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EVERYTHING MATTERS

International Recruitment - the do's and don'ts

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1 Don't gild the lily

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Section 52 and 53B of the Trade Practices Act

- *A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. (**Section 52**)*
- *A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment. (**Section 53B**)*

Potential for breach of contract of employment

1 Don't gild the lily



McRae v Watson Wyatt Australia Pty Limited

- McRae approached by Watson Wyatt
- McRae raises concerns
- **Alleged response**
- That Watson Wyatt always looked after its staff
- Watson Wyatt had a very generous policy compared to the industry standard
- In the event that her position was made redundant, McRae would be well looked after
- Watson Wyatt did not include redundancy policy in contracts of employment

1 Don't gild the lily



McRae v Watson Wyatt Australia Pty Limited

- McRae commenced employment in 2000
- McRae was made redundant in 2007
- Court found:
 - Alleged responses were made and constituted representations
 - The representations were clear and not mere 'puffery'
 - McRae relied upon the representations in accepting Watson Wyatt's offer.
 - McRae entitled to damages - \$107,000 plus interest



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**# 2 Do state that the
employment is subject
to the contract**

2 Do state that the employment is subject to contract



- Make it clear to the candidate that the employment is subject to signing a written contract of employment
- Masters v Cameron



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**# 3 Do reduce ALL the
terms of employment to
writing**

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- Ensure that the contract of employment contains all the terms
- Make this clear in the contract of employment
- Include an Entire Agreement clause

3 Do reduce ALL the terms of employment to writing



- Example of Entire Agreement clause

“This contract of employment (including its schedules and annexures)

- *constitutes the entire agreement between the parties as to its subject matter and supersedes all prior representations and agreements; and*
- *may only be altered in writing signed by the parties.”*

3 Do reduce ALL the terms of employment to writing



- McRae v Watson Wyatt Australia Pty Limited

- December 2003 promotion
- New contract of employment

“This letter sets out the entire agreement with you regarding the terms and conditions of your employment with the Company.”

- Other terms existed outside of the contract of employment
 - Qantas lounge fees
 - Private mobile phone calls



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4 Do make the employment contract subject to Visa approval

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- Example clauses:

"This offer of employment is subject to the Department of Immigration and Citizenship approving your visa application to work in Australia."

"This offer of employment is conditional upon confirmation of your permanent residence status. You are required to provide proof of your permanent resident status before commencing your employment with us."



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5 Do state your choice of law

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Consider this scenario:

- University based in New South Wales
- Candidate is a Sri Lankan national
- Employment negotiations concluded in Hong Kong
- Candidate signs contract of employment in California

5 Do state your choice of law



Potential applicable choices of law

- New South Wales
- Sri Lanka
- Hong Kong (or P.R.C)
- California

5 Do state your choice of law



- Examples of governing law clauses

“This contract of employment will be governed by the laws of New South Wales.”

“The interpretation and enforcement of this Agreement shall be subject to the laws of New South Wales. The parties submit to the exclusive jurisdiction of New South Wales courts and courts of appeal from them. The parties will not object to the exercise of jurisdiction by those courts on any basis.”



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**# 6 Do make your
specific terms and
general terms
consistent**

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Walker v Citigroup Global Markets Pty Ltd

- Walker approached by Citigroup
- Specific provisions
 - Walker be promoted at the end of the year
 - Walker receive a guaranteed bonus paid in the following February.
- Standard terms and conditions
 - Citigroup entitled to terminate employment on 1 month's notice



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7 Do consider tax implications

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- Will the individual become an Australian resident?
- Will the individual becoming to Australia permanently?
- Is the move to Australia temporary?



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8 Do ensure compliance with privacy laws

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- Reference checks
- National Privacy Principal 9 – Transborder Data Flows

“An organisation in Australia may transfer personal information about an individual to someone who is in a foreign country only if:

....

(b) the individual consents to the transfer.

....”

8 Do ensure compliance with the privacy laws



- Example clause

“You consent to us collecting, using, disclosing to third parties and transferring overseas to other organisations, your personal information and your sensitive information for the purposes of your employment and for purposes related to that purpose.”



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Questions

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