

## SPEED.VALUE.QUALITY.COMMITMENT

February 2010 Newsletter

### >> THE FAIR WORK ACT

#### **Since 1 July 2009 employment law has been governed by The Fair Work Act 2009 ("the Act").**

The Act has made a number of important changes to employment law. In particular, changes have been made to unfair dismissal, the making of agreements and dispute resolution. The government has introduced Fair Work Australia and the Fair Work Ombudsman.

Many changes started on 1 January 2010. In particular, the Australia Fair Pay and Conditions Standard.

#### **Which employees benefit under the new standard conditions?**

Employees employed in the ACT, Northern Territory or Victoria, by a company or were covered by a Federal Award before 27 March 2006 are entitled to the benefits of the Australia Fair Pay and Conditions Standard.

#### **What is the Australia Fair Pay and Conditions Standard**

Under the standard, working hours are limited to thirty eight hours per week plus reasonable additional hours averaged over twenty six weeks. This applies to both full time and casual employees.

When considering "reasonable additional hours" employers should have regard to the following factors:

- Whether the additional hours are a risk to the employee's health and safety;
- Whether it may cause problems for the employee's personal circumstances; and
- The needs of the business and the other staff members' entitlements to receive overtime payments.

#### **Redundancy Payments**

Under the Australia Fair Pay and Conditions Standard, all employees are entitled to receive redundancy payments if their employment is terminated for reasons of redundancy.

#### **High Income Employees**

Employees who earn more than \$108,000.00 as at 1 July 2009 to be indexed on 1 July each year, are in a special position. These employees cannot sue for unfair dismissal. These employees are also excluded from Award coverage provided certain notices are given.

#### **Flexible Working Arrangements and Parental Leave**

The Australia Fair Pay and Conditions Standard provide for flexible working arrangements and twelve months unpaid parental leave to employees with more than twelve months continuous service or for long term casual employees. Either parent may apply for this parental leave.

#### **Fair Work Information**

Employees must provide each new employee with an Information Statement at the commencement of their employment. This can be downloaded from [www.fairwork.gov.au](http://www.fairwork.gov.au).

Anyone wishing to have more detailed information about the regulations should contact David Lalic at Jackson Lalic Lawyers.

### >> MULTIPLE MORTGAGES

**If there are several mortgages and the first is paid out and there is a surplus of money, what should happen to that surplus money ...**

The High Court discussed this question in the case of *Bofinger v Kingsway Group Ltd* and reminded practitioners, lenders and borrowers of established law that perhaps had been forgotten or overlooked.

In the *Bofinger* case, Mr and Mrs Bofinger had guaranteed borrowings by their company to finance a development in the Sydney suburb of Enmore.

There were a second and third mortgage.



When the project got into difficulty, Mr and Mrs Bofinger sold some of their property and paid out the first mortgage in full. There was a surplus of monies. The first mortgagee paid this money to the second mortgagee to discharge that liability.

The Court said that this was a wrong approach. The Court pointed out that there was well established law that this surplus money was held on trust for Mr and Mrs Bofinger. The first mortgagee who paid out the money was obliged to account for the monies paid. The High Court did not make final decisions but sent the matter back to the Supreme Court for further argument.

## >> FARM DEBT MEDIATION ACT

### Should there be a new mediation if there is a second loan agreement but only one mortgage?

On 12 November 2009 Judge Harrison delivered judgment in the matter of Hargraves Secured Investments Limited v Waller. Mrs Waller was a farmer who applied for a loan in June 2003. The first loan agreement was entered into on 28 August 2003. The amount borrowed was \$450,000.00. Mrs Waller gave a mortgage to secure the loan.

Mrs Waller found herself in difficulty and a Farm Debt Mediation occurred on 5 June 2005. A Deed of Settlement was entered into on 26 July 2005. The Loan Agreement was increased by \$190,000.00 and there were new obligations agreed to.

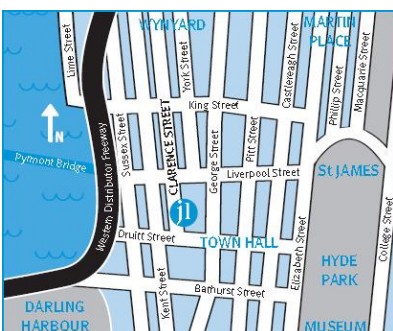
Ultimately after further defaults, a third Loan Agreement was entered into on 29 August 2006.

Hargraves commenced proceedings to obtain possession of the farm and recovery of monies owing after default of the third loan agreement.

Mrs Waller claimed that Hargraves was not entitled to do this because she should have been invited to a further mediation when there was a default under the third Loan Agreement.

The Court held that the Farm Debt Mediation Act only dealt with mortgages and not debts or loan agreements and that Mrs Waller was not entitled to a further mediation. Hargraves was granted an order for possession of the property. The Judge delayed the exercise of the order to give Mrs Waller time to vacate the premises.

Mrs Waller has appealed the decision of his Honour and Hargraves have agreed to a stay until judgment on the appeal.



The articles contained in this newsletter are in the nature of general comment only. The articles are neither intended nor should be taken to be, advice in respect of any particular matter. Advice should be sought in relation to particular circumstances.

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### Jackson Lalic Lawyers

Level 7, 217 Clarence Street, Sydney, NSW, 2000

T: (02) 9262 1770 F: (02) 9262 1771 DX: 13132 Sydney West

Post: PO Box Q245 Queen Victoria Building Post Office Sydney 1230.

## >> KYOTO PROTOCOL

### Forestry and Land Use and the Kyoto Protocol...

Investigations as to how to incorporate Forestry and Land Use into Carbon Trading mechanisms are ongoing...

The most obvious method of capturing carbon from the atmosphere is the planting of trees. However, under the Kyoto Protocol such projects will earn temporary Certified Emission Reduction certificates which expire after a few years to reflect the perceived fragility of carbon captured in plants. These credits have proven unpopular with buyers and sell for a fraction of the price of normal Certified Emission Reduction certificates. Ways of dealing with this problem have been developed in the United States in the context of the introduction of the Climate Bill.

There are two alternatives to temporary credits. The first is to bundle offsets into a diversified portfolio of credits or through what is referred to as buffering.

Under the buffering approach, a negotiated portion of credits from a project are set aside and treated as permanent once the projects permanence risk has been assessed. After an agreed period of time, the remainder of the credits are re-evaluated based on how the project has performed to date.

In the United States the main principal opposition to terminate offsets from changes in land use practices and forestry comes from the land holder themselves because of the requirement to lock in a certain quantity of carbon for a hundred year period. Land owners see significant difficulty with this proposal.

Australia will no doubt observe this American experience closely, since at least under the New South Wales scheme, the one hundred year requirement exists and there is a push to include forestry and land use in Australia's Carbon Pollution Reduction Scheme.