yet terminated or expired under the *Workplace Relations Act*, the relevant Modern Award is applicable.

Employees are entitled to claim protection or entitlements according to that Modern Award, despite any verbal or written employment contract.

For example, if you are an employer that pays your employees a flat rate which is intended to cover overtime and leave entitlements, and you do not have an Enterprise Agreement in place, employees can claim leave entitlements, overtime, penalty rates, allowances, as so on, on top of their flat rate in the event of a dispute.

Any party seeking to rely on the terms of an employment contract will find those terms are unenforceable, and similarly, will only be able to rely on the terms of the relevant Modern Award.

**The main thing to remember is: there is no longer any avenue for entering into individual workplace agreements, even by contract. Unless the employment conditions imposed by the relevant Modern Award are satisfactory and appropriate, employers and employees need to ensure there is a valid Enterprise Agreement in place as soon as possible.**

If you have any queries about any of the articles in this newsletter, please feel free to email [mac@macamiet.com.au](mailto:mac@macamiet.com.au) or phone 4944 0333 (Mackay) or 4948 4500 (Whitsundays) to speak directly with the author of the article.

## profile - Jodie Sanders-Bond

I was born in Upper Ferntree Gully at the foot of the Dandenong Ranges, east of Melbourne where I spent my entire childhood and teenage years. I completed my schooling at the local primary and high schools. I grew up wanting to be an Olympic athlete as I was quite a good 1500m runner as a junior (all of my club records from the 80's still stand today). I also did singing and songwriting in my spare time.



Jodie Sanders-Bond

After I completed High School I attended Monash University completing a Bachelor of Arts degree with a major in Philosophy (this is the usual degree you do when you don't quite know what you want to do). Towards the end of that degree, I had to start seriously thinking about what I was actually going to do for a job. Law had always appealed to me since enjoying Legal Studies in High School, so I applied for a place in a Bachelor of Laws at the same university and was accepted. I completed my first year of my Law Degree full time, but then made the decision to work full time and finish the course part time. This took 10 years!

Whilst I was studying part time I began working in a small law firm in Melbourne as a law clerk doing all kinds of commercial and commercial litigation work. I then moved to a mid-tier firm where I spent 4 years doing debt recovery and general corporate work such as the registration of companies, business names, trade marks, etc.

After working in law firms for over 5 years, I branched out to an in-house role with the Port of Melbourne Corporation where I spent 3 years working as an assistant company secretary/ paralegal. Whilst the role was primarily government corporate governance work, I also handled a lot of freedom of Information requests because at the time the Port was seeking environmental approvals for the channel deepening project which was quite

a controversial project in Melbourne.

I then moved to another in-house company secretarial/paralegal role in the corporate world where I spent 9 months before deciding to give up full time work and finish my Law degree. At this stage I had married and had a child and decided that I had too much going on.

I finally completed my Bachelor of Laws in January 2010. I then went to work for a former colleague who had started his own firm for 6 months doing construction litigation work.

In September of 2010, my husband was offered the opportunity to move to Mackay to work in the mines. We had both been very keen to move to Queensland for some time (we both hate the cold!), so naturally we jumped at the chance.

I moved to Mackay in early November 2010 and commenced working at Macrossan & Amiet 3 weeks later. I am so excited to have the opportunity to undertake my traineeship with Macrossan & Amiet. The areas of law are so diverse and I am doing things I have never had the opportunity to do before. I am looking forward to the challenges that the traineeship year brings and to finally being admitted early next, after such a long journey to get to this point in my career.

### Contact us

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