

IRS

Industrial  
Relations  
Society of  
South Australia Inc

# NEWSLETTER

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## SECRETARIAT

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**Note:** The views of the contributors are not necessarily those of IRSSA

### Patron:

**Hon Trevor Olsson, LL.B, MBE, KSJ,  
RFD,ED**

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## PRESIDENT'S MESSAGE

Dear members,

I am proud to be President of the Society for a further term and look forward to working with the new Committee of Management to facilitate high quality events for members and industrial and employee relations practitioners. The immediate past Committee has organised a State Convention on 17 October 2014 at Ayers House. We have secured a number of high quality speakers and arranged for Professor Andrew Stewart and his band, Orange Whip to play at the dinner following the Convention. Also organised by the previous Committee is a top class advocacy course from 31 October to 2 November 2014. Email fliers have been distributed and you can find further detail of these events on the IRSSA web site – [www.irssa.asn.au](http://www.irssa.asn.au)

At our recent Annual General Meeting I advised that the Committee will, over the coming year, engage with members on the potential for a change of name of the society – to the South Australian Labour and Employment Relations Association. This would bring the Society into line with the national parent body, the Australian Labour and Employment Relations Association. We will start consultation with members in the near future on this issue.

Best wishes,

Craig Stevens  
President

## IRSSA FULL DAY CONVENTION - 17TH OCTOBER 2014

Join us for an enjoyable and informative Convention at "Ayers House", 228 North Terrace, Adelaide, SA, 5000. Download the Registration form [HERE!](#)

Our prominent guest speakers will discuss and educate us about contemporary challenges in Workplace Relations, from a variety of perspectives, and include:

- Anne Gale – Commissioner for Equal Opportunity
- Ingmar Taylor SC – Barrister at State Chambers, Sydney
- Natalie Charlesworth – Barrister at Anthony Mason Chambers, Adelaide
- Vice President Hatcher – Fair Work Commission Member
- Joe Szakacs - SA Unions
- Cameron Brown - Ambassador for Beyond Blue
- Professor Andrew Stewart - Adelaide University
- Commissioner Hampton - Fair Work Australia

This is an event and networking opportunity not to be missed with lunch and refreshments over the course of the day. Download the Convention Program [HERE](#).

### Networking Opportunities

Our Convention will be followed by a 3 Course Dinner, with local South Australian produce and wines. Dancing and Entertainment from "Orange Whip"

### CPD Points for Practitioners:

The Convention will attract 6 CPD points for the full day, and 3 CPD points for the half.

## High Court resolves question of "implied term of trust and confidence"

### BY KYLIE DUNN, IRSSA COMMITTEE MEMBER

In a landmark decision, [\*Commonwealth Bank of Australia v Barker\* \[2014\] HCA 32](#), the High Court of Australia has confirmed that there is no duty of mutual trust and confidence implied in all Australian contracts of employment and has unanimously overturned a decision of the Full Federal Court which found that an employer had breached an implied term of trust and confidence in an executive's employment contract.

### The Facts

Mr Barker was employed by the Commonwealth Bank of Australia in the position of executive manager.

After being notified that his position was redundant, the Bank directed Mr Barker not to attend for work during the 4 week redeployment period and to return all company property including his mobile telephone. The Bank also immediately withdrew his intranet and email access.

The Bank informed Mr Barker that it was considering appropriate redeployment options for him in accordance with the Bank's Redeployment Policy which required the Bank to take certain steps to facilitate internal redeployment.

During the redeployment period the Bank tried unsuccessfully to contact Mr Barker about available positions within the Bank; however Mr Barker was unable to receive these communications due to his email and telephone access having been withdrawn. Consequently he was not redeployed and at the end of the redeployment period Mr Barker was terminated and received a redundancy package.

### Federal Court and Full Federal Court decisions

Mr Barker brought a claim against the Bank in the Federal Court seeking damages for breach of his employment contract on the basis that:

- the Redeployment Policy was incorporated into his contract of employment;
- the Bank breached the Policy by failing to take sufficient steps to inform him of suitable alternative roles, causing him to lose the benefit of those opportunities; and
- by failing to comply with the terms of the Policy the Bank had breached an implied term of mutual trust and confidence owed to Mr Barker.

At first instance, Justice Besanko found in favour of Mr Barker.

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On appeal by the Bank, the Full Court of the Federal Court upheld Justice Besanko's decision, albeit on different grounds.

The Full Court majority (Jacobsen and Lander JJ) recognised the existence of an implied term of mutual trust and confidence in all contracts of employment but held that such a term could be expressly excluded by a contrary express term in the contract.

The Full Court found that the Bank had breached the implied duty of mutual trust and confidence by failing to:

- take positive steps to consult with Mr Barker regarding alternative positions that were available to him;
- give Mr Barker an opportunity to apply for those alternate positions; and
- make contact with Mr Barker for an unreasonable period of time due to the fact it had withdrawn email and mobile telephone communications.

### **High Court decision**

The question on appeal was whether, under the common law of Australia, all employment contracts contained a term of mutual trust implied by law, where the parties would not, without reasonable cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence between them.

In a unanimous decision, Chief Justice French and Justices Kiefel, Bell, Gageler and Keane allowed the appeal and concluded that the proposed implied term was not necessary in the sense that would justify implying it by law into all employment contracts.

The Court also observed that the implied term had its history and development in the United Kingdom and applied in a different statutory context.

Their Honours held further that the implication of the term was a "step beyond the legitimate law-making function of the courts" and that the complex policy considerations meant that it was a matter which was more appropriate for the legislature to determine.

### **Implications**

The High Court's decision confirms that an implied term of mutual trust and confidence is not good law in Australia. There is no longer a presumption that all employment contracts in Australia contain an implied term not to engage in conduct that is likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.

This decision should discourage employees from making claims that legitimate management decisions are in breach of an implied contractual duty of trust and confidence.

However, three members of the High Court (French CJ, Bell and Keane JJ) noted that the Court's decision does not determine whether there is a general obligation to act in good faith in the performance of contracts, or whether contractual powers and discretions may be limited by good faith and rationality requirements.

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## **Defending applications in the new bullying jurisdiction – what should employers do?**

**By Julia Swift, Senior Associate, Cowell Clarke**

Since the introduction of the bullying jurisdiction in the Fair Work Commission from 1 January this year, there has not been the anticipated flood of applications.

Nevertheless, there are some lessons which can be taken from the operation of the jurisdiction in practice which can assist employers in how best to deal with such applications if and when they are made.

### **Preliminary issues an employer should consider**

First, the employer should consider whether it should seek to be legally represented in defending the application particularly given the potentially serious consequences of an adverse finding of bullying. Although the general rule is that the employer will represent itself, the Commission has been willing to allow employers to be legally represented particularly where the issues involved are complex or there are multiple witnesses.

Second, the employer should consider whether it is appropriate to seek an order that its name not be published to avoid any potential reputational damage. The Commission has made such orders in a number of cases.

Finally, the employer should consider whether there are any jurisdictional objections which can be raised such as that:

- the employer is not a constitutional corporation;
- the applicant is not a 'worker' (although note the wide definition of 'worker');
- the worker has provided insufficient information regarding the bullying allegations;
- the worker's employment has been terminated;
- the alleged conduct did not occur 'at work'; or
- the alleged conduct only involved one incident.

### **Responding to the allegations of bullying**

Obviously, an employer may deny that the alleged conduct occurred and that even if it did occur it did not constitute bullying because it was not unreasonable and/or did not create a risk to health and safety.

However, the most effective defence to bullying applications appears to be to assert that any alleged bullying conduct was simply reasonable management action taken in a reasonable manner. Based on the limited decisions of the Commission to date, many actions of managers have been justified on this basis including:

- monitoring performance more regularly than scheduled reviews;
- requiring an employee to report more frequently;
- conducting a meeting with an employee behind closed doors and raising concerns about the employee's conduct;

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- speaking (for a short time) in an aggressive tone and pointing to the worker;
  - forcefully asking the employee to leave the premises because they had provided a medical certificate for the period;
  - requiring an employee to perform a task which the employee asserts is beyond their skill level; and
  - determining not to pay, or to pay a reduced amount of, a discretionary bonus.

### **Conclusion**

Importantly for employers, despite the inability of the Commission to award compensation, employers should still be very careful how they deal with bullying applications because the facts involved may also found a claim by the employee for workers compensation, breach of work health and safety obligations and breach of contract (including policies related to bullying).

Further, if an employee succeeds in establishing bullying conduct in the Commission and the order made by the Commission is subsequently breached, that breach then gives the employee the right to seek compensation and significant pecuniary penalties.

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## **FAIR WORK OMBUDSMAN WEBSITE**

The Fair Work Ombudsman (FWO) website - [www.fairwork.gov.au](http://www.fairwork.gov.au) - has various new features including online learning tools for employers and employees. Further to this, there are specific sections on the website providing guidance for small business, young workers and students, and apprentices & trainees.

The FWO website also features an Online Learning Centre - available at [www.fairwork.gov.au/learning](http://www.fairwork.gov.au/learning) – that has a range of free interactive courses for both business owners and employees.

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## **A New Approach to Workplace Relations?**

On Wednesday 3 September 2014, as part of the UniSA Nelson Mandela Lecture series, jointly presented by the Bob Hawke Prime Ministerial Centre and the School of Law, former President of Ireland Mary McAleese spoke about the Irish Peace Process. Significantly she spoke about how important good working relationships are in all aspects of our lives, including our workplaces. The full video of her lecture can be accessed [here](#)