

# **CRITICAL CASE-LAW & LEGISLATIVE DEVELOPMENTS: THE YEAR IN REVIEW**

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**CLAYTON UTZ**

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# INTRODUCTION

Overview

- An change-rich environment?

Cases

- Top 5 emerging case issues

Lessons

- Complex case management in a complex environment

# A TYPICALLY BIG YEAR FOR UNIS

Adelaide University academics warned on under-performance, as teaching focus boosted

Updated 28 Apr 2015, 3:01pm

**Melbourne University to cut 540 administrative jobs**

THE AUSTRALIAN | JUNE 05, 2014 5:02PM

**Slashed research triggers dispute at Australian Catholic University**

THE AUSTRALIAN | NOVEMBER 19, 2014 12:00AM

Swinburne University to settle legal dispute over staff contracts

Universities call for fresh funding debate following defeat of Government's deregulation legislation

By political reporter [James Bennett](#)

Updated 18 Mar 2015, 3:44pm

*The full story...*

Enter Keywords Here

SEARCH

**Universities looking at cost cutting measures**

Alison Branley reported this story on [Tuesday, January 27, 2015 18:34:00](#)

# LEGISLATION AND POLICY CHANGES

- ▶ Frustrated Higher Education "reform"
- ▶ Other IR/employment legislation also blocked by senate (eg Construction watch dog)
- ▶ Productivity Commission
- ▶ Union Corruption Royal Commission
- ▶ Examination of the boundaries of employment:
  - » Sham contracting
  - » Interns/volunteers
  - » Unpaid adjuncts?
- ▶ Social media and work/private interface

# KEY CASES AND TOP 5 EMERGING ISSUES

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# 1. NEW STRATEGIC/FIRMER APPROACH TO BARGAINING

Bargaining by concession and attrition  
Limited meaningful "productivity trade-offs"

- ▶ Issue was:
  - » Dominos and PR pressure
  - » Student facing IA
- ▶ Suspension cases S.424 cases
  - » Monash
  - » Swinburne
- ▶ Swinburne bargaining approach and challenge to approval
- ▶ New approach?



## 2. INCREASINGLY LITIGIOUS APPROACH FROM THE NTEU - FED COURT HAPPY!

- ▶ LTU Future Ready:
  - » FWC dispute re consultation
  - » Applications for interlocutory orders x 3
  - » Subpoenas for production
  - » Protracted hearing
- ▶ LTU: Federal Court Breach of Job Security
- ▶ NTEU v Victoria University



## 2. INCREASINGLY LITIGIOUS APPROACH FROM THE NTEU - FED COURT HAPPY!

### LTU clause

#### 74 Job Security

The University is committed to job security. Wherever possible redundancies are to be avoided and compulsory retrenchment used as a last resort. The University reserves the right to use the agreed redundancy procedures and provisions set out in this Agreement when all reasonable attempts to mitigate against such action and to avoid job loss have been unsuccessful.

### VU clause

#### 65 Job Security

**65.1** The University recognises that security of employment is an important issue for its staff members. The goal of the University is to endeavour that there be no net reduction in jobs.

**65.2** The University will pursue the options of retraining, natural attrition, voluntary separations, fixed term retirement contracts, leave without pay, voluntary conversion to part-time employment, long service leave, or internal transfer before proceeding with forced redundancies.

**65.3** The University will seek wherever possible to avoid forced redundancies, but reserves the right to adopt this approach. Forced redundancies will be considered only as a last resort when all other options have been exhausted.



## 2. INCREASINGLY LITIGIOUS APPROACH FROM THE NTEU - FED COURT HAPPY!

- ▶ Swinburne: "Outsourcing"
  - » Consultation and adverse action = Fed Court breach?
  - » Alleged adverse action by diminishing or removing the security of employment, the prospects of advancement, transfer or promotion and the prospects of future engagement of its employees, because of, or to prevent the exercise of, their workplace rights to consultation under the EA.

## 2. INCREASINGLY LITIGIOUS APPROACH FROM THE NTEU - FED COURT HAPPY!

Chesnokova v The University of Adelaide

- [2014] FCA 1436

NTEU and Anor v UTS

- [2014] FCCA 1243 ('Simon Wade case')

Imberger v University of Western Australia [2014] FCA 1456

Zhang v University of Canberra [2015] FCA 21 University

### 3. POLICIES AS THE NEW SOURCE OF DUTIES OF TRUST, CONFIDENCE AND GENERAL FAIRNESS

Since we last met:

- High Court
  - CBA v Barker

How does the sector fare?

- EA's incorporating policies
- Multiple policies?
- Legislative status:
  - Policies instruments or standards
  - Promulgated under delegation /statute of council?
- Employment status

# ARE YOUR POLICIES PART OF YOUR CONTRACT?

## Case development:

- *Nikolich v Goldman Sachs*
- *Barker v CBA*

## Risk Management:

- Breach of contract and enforcement
- Versus reciprocity
- Can you manage the risk?

## Case update:

- *Romero v Farstad Shipping (Indian Pacific Pty Ltd)* (December 2014)

# ROMERO V FARSTAD SHIPPING (INDIAN PACIFIC) PTY LTD

Failure to consult before commencing formal investigation

Claimed breach of contract

Contract did not expressly include or exclude policies

Court looked at:

- ▶ The language of contract
- ▶ contract must be viewed in context, not in abstract isolation
- ▶ regard must be had to the purpose and object of the transaction

# ROMERO V FARSTAD SHIPPING (INDIAN PACIFIC) PTY LTD

## Contract stated:

- Policy could be changed from time to time by the employer
- But this did not create intention not to be contractually bound

## Implied term:

- That the employer would act with due regard to the policy
- Could not do so capriciously or unfairly towards the employee

Policy did form part of the contract of employment

# APPLIED DIRECTLY TO THE SECTOR

Christos v  
Curtin  
University of  
Technology  
[No 2] [2015]  
WASC 72  
(27 February  
2015)

- Followed Romero
- Curtin's grievance policy imposed "mutually binding obligations" on the lecturer and university
- BUT
- Failure to deal with the grievance while lecturer on leave was:
  - not a breach of its duty of care
  - nor a breach of any implied condition of employment



# 4. RISE AND RISE OF ADVERSE ACTION

- ▶ Can limit some actions (eg discipline):  
Focus is the reason why





# 4. THE RISE AND RISE OF ADVERSE ACTION

Heathcote v University of Sydney:

- [2014] FCCA 613 (14 November 2014)

National Tertiary Industry Union & Anor v University of Technology Sydney

- [2014] FCCA 1243 (14 June 2014) ('Simon Wade case')

Borg v Victoria University

- [2015] FCA 252

# 4. THE RISE AND RISE OF ADVERSE ACTION

## Heathcoate v UTS

- Workplace right:
  - Political opinion:
    - taking sides in an ideological split in Dept.
  - Bullying complaint
- BUT
- No link to redundancy
  - University wide redundancy process
    - Applied a "sound procedure of checks and balances" to the recommendations made for redundancy
  - No evidence of hidden agendas or bias

# 4. THE RISE AND RISE OF ADVERSE ACTION

## Borg v Victoria University

- Prior multiple complaints:
  - Bullying / harassment
  - FWO
  - WHS
- Refused re-engagement as sessional teacher
- Detailed analysis of evidence
- No link between prior complaints and failure to employ and workplace right
- BUT
  - Could have handled more sensitively
  - No paper trail contemporaneous to support defensible reasons

# 4. THE RISE AND RISE OF ADVERSE ACTION

## NTEU (Wade) v UTS

- "multiple acts of dishonest and fraudulent conduct"
- NTEU claimed:
  - Dismissed due to UTS Branch President and spent time in EA bargaining
- UTS could still bargain, even though not employee
- No impediment to representing the union
- Failed in temporary reinstatement
- Settled

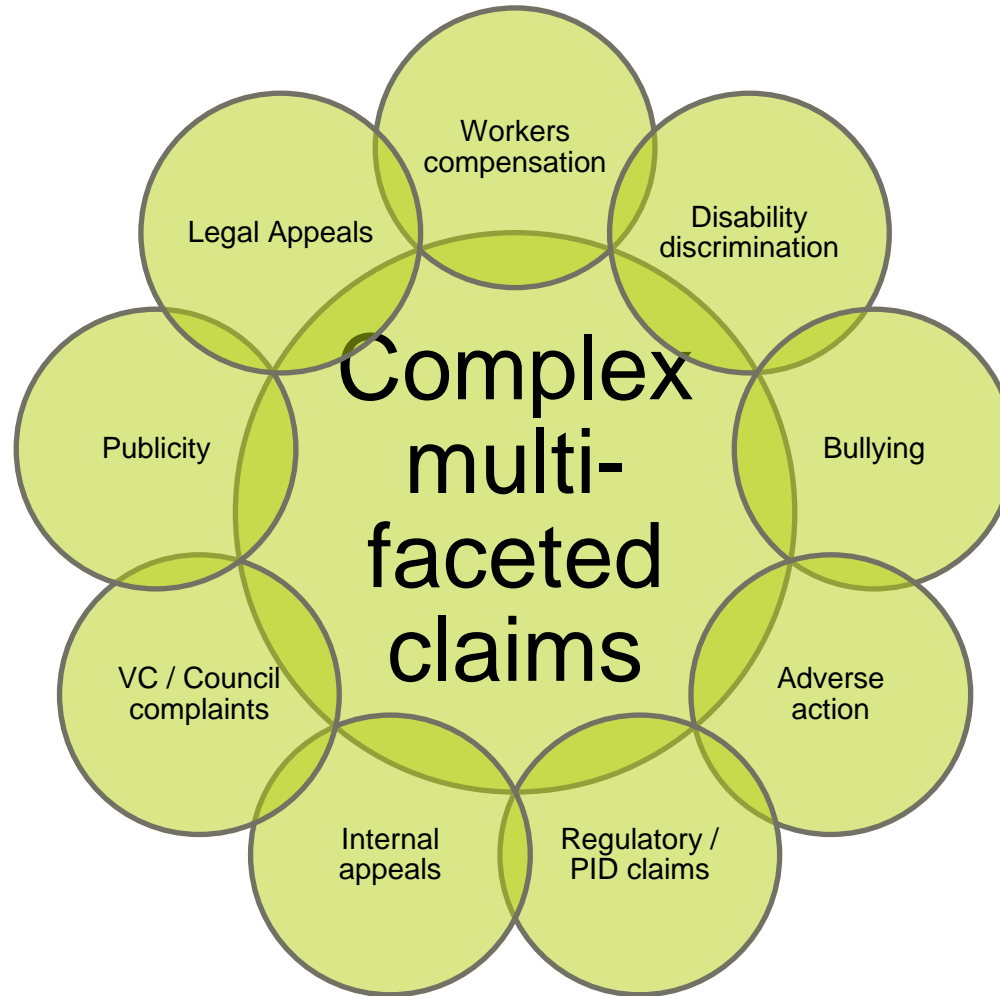
# SETTING THE SCENE

Employment law is hard

But it can be harder for Universities:

- Usual employment duties and obligations
- Additional:
  - Complex IR frameworks
  - Legislative overlay for policies / standards
  - Significant governance requirements
  - legislative and regulatory obligations
    - FOI - access regimes
    - Whistle-blower / Public Interest Disclosure regimes
    - Finance / audit obligations

# IT CAN BE MADE MORE DIFFICULT BY



# 5. THE PREVALENCE OF MULTI-PRONGED, COMPLEX LITIGATION

## Chen v Monash University

- [2015] FCA 130 (27 February 2015)

## Soliman v University of Technology, Sydney

- [2014] FWCFB 6394 (16 September 2014)

# 5. THE PREVALENCE OF MULTI-PRONGED, COMPLEX LITIGATION

Chen v Monash University

- Sex discrimination and harassment claim based on 53 incidents over 5 years

Finding: Rejected

- reconstructed "innocent" events after failing to fulfil her professional ambitions

December 2011  
AHRC and Federal Circuit Court

August 2013  
referred to Federal Court

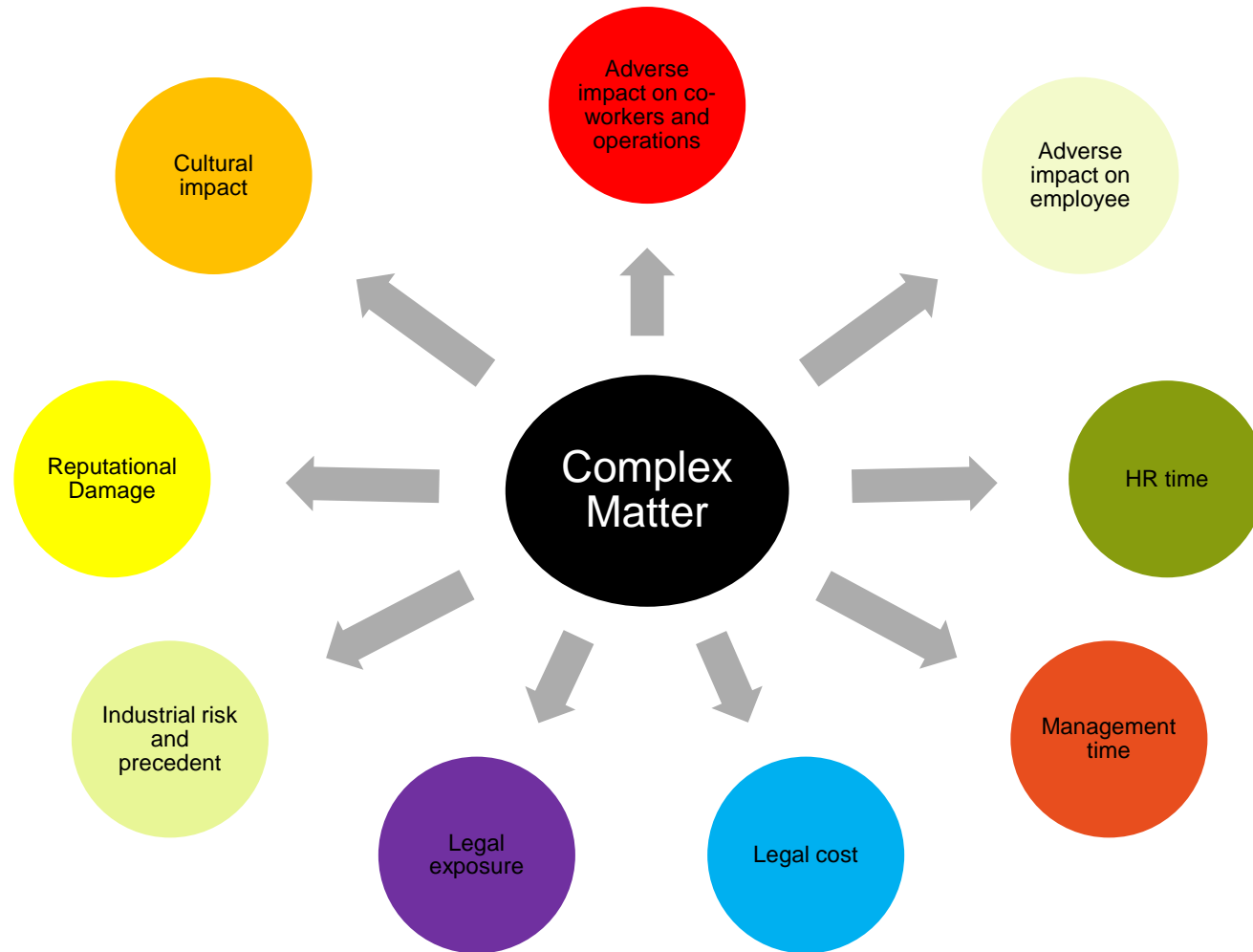
- Delay between evidence and final submissions
- Further attempt to amend application by Chen



# COMPLEX CASE MANAGEMENT IN A COMPLEX ENVIRONMENT

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# WHY IS IT IMPORTANT?





# ON-THE-GROUND COMPLEX CASE MANAGEMENT AND COMMON MISTAKES

- ▶ Poor framework
  - » Absence of clear policy guidance
  - » Overly prescriptive policy with limited capacity for early resolution or de-escalation
- ▶ A failure to identify the likely multi-faceted elements of a matter and likely risk profile. ie failure to triage
- ▶ Lack of knowledge of nature and extent of risks and exposures
- ▶ Absence of early case management planning:
  - » Failure to identify single (senior) case manager for higher risk cases
  - » Failure to identify different areas requiring consideration and possible involvement
  - » Failure to have a clear goal
- ▶ Contingency planning failure: Operational / Communications / Legal / Industrial
- ▶ Failure to factor in an intended timeline for completion (and factor in likely disputation)
- ▶ Failure to align and brief - Faculty/HoD, HR and Senior Management



# ON-THE-GROUND COMPLEX CASE MANAGEMENT AND COMMON MISTAKES

- ▶ Absence of a chronology (+ key document retention)
- ▶ Delay
- ▶ Creating an indefensible paper trail / emails (outside of LPP)
- ▶ Poor communication with and protection of senior decision makers
- ▶ Failure to apply rules and rigour:
  - » Failure to strictly apply the EBA
  - » Inadequate particulars/rigour in allegations and communications
  - » Failure to co-ordinate and checking of responses
- ▶ A reactive approach

# COMPLEX CASE MANAGEMENT CHECKLIST

## Key steps

1. Sound policy framework within which to manage such cases
2. Initial case assessment to identify cases as complex or potential complex/high risk
3. Seek advice early if required about nature and extent of risks and how best can be managed
4. Identify key case officer/co-ordinator and co-ordinate actions and decisions
5. Identify all current and likely future issues: Operational, staff impact, legal, industrial so as to plan and to inform decision making.- Identify different areas/persons requiring consideration and possible involvement
6. Have clear plan and protocols for communications and the preparation of documents, including to minimise the risk of documents later damaging the defence of an unfair dismissal, adverse action or other claim in a Court or Tribunal  
  
Use paper trail to your advantage
7. Minimise email
8. Commence and maintain a chronology and all communications with the staff member (for legal advice)

# COMPLEX CASE MANAGEMENT CHECKLIST

## Key steps

### 9. Plan for complexity:

- steps to ensure basic compliance
- contingencies including disputes and challenges and likely options for response
- mental health/stress issues
- escalation steps

### 10. Early proactive intervention and avoid delay

10. Brief area to know what to expect and ensure clear expectations, alignment and support.  
Brief senior management- no "surprises"

11. Identify likely decision makers and consider who "evidence givers" would be- avoid creating a cast of thousands  
Clarity of who is decision maker

12. Ensure rigour in particulars of allegations and in communications

13. Regular case management meetings

14. Be proactive and avoid inertia arising from competing risks or complexity

15. Ultimately ensure decisions are reasonable and defensible (or carry acceptable risk) and take into account all risks and impacts

Questions?

