

scoop

entertaining the law



scoops

A word on journal entries...

Journal entries are popular with accountants and bookkeepers.

Many people think a journal entry can effect a legal transaction, such as a payment, set-off, novation, transfer, SMSF cashing etc.

That is incorrect. For legal and tax purposes, a journal entry is simply the recording of an underlying transaction. It is not the transaction itself. Whether or not the transaction occurs (and the date of the transaction) depends upon, among other things, the parties' intentions and whether/when any necessary formalities are observed.

Transacting parties' intentions are best documented in writing. Verbal arrangements carry evidentiary problems and can be less than satisfactory under scrutiny or challenge.

Necessary formalities depend on the transaction. Land dealings require writing, releases require deeds/ consideration, set-offs and novations require mutual agreement. A failure to follow a formality can result in a failure in the transaction.

Be careful when you make journal entries. Don't confuse your recording of the transaction with the transaction itself.



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Don't be casual about casual employees!

The recent 16 August 2018 Full Federal Court decision in **WorkPac Pty Limited v Skene** has **profound consequences** for employers, business buyers, sellers and advisers.

The Court held that a labour hire employee – employed/ described as *casual* but working a regular roster – was on true characterization *permanent*. Consequently, the employee was entitled to “**double dip**” – i.e. he was entitled not only to his casual loading (a feature of his casual employment contract) but also to annual leave under the *National Employment Standards* (not a feature of his casual employment agreement).

This is a **timely reminder** that a label or document describing an employee as casual can be rebutted by the true nature of the arrangement. If the employment arrangement does not involve some or all of irregularity/ uncertainty/ discontinuity/ intermittency/ unpredictability/ flexibility of work, it may well be recharacterized as permanent.

This case carries **expensive implications for all employers** if an employee's employment is recharacterized - including **unfunded** and **unexpected** paid leave liabilities and mandatory (but unexpected) obligations relating to notice of termination, redundancy pay, public holidays and unfair dismissal laws.

Australian Industry Group has estimated the decision has created **employer backpay liabilities** between **\$6 billion** and **\$8 billion**. This is an **extraordinary black hole** in the balance sheets of Australian businesses.

Much has already been said about the decision and its consequences for Australian businesses.

We wish to focus on a **few important points** that are less well understood:

First, a Valuation Issue for Business Buyers and Sellers: Any due diligence and conclusion on business value must consider the potential off-balance sheet liability for recharacterized casuals. Otherwise the Buyer will pay more than it should.

Second, a Risk Issue for Buyers and Sellers: appropriate warranties/ adjustment mechanisms must be included in the sale document to pass the recharacterization risk to the Seller. Otherwise the Buyer will, again, pay more than it should.

Third, an Employment Agreement Issue for Employers: The Court left open as a solution for employers the ability to set-off the casual loading against the permanent leave entitlements. But only if the employment documentation identified/ quantified the loading and contained appropriate acknowledgements and set-off language. Employers, get your documentation into order!

Finally, a Warning for Employers about Fair Work Act Penalties: Ignorance is no defence to penalties. Here, the Court remitted the penalties to the primary judge for determination. Penalties under the Act are significant. They can dwarf the actual liability to the employee. They can crush a business.

You need to be across these issues and manage them properly. Ignore them at your peril.

Baggiolegal regularly advises on business transactions and employment arrangements. Contact us if you need legal solutions

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