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# Who owns tips? Hospitality workers and the distribution of customer gratuities

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# Who owns tips? Hospitality workers and the distribution of customer gratuities

## **Abstract**

The tipping of hospitality workers by customers is an increasingly common custom in Australia. Tips are a substantial (though unquantified) part of the income of hospitality workers. Such workers are often casual and vulnerable young employees. Tipping occurs in a tripartite relationship between the employer/business operator, the customer and the worker. It is almost completely unregulated by the labour law instruments of awards and enterprise agreements.

Who owns tips? While customers may reasonably assume that service workers will receive all the tips they leave, either individually or as a share of a common fund (the tips jar), the legal ownership of tips is uncertain. The common law position is that the employer owns tips, on the basis that tips are monies received by employees arising from their employment. However if the employer sets up a system for sharing tips between employees which involves an independently administered fund (the tronc), tips are then owned beneficially by the employees. Express or implied terms of the employment contract may also provide that employees are entitled to tips, either individually or jointly. In this article we explore common tipping distribution practices in Australia, the legal ownership of tips, and the potential for regulatory intervention.

## **Keywords**

distribution, owns, customer, tips, gratuities, who, hospitality, workers

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# Who owns tips? Hospitality workers and the distribution of customer gratuities

*Amelia Gow\* and Andrew Frazer†*

*The tipping of hospitality workers by customers is an increasingly common custom in Australia. Tips are a substantial (though unquantified) part of the income of hospitality workers. Such workers are often casual and vulnerable young employees. Tipping occurs in a tripartite relationship between the employer/business operator, the customer and the worker. It is almost completely unregulated by the labour law instruments of awards and enterprise agreements.*

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## Introduction

Giving a tip is a familiar social custom in Australia. The individual transaction is such a small amount and so commonplace that many customers give little consideration to how the tip is dealt with once it leaves their hands. However, for workers and businesses in the hospitality industry the total accumulation of transactions across time means that tips can become a significant aspect of employment and a potential source of conflict in the workplace. This article will explore the social practices and legal position regarding the ownership and distribution of tips in Australia. Tipping is defined here as a voluntary payment of money by a customer in addition to the contract price, typically after service has been rendered.<sup>1</sup> This definition does not include service charges that are predetermined by businesses and included as part of the bill.

Tipping is an unusual transaction both socially and legally. The customer gives an amount of money beyond their legal obligations, apparently with the unstated intention that it will be received by an individual or group of workers who are already provided with a wage by their employer. Apart from its economic value, the money involved has social significance as a

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<sup>1</sup> M Lynn, 'Tipping Customs and Status Seeking: A Cross-Country Study' (1997) 16 *International Journal of Hospitality Management* 221.

‘symbolic medium’.<sup>2</sup> Particularly in Australia, where tipping is not considered obligatory, tipping may be considered part of the ‘economy of regard’.<sup>3</sup> As something distinct from a spontaneous gift or market transaction, it is part of a reciprocal exchange in which recipients are rewarded for performing personal service which is often done in the expectation that a tip will be received. Social pressures to tip may be strong but are generally unspecified and ambiguous for the customers and workers involved.<sup>4</sup> There are no clear social norms about where, why or how people should tip. This is particularly true in Australia, where it is only comparatively recently that tipping has become a common social practice and there is not yet a social expectation to tip comparable to that in North America.<sup>5</sup>

Nor do employers and employees have clear guidance on how tips should be treated. Instead, the distribution of tips is usually left to a policy or practice at a particular establishment, which is influenced by wider customs and practices within an industry.<sup>6</sup> The ownership and distribution of tips is almost entirely unaffected by state labour regulation. The issue arose in an early federal award application where Higgins J included tips in the wages of ship stewards on the principle that there was no justification for income differences between those who received tips and those who did not.<sup>7</sup> Since then, tips have rarely featured in awards and agreements.

Employment in food and beverage services comprises 5.6% of the Australian labour force, 60% of whom work part-time.<sup>8</sup> Hospitality workers often possess characteristics of vulnerable workers in precarious employment:<sup>9</sup> they tend to be young, casually employed, female and/or international students. As an indication of this, average weekly earnings of cafe workers and waiters in 2012 were just \$372 and \$403 respectively, around 35% of the national weekly

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<sup>2</sup> D Suarez, ‘Restaurant Tipping: Short-Circuiting the Morality of the Market’, in *Economic Development, Integration, and Morality in Asia and the Americas*, D C Wood (Ed) Vol 29, Emerald Publishing, Bingley, 2009, p 309.

<sup>3</sup> A Offer, ‘Between the Gift and the Market: The Economy of Regard’ (1997) 50 *Economic History Review* 450.

<sup>4</sup> B Shamir, ‘Between Gratitude and Gratuity: An Analysis of Tipping’ (1984) 11 *Annals of Tourism Research* 59 at 65; Y Margalioth, ‘The Social Norm of Tipping, Its Correlation with Inequality, and Differences in Tax Treatment Across Countries’ (2010) 11 *Theoretical Inquiries in Law* 561 at 567–8.

<sup>5</sup> J Burgess, ‘Tipping in Australia: The Result of American Influence?’ (2012) 36 *Journal of Australian Studies* 377; M O’Neill et al, ‘The Impact of Tipping on Job Satisfaction of Restaurant Servers: A Cross-Cultural Study’ (2000) 7 *Australian Journal of Hospitality Management* 51.

<sup>6</sup> S Bolles, ‘Gratuitous Behaviour’, *Sydney Morning Herald*, 26 October 2010.

<sup>7</sup> *Federated Marine Stewards and Pantrymen's Association v Commonwealth Steamship Owners' Association* (1910) 4 CAR 61.

<sup>8</sup> Australian Bureau of Statistics, *Labour Force, Australia, Detailed, Quarterly, August 2014*, Cat No 6291.0.55.003, Table 6, ABS, Canberra, August 2014. Apart from restaurants and cafes, this category includes takeaway and catering services, as well as pubs, taverns, bars and hospitality workers in clubs.

<sup>9</sup> On precariousness, see L Vosko, M MacDonald and I Campbell, ‘Introduction: Gender and the Concept of Precarious Employment’ in *Gender and the Contours of Precarious Employment*, L Vosko, M MacDonald and I Campbell (Eds), Routledge, Oxfordshire, 2009, pp 4–8.

average.<sup>10</sup> The total value of tips received in Australia is undocumented, but the large number of cafes, bars and restaurants in Australia must mean that the amount is substantial and, given the low wages of relevant occupations, represents a significant part of employee earnings.

After identifying the nature of the legal relationships involved in tipping, this article will examine the range of tip distribution practices, and attitudes towards them, as identified in a small exploratory study. No research has been published before on the methods by which tips are distributed within Australian hospitality businesses. This information is necessary to frame the practical context in which legal issues may arise. The study also identifies a range of workplace issues which may be perceived by employees, thereby identifying guidance for regulation. We then examine the legal ownership of tips under property and employment contract law, and the circumstances in which employees may have a right to receive customer tips. The limited potential for current statutory regulation to resolve tip ownership and distribution is examined, as well as other means of less formal regulation.

### **The relevant relationships of the tipping transaction**

The tipping transaction involves multiple parties: customer, employee(s) and employer. Different legal relationships exist between these parties. The relationship between employee and employer, created by a contract of service, is well-recognised and widely adopted. The employment contract may contain express terms which deal with tipping, and also generates implied duties which may be relevant. The customer and employer also have a contractual relationship created by the offer and acceptance of goods or services provided by the employer/proprietor's business. The provision of a tip is outside the terms of this contractual exchange but arises from it, and so occurs in a commercial context. There are also obligations and guarantees implied into the contract between customer and employer by competition and consumer law.<sup>11</sup>

There is no distinct legal relationship created by the interaction between employees and customers, or employees as co-workers, aside from the duties of reasonable care that arise under tort law and those created by general duties under work health and safety legislation.<sup>12</sup> In some particular factual circumstances, the tipping transaction may create separate legal relationships between customers, employers and employees such as that of agent and principal or trustee and beneficiary.

In addition to these recognised and potential legal relationships, the tipping transaction creates a unique tripartite relationship between employer, employee and customer. This relationship is distinct from the traditional bilateral relationship to which labour regulation

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<sup>10</sup> Australian Bureau of Statistics, 'Data Cube: All Employees, Average Weekly Total Cash Earnings – Occupation by Sex' in *Employee Earnings and Hours, Australia, May 2012*, Cat No 6306.0, ABS, Canberra, May 2012, at Row 222, 4312 'cafe workers'; at Row 225, 4315 'waiters'.

<sup>11</sup> See, eg, Competition and Consumer Act 2010 (Cth); Sch 2 (Australian Consumer Law) s 18.

<sup>12</sup> See, eg, Work Health and Safety Act 2011 (NSW) s 28.

and employment law is normally applied.<sup>13</sup> Analysis of multilateral work relationships has typically been limited to agency, subcontractor and franchising arrangements, rather than situations which directly involve customers.<sup>14</sup> Albin has proposed the term ‘multiple work relations’ to define situations in which the working functions of the worker and the employing functions of the employer are distributed among several persons.<sup>15</sup> Using this approach, tipping represents a distribution of part of the employing functions to the customer, who participates in the paying function which is normally the preserve of the employer, and may as a consequence also be regarded as participating in the employer’s management function. Albin’s approach indicates that hospitality workers may be placed in situations where they are forced to deal with conflicting demands from their employer and customers. This formulation was, however, influenced by the UK situation where (like the United States still) tips could be applied by the employer to make up the minimum wage until 2009.<sup>16</sup> While this may technically be the case in Australia (assuming that employers own tips), the Australian tradition of labour regulation has always assumed that the obligation to pay minimum wages lies directly on the employer,<sup>17</sup> so that such potential conflicts are less apparent.

### Tip distribution practices

A small exploratory study was undertaken in order to understand the range of tip distribution practices used in Australian hospitality businesses. No such research has previously been undertaken in Australia. The purpose of this research was to anchor discussion of the legal issues by reference to actual workplace practices. Because we were interested in the variety of practices and their role in the perceptions and interactions between workplace participants, a mainly qualitative methodology was used. Following human ethics approval, semi-structured interviews<sup>18</sup> were conducted to determine how tips are currently

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<sup>13</sup> P Davies and M Freedland, ‘The Complexities of the Employing Enterprise’ in *Boundaries and Frontiers of Labour Law*, G Davidov and B Langille (Eds), Hart Publishing, Oxford, 2006, pp 273–4.

<sup>14</sup> R Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships*, Federation Press, Sydney, 2012, p 48.

<sup>15</sup> E Albin, ‘Labour Law in a Service World’ (2010) 73 *MLR* 959 at 965, 968, 970–1 and 981; E Albin, ‘A Worker-Employer-Customer Triangle: The Case of Tips’ (2011) 40 *ILJ* 181. Albin draws on the identification of employer functions in M Freedland, *The Personal Employment Contract*, Oxford University Press, Oxford, 2003, pp 40–5.

<sup>16</sup> National Minimum Wage Regulations 1999 (UK) SI 1999/584, reg 31(1)(e); replaced by National Minimum Wage Regulations 1999 (Amendment) Regulations 2009 (UK) SI 2009/1902, reg 5. The US Fair Labor Standards Act 1938, 29 USC § 203(m) (2015) (FLS Act) allows employers to include tips in the minimum wage (currently US\$7.25) above a minimum cash wage for ‘tipped employees’ (currently US\$2.13): US Department of Labor, Wage and Hour Division, Fact Sheet 15: Tipped Employees Under the Fair Labor Standards Act, at <<http://www.dol.gov/whd/regs/compliance/whdfs15.htm>> (accessed 9 April 2015).

<sup>17</sup> Modern awards require that wages ‘will’ or ‘must’ be paid to the employee but do not specify the source of payment: see, eg, Hospitality Industry (General) Award 2010 [MA000009], 17 November 2014, cl 20.

<sup>18</sup> See generally D Silverman, *Interpreting Qualitative Data*, 4<sup>th</sup> ed, Sage Publications, Los Angeles, 2011, p 162; R Yin *Qualitative Research from Start to Finish*, Guilford Press, New York, 2011, pp 134–9.

managed and the effect of such management systems on relations at the workplace. The research did not attempt to examine customers' tipping practices or their intentions when they tipped. The interviews were conducted with persons identified as knowledgeable about the practice of the workplace at 18 hospitality establishments (six restaurants, six cafes and six bars) selected to provide a range of businesses by size and market position within the central business district of Wollongong during May 2014. Family-operated establishments were not included.

Two methodological points need to be made. Firstly, the limited demographic scope of this study cannot provide information about the relative incidence of particular practices, or attitudes to them, in a way that is generalisable across the Australian hospitality industry. No such study could claim to be representative of the wider population without the use of robust sampling methods and a significantly larger sample size, which were beyond the scope or intention of this study. This is true wherever the study is located. In our experience, the range of hospitality businesses in Wollongong is very similar to that found in any sizeable Australian city and the sample was chosen to reflect that range.<sup>19</sup> Secondly, though the sample was small, it is consistent with qualitative research in many fields. Such research may not be statistically reliable, but can make some claims for the wider relevance of results provided the methods and results are credible, dependable and confirmable.<sup>20</sup> Indicators of the wider applicability of our results are that the variety of reported distribution practices and experiences was relatively narrow, stable over time, consistent across the sample and consonant with other available sources.

Cash tips may be given directly to an individual server, left in an anonymous area on the table or the bar, or placed in a tip jar which is usually near the till. In the case of credit card payments, the customer includes the tip as a separate item on the bill. The method of tip payment used by the customer may significantly affect both the legal ownership of the money (discussed later) and the method of its distribution in practice. In the survey of practices at hospitality establishments in Wollongong, the most frequent method observed by research participants was tips paid into a communal tip jar (n=11).<sup>21</sup> Tips paid by credit card were noted to be uncommon in most hospitality establishments, however, at several restaurants it was noted to be common and a significant proportion of tip income (n=5).<sup>22</sup>

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<sup>19</sup> With over 280,000 inhabitants and located 90 km from the Sydney CBD, Wollongong is the 10th largest urban area in Australia. Restaurants and cafes are particularly concentrated in the geographical area studied: B Parkins, 'Council Unfazed by CBD Cafe Overload', *Illawarra Mercury*, 9 April 2015. The results of the study are supported by media reports of practices in other Australian cities, see, eg, C Lucas and S Whyte, 'Waiters' Tips Grabbed by Owners', *The Age*, 28 January 2013.

<sup>20</sup> E Guba and Y Lincoln, 'Competing Paradigms in Qualitative Research' in *The Landscape of Qualitative Research*, N Denzin and Y Lincoln (Eds), Sage Publications, Thousand Oaks, 1998, p 195 at 213–14; C Marshall and G Rossman, *Designing Qualitative Research*, 4<sup>th</sup> ed, Sage Publications, Thousand Oaks, 2006, pp 200–3.

<sup>21</sup> The number of establishments reporting a particular practice (18 establishments in total).

<sup>22</sup> Interview with service worker, restaurant 2 (Wollongong, 7 May 2014); interview with supervisor, restaurant 3 (Wollongong, 7 May 2014); interview with owner, restaurant 4 (Wollongong, 7 May 2014); interview with supervisor, restaurant 5 (Wollongong, 7 May 2014); interview with supervisor, restaurant 6 (Wollongong, 12 May 2014).

Once received, tips may be appropriated by the employer/proprietor, retained by individual serving staff, or pooled in some fashion for distribution. Media accounts suggest that pooling of tips is normal at hospitality establishments in Australia, although it is common for the employer/proprietor to keep a portion of the pool before distribution, or else to take a share of the tip pool on distribution.<sup>23</sup> All of the Wollongong establishments examined used pooling of tips. Once pooled, tips were distributed using one or a combination of the following methods:

- dividing the tips evenly at the end of a shift with remaining staff (n=6);
- dividing the tips based on hours worked on a periodical basis (n=6);
- allocating the total amount for a staff social event, such as the Christmas party or periodical dinners (n=7); and
- retaining the tips for the business, either entirely or by percentage (n=6).<sup>24</sup>

The distribution systems reported by research participants ranged from simple to very complex. At one end of the spectrum, tips were pooled and allocated to a single yearly social event for staff members.<sup>25</sup> The most complex distribution system involved a points allocation system based on skill level and length of employment as determined by the employer. Four different point values were available to staff in the distribution pool. The tips were allocated to employees according to their individual point values, to be distributed every 3 months.<sup>26</sup> At all workplaces surveyed, the employer determined the tipping policy and method of tip distribution; however, their involvement in the management of tips varied significantly.

Research participants were asked what the correct response would be under the workplace tipping system if a customer directly handed an employee a \$20 tip. Some hospitality enterprises permitted or encouraged employees to keep the hypothetical \$20 despite the pooling system (n=5). The majority of hospitality enterprises required employees to contribute any tips given directly by customers into the distribution pool (n=13). The research participants were also asked whether they would pool the tip or keep the tip in this situation. Of the 13 establishments that required employees to pool direct tips, five research participants responded that they would keep the tip in breach of the 'rule'. Many respondents pointed out that the direct and personal nature of the tip made them feel they 'earned' the money. One respondent stated:

I see tips as a service fee that has nothing to do with the kitchen, and has nothing to do with anyone else except the perception you gave the customer. Because they feel like you were good enough to warrant a service fee.<sup>27</sup>

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<sup>23</sup> S Whyte and C Lucas, 'Hard to Swallow: Restaurant Staff Tips Taken by Owners, Says Union' *Sydney Morning Herald*, 29 January 2013; R Lebihan, 'Tipping Point: Why I Won't Tip Restaurant Staff in Future' on *The Food Sage* (3 February 2013) at <<http://thefoodsage.com.au>> (accessed 4 July 2015).

<sup>24</sup> Some establishments are counted more than once as the practices overlap.

<sup>25</sup> Interview with service worker, bar 2 (Wollongong, 12 May 2014).

<sup>26</sup> Interview with supervisor, restaurant 3 (Wollongong, 7 May 2014).

<sup>27</sup> Ibid.



## Recipients of tips

Research participants were asked who was ‘entitled’ to tips under the workplace tipping system. There was significant variation in results and no general rule or approach can be determined. Where tips were allocated to a staff social event, all staff members were entitled to attend and therefore able to receive a share in the benefits of tips. Several respondents employed at hospitality enterprises which used this system acknowledged that when staff members could not or did not want to attend events such as these they often expressed disappointment or upset.<sup>28</sup> In distribution systems where tips were divided at the end of a shift or on a periodical basis, staff members consistently entitled to the pool included wait staff, bartenders and baristas (front of house staff) (n=12). Staff members commonly, but not consistently, excluded from the distribution pool included kitchen hands, management staff and the employers themselves. In several hospitality enterprises, kitchen staff were allocated a single share as a group or individually given ‘half shares’ (n=4).<sup>29</sup>

## Workplace issues

During interviews several research participants revealed instances where tips had become a source of conflict or disagreement at the workplace. The responses revealed that this was due to: lack of transparency, arbitrary decision-making, and disagreement over employee entitlement and apportionment. In addition, several responses revealed tips being used as a method of punishment or reward for workplace conduct, however, this was not expressed as a source of conflict.

Research participants pointed out that there were rarely written records of tips. As the distribution function was usually in the control of one employee or the owner, there was no way to determine whether or not the entirety of tips was going to employees or being distributed in accordance with the workplace system. One participant stated:

It is a grey area whether tips go to other sources. The boss has used tips in the past for renovations, staff parties. The thing about tips is because it is distributed so distantly, no one knows how much are [sic] generated. It’s a pretty free source of money for him.<sup>30</sup>

Another participant pointed out that the lack of records and complete employer control made the workplace tipping policy ‘unfair’:

Only one person really knows how much money there is there. We just get an envelope, we don’t have any paperwork saying you work X amount of hours so that is why you have this much. I think that annoys some people.<sup>31</sup>

The same research participant also raised doubts about whether the 30% portion of tips retained for the staff Christmas party were used for that purpose:

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<sup>28</sup> Interview with service worker, bar 2 (Wollongong, 12 May 2014); interview with manager, bar 3 (Wollongong, 12 May 2014); interview with manager, cafe 1 (Wollongong, 13 April 2014).

<sup>29</sup> Interview with service worker, restaurant 2 (Wollongong, 7 May 2014); interview with supervisor, restaurant 3 (Wollongong, 7 May 2014); interview with service worker, restaurant 5 (Wollongong, 7 May 2014).

<sup>30</sup> Interview with supervisor, restaurant 3 (Wollongong, 7 May 2014).

<sup>31</sup> Interview with supervisor, cafe 5 (Wollongong, 14 May 2014).

Sometimes I think: I swear you are making money off these tips. But you have no way of knowing. You don't really get an option, it's just how the system was when I started. I don't really like it, what if you don't want to go to the Christmas party or anything like that?<sup>32</sup>

Arbitrary decision-making by employers was seen by research participants as a significant source of conflict in the workplace. This was usually in response to changes in the tipping distribution system, or employer decisions which went outside the established system. One research participant recounted a workplace conflict regarding a decision by a manager to use pooled tips to repair a broken kitchen appliance. The participant emphasised this was 'unfair' as the appliance was not broken through the fault of employees, but the decision resulted in employees not receiving income from tips for 4 weeks. The respondent recalled that:

everyone was saying 'that's illegal, she can't do that', and I thought I don't know if that's illegal but it's s\*\*\*. She isn't an owner, but she has a salary and an incentive to meet budget.<sup>33</sup>

Another research participant in a management position recalled workplace disagreement when the tip distribution system changed from an individual entitlement model to a staff social event pool. The respondent noted workplace disagreement over the change as well as the decision to 'override everyone's opinion' in order to implement the new system.<sup>34</sup>

The amount of tips which go to employees and which employees were entitled to be in the pool were common sources of conflict in workplaces surveyed. This was due to perceived differences in hours worked and skill level of employees,<sup>35</sup> and the proportion of tips that were cycled back into the business, or were used for 'breakages' under the distribution system.<sup>36</sup> One restaurant, where tips were described as 'significant', retained 30% of tips for the purpose of breakages. The respondent commented that his co-workers partook in 'a fair bit of bitching' over this aspect of the tipping policy. It was seen as an unfairly large proportion of tips because breakages were an infrequent occurrence.<sup>37</sup> Another research participant recalled a time when an employee was given a verbal warning for 'skimming tips' (taking funds prior to an even-split pooled distribution). The employee had felt entitled to a larger proportion of the tips as they worked more hours and had perceived themselves to have a higher skill level than his co-workers.<sup>38</sup> The same respondent had resigned from a previous job over the issue of tips. His former workplace had a distribution system where 25% of tips were allocated to the head chef and maître d'. The respondent considered this unfair as these staff- members were paid by salary and did not engage in high levels of customer service. The

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Interview with manager, bar 3 (Wollongong, 12 May 2014).

<sup>35</sup> Interview with service worker, restaurant 2 (Wollongong, 7 May 2014); interview with manager, bar 6 (Wollongong, 12 May 2014).

<sup>36</sup> Interview with service worker, restaurant 5 (Wollongong, 7 May 2014).

<sup>37</sup> Ibid.

<sup>38</sup> Interview with manager, bar 6 (Wollongong, 12 May 2014).

workplace also paid staff members their tips in coin regardless of the total amount, which the former employee found demeaning.<sup>39</sup>

Tips were used as a disciplinary measure or reward at several workplaces. One restaurant excluded workers from the tipping pool as discipline for employee error. The survey participant explained:

If someone has done something wrong they are penalised by not getting their tips. Say if a worker sends out the wrong bill and a customer pays less than the charge, or if a worker did something that was costly to the business like dropping something that was expensive.<sup>40</sup>

One bar excluded employees from the tipping pool if employees were caught breaching a newly introduced safety rule. If a co-worker reported the offending employee they would receive the offender's share of tips. The same establishment used tips as a form of reward for completing unpleasant tasks.<sup>41</sup> Another survey participant explained that the practice at his workplace was to use tips to 'pay up' any tills that were short at the end of the night. The participant explained this was done so that employees were not obliged to pay the difference 'out of their own pocket'.<sup>42</sup> Such deductions from pay would most likely be unlawful but the employees were clearly unaware of this.<sup>43</sup>

## Overview

While there are certain methods of distribution that appear to be known across the hospitality industry, each workplace had an individual approach and policy. The lack of common custom means an employee could not predict with certainty the way in which tips were distributed when commencing work with a new employer. There was also no clear pattern of response indicating that staff or employers had ownership of tips. Many service staff felt that they had earned tips and had moral rights to tips that should prevent employers from taking a substantial or arbitrary amount. However participants acknowledged that employers typically had decision-making power and control over tips that could not easily be challenged by employees.

There was also evidence of different attitudes towards tips as between employer proprietors and employees. These differences stemmed from the ambiguity of the symbolic significance and intended recipients of tips. The employee participants clearly believed that they earned tips based on effort, emotional labour and contribution to the business. This sense of moral entitlement was expressed to exist at both group and individual levels. Distinctions were often made between serving and kitchen workers, and between employees and managers or owners. Although less clear, there was evidence that some business owners considered tips to be legitimately earned by the business. One restaurant owner expressed this view:

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<sup>39</sup> Ibid.

<sup>40</sup> Interview with supervisor, restaurant 6 (Wollongong, 12 May 2014).

<sup>41</sup> Interview with owner, bar 5 (Wollongong, 14 May 2014).

<sup>42</sup> Interview with supervisor, bar 4 (Wollongong, 12 May 2014).

<sup>43</sup> Fair Work Act 2009 (Cth) (FW Act) s 323. Under FW Act s 326 a contractual term allowing deductions would only be valid if not unreasonable.

I see tips as the business's, because when they leave it as extra and they don't say specifically 'that's for the service' or 'this person was great'. To me it [tips] belong to the business because they enjoyed everything. It wasn't one specific thing that means that person deserves the money. It was the whole experience together that's what the tip was for, and the experience was created by the owner – the business.<sup>44</sup>

## Legal ownership of tips

Although there is no accepted legal definition of a tip in Australian law, as defined in this article (that is, a voluntary payment in addition to the contract price) a tip has the legal status of a gift. Hence, on delivery and acceptance, legal title to the money in specie transfers to the intended recipient as objectively determined.<sup>45</sup> The problem is, however, that anonymous tips do not indicate who that recipient is intended to be. Where tips are not given directly to employees, there is at least as strong an argument that the customer objectively intends to give the tip to the business as to employees. This issue is compounded by the question of whether, if tips are intended to go to employees, it is on an individual or pooled basis.

Irrespective of the donor's actual intention, the common law appears to state that title to all gifts received by the employee in connection with their employment belongs to the employer unless the employee's entitlement is established by an express or implied contractual term, or perhaps a restitutionary claim. No Australian legal decisions have directly determined the general position regarding the ownership of tips; however, several UK cases (discussed below) provide relevant authority in specific situations in the course of deciding questions of remuneration of employees under workers compensation or minimum wage law. The approach taken by the UK courts in regard to implied terms and tip ownership provides a strong basis for the position in Australian law.

### Employer ownership: The duty to account

The employee's duty to account to the employer for property is well-recognised duty and may be considered an aspect of the implied contractual duty of fidelity and good faith.<sup>46</sup> The duty arises at common law as well as equity and does not depend on the existence of fiduciary duties. It applies whether the property is acquired in circumstances of dishonesty or of honesty. The employee's duty to account means that if an employee receives money or other property in connection with their employment, that property belongs to the employer who gains legal possession of it as soon as it passes into the hands of the employee. Provided the property is received as a consequence of employment, the employee cannot assert title as

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<sup>44</sup> Interview with owner, restaurant 4 (Wollongong, 7 May 2014).

<sup>45</sup> *Ilich v R* (1987) 162 CLR 110 at 139 per Brennan J ; 69 ALR 231; [1987] HCA 1; BC8701758; G Pearson et al, *Commercial Law: Commentary and Materials*, 3<sup>rd</sup> ed, Thomson Reuters, Pyrmont, 2010, p 136; D Sheehan, *The Principles of Personal Property Law*, Hart Publishing, Oxford, 2011, p 53.

<sup>46</sup> C Sappideen et al, *Macken's Law of Employment*, 7th ed, Thomson Reuters, Rozelle, 2011, p 242; M Irving, *The Contract of Employment*, LexisNexis Butterworths, Chatswood, 2012, pp 430–1, 434; H Collins, K Ewing and A McColgan, *Labour Law*, Cambridge University Press, Cambridge, 2012, p 147; A Frazer, 'The Employee's Contractual Duty of Fidelity' (2015) 131 *LQR* 53 at 58.

against the employer. The duty is enforceable in debt, by a restitutionary claim for money had and received, as well as by equitable remedies for breach of fiduciary duty.<sup>47</sup> If tips are the property of the employer under this duty, an employee who took tips without the employer's agreement or acquiescence would commit a repudiatory breach of the employment contract, providing grounds for summary dismissal at common law.<sup>48</sup>

Under early common law and equity, where a servant obtained a monetary benefit by using his master's property entrusted to him for the benefit of the master, the servant was liable to account to the master.<sup>49</sup> Furthermore, where a servant agreed to perform services for a third party during the time the servant was obliged to work for the master, the master was entitled to the proceeds of the services earned by the servant.<sup>50</sup> The principle extended to all property which came into the servant's hands by reason of their employment. Pollock and Wright stated that in general 'the rule is settled in our modern law that a servant does not possess by virtue of his custody' and that 'the servant has no property as against his master'.<sup>51</sup> Several 'finding' cases establish that when an employee finds personal property by reason of their employment, the employer and not the employee gains legal possession because of the nature of the relationship.<sup>52</sup>

The duty to account was developed mainly in relation to agents and in the context of bribes and other secret commissions. A secret commission arises whenever an agent or employee obtains a pecuniary benefit, undisclosed to the principal or employer, while engaging in transactions on their behalf. The principal or employer is entitled to the commission at common law, and may alternatively recover any profits in equity.<sup>53</sup> The duty applies whether or not property of the principal or employer has been used to obtain the commission. It is based on deterrence against abuse of position, but is not limited to situations

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<sup>47</sup> *Morison v Thompson* (1874) LR 9 QB 480; *Willey v Synan* (1937) 57 CLR 200 at 216-17 per Dixon J; [1937] HCA 85; *City of London Corporation v Appleyard* [1963] 1 WLR 982 at 988; [1963] 2 All ER 834; *Eccles & Co v Louisville and Nashville Railroad Company* [1912] 1 KB 135 at 145, 147; (1911) 28 TLR 67; *Peninsular and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at 228 per Dixon J; 11 ALJR 570; BC3890124; *Asset Risk Management Ltd v Hyndes* [1999] NSWCA 201; BC9909077; Irving, above n 46, pp 394-6; P Millett, 'Bribes and Secret Commissions' (1993) 1 *Restitution Law Review* 7 at 23, 28-9; G Dal Pont, *Law of Agency*, 2<sup>nd</sup> ed, LexisNexis Butterworths, Chatswood, 2008, p 340.

<sup>48</sup> *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 357, 363; [1886-90] All ER Rep 65.

<sup>49</sup> *Diplock v Blackburn* (1811) 3 Camp 43; 170 ER 1300; *Shallcross v Oldham* (1862) 2 J & H 609; 70 ER 1202.

<sup>50</sup> *Thompson v Havelock* (1808) 1 Camp 527; 170 ER 1045.

<sup>51</sup> F Pollock and R Wright, *An Essay on Possession in the Common Law*, Clarendon Press, Oxford, 1888, pp 60, 139; see also J Salmond, *Jurisprudence*, 7<sup>th</sup> ed, Sweet & Maxwell, London, 1924, p 307.

<sup>52</sup> *Bridges v Hawkesworth* (1851) 21 LJ QB 75; *M'Dowell v Ulster Bank Ltd* (1899) 33 ILT 223; *Willey* (1937) 57 CLR 200; [1937] HCA 85; *City of London Corporation* [1963] 1 WLR 982; [1963] 2 All ER 834; *Byrne v Hoare* [1965] Qd R 135; Irving, above n 46, pp 393, 396.

<sup>53</sup> *Boston Deep Sea Fishing and Ice Co* (1888) 39 Ch D 339 at 364, 375; [1886-90] All ER Rep 65; *Parker v McKenna* (1874) LR 10 Ch App 96 at 118; [1874-80] All ER Rep 443; P Millett, 'Bribes and Secret Commissions Again' (2012) 71 *CLJ* 583 at 586-7.

of actual or potential conflict of interest.<sup>54</sup> Nor is recovery limited to situations involving fraudulent intent: both the donor's intention and the recipient's state of mind are presumed to be irrelevant in the face of an apparent breach of the duty.<sup>55</sup> Employees are often placed in a position of agency and the agency aspect of the employee's duties is still relevant.<sup>56</sup> The duty to account certainly applies when an employee handles money in the course of their employment.<sup>57</sup>

The duty to account applies not only when the employee is acting in the course of employment, but more widely where there is a connection between the employment and the property.<sup>58</sup> This was made clear in *Morison v Thompson*, where the Court of Queen's Bench on appeal thought it beyond question that the duty applies to all servants and agents:

the profits acquired by the servant or agent in the course of, *or in connection with*, his service or agency, belonging to the master or principal.<sup>59</sup>

In *Reading*, Denning LJ recognised that, without the employer's express or implied approval to retain them, tangible benefits received by employees by virtue of their employment are the property of their employer, and failure to account for them is a breach of the duty of fidelity and good faith. Denning LJ expressed the connection between the benefit and the employment in slightly more circumscribed terms than previously:

if a servant, in violation of his duty of honesty and good faith, takes advantage of his service to make a profit for himself, in this sense, that the assets of which he has control, or the facilities which he enjoys, or the position which he occupies, are the *real cause* of his obtaining the money, as distinct from being the mere opportunity for getting it, that is to say, if they play the *predominant part* in his obtaining the money, then he is accountable for it to the master.<sup>60</sup>

There is no reason to conclude that this duty does not include tips.<sup>61</sup> If the employment provided the means and opportunity to obtain the property, the duty to account will apply.<sup>62</sup>

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<sup>54</sup> *Reading v A-G* [1951] AC 507 at 516 per Lord Porter; [1951] 1 All ER 617; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; 287 ALR 22; [2012] FCAFC 6 at [188], [192]; BC201200621.

<sup>55</sup> *Salford Corporation v Lever* [1891] 1 QB 168; *Williamson v Hine* [1891] 1 Ch 390; *Shipway v Broadwood* [1899] 1 QB 369; *Grant v Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233; *Hippisley v Knee Brothers* [1905] 1 KB 1; *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 at 575; [1949] WN 333; *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at 132; [2004] 3 WLR 1106; [2005] 4 All ER 73.

<sup>56</sup> See Collins et al, above n 46, p 146; Frazer, above n 46, where the influence of agency on the employee's duty of fidelity is recognised.

<sup>57</sup> *Jarrad v Silver Top Taxi Service* (1980) 43 FLR 1 at 6; 29 ALR 533.

<sup>58</sup> *A-G v Goddard* (1929) 98 LJ KB 743.

<sup>59</sup> *Morison* (1874) LR 9 QB 480 at 483 (emphasis added).

<sup>60</sup> *Reading v R* [1948] 2 KB 268 at 275 (emphasis added). That the employer prima facie owned benefits obtained by an employee by virtue of their employment was accepted on appeal: *Reading* [1951] AC 507 at 514, 516 per Lord Porter; 517–18 per Lord Oaksey; [1951] 1 All ER 617.

<sup>61</sup> An anomalous case is *The Parkdale* [1897] P 53, where a shipmaster was allowed to keep personal gratuities given after a transaction was concluded. The decision, however, was made in

This clearly encapsulates the tipping transaction, as employees would not receive tips were it not for their employment at the hospitality enterprise. It is sometimes said that tips are an exception to the duty to account, but this view is based on an assumption that the employee has a contractual entitlement to retain them, or at least that there is acquiescence by the employer.<sup>63</sup> If that is the case, the duty to account does not apply because title has been transferred to the employee in some way.

The survey results discussed earlier observed that several employees would retain tips given to them directly notwithstanding workplace rules regarding pooling tips, due to notions of ‘ownership’ or ‘earning’ the money. This would be in conflict with the duty to account under common law. This duty applies to both tips given personally to the employee and to money left in anonymous places in hospitality establishments, such as on a table or bar. Both property law and the duty to account indicate that employers have legal ownership of tips in the absence of an express or implied term in the employment contract. This would allow employers to require employees to account for tips received in employment if they choose.

### Employee ownership: The *tronc*

Several English cases describe the *tronc* system, which was apparently introduced by continental waiters who followed their wealthy clientele around the fashionable resorts and destinations from season to season in the early twentieth century. It seems that such waiters were originally considered self-employed and were remunerated mainly by tips, although subsequent case law has proceeded on the basis that the workers concerned are employees.<sup>64</sup> The practice developed whereby tips were placed in a *tronc* (from the French, meaning in this context a collection box). This was often a locked box kept in the custody of one of the waiters (the *tronc*master) who kept accounts and distributed the proceeds according to an established formula. The term and the practice signified by it have gained a specific legal recognition and meaning. The key feature of the *tronc* system is that custody and distribution are independent of the employer or proprietor; although as the custom was naturalised the scheme was often established by or with the consent of the employer, with a head waiter or managerial staff member appointed *tronc*master.

The practice was considered by the English Court of Appeal in *Wrottesley v Regent Street Florida Restaurant*<sup>65</sup> in the context of determining whether tips could be counted towards the statutory minimum wage in the catering industry. The facts disclosed that a *tronc* system had been agreed upon orally by the employer and employees. Under this system, employees pooled all tips in a locked box, with the key being held by the head waiter. The proceeds were

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the context of Crown forfeiture, did not consider the duty to account and was based on an arbitrator’s finding that retention of such gratuities was an established custom. Cf P Watts and F Reynolds, *Bowstead and Reynolds on Agency*, 19<sup>th</sup> ed, Sweet & Maxwell, London, 2010, p 257.

<sup>62</sup> Sappideen et al, above n 46, p 242.

<sup>63</sup> F Batt, *The Law of Master and Servant*, 5<sup>th</sup> ed, Pitman, London, 1967, p 206: on the basis that in many areas ‘the receipt of “tips” is fully recognised by the employers or it is so notorious a practice that they cannot complain of it’. See also A Emir, *Selwyn’s Law of Employment*, 17<sup>th</sup> ed, Oxford University Press, Oxford, 2012, p 312.

<sup>64</sup> Albin, ‘A Worker-Employer-Customer Triangle’, above n 15, at 192–3.

<sup>65</sup> [1951] 2 KB 277.

distributed weekly to those entitled to participate in the distribution pool. The court concluded that tips were not ‘wages’ under the legislation as wages come from the employer, not third parties. The court agreed with the prosecutor (for the waiters) that the employer was ‘no more than a “custodian” of the tronc’.<sup>66</sup> The customers’ intention was for tips to vest in the waiter, not the employer business. When a customer provided a tip to an employee ‘it became the property’ of the employee and when placed in the tronc it became the joint property of those entitled to the distribution:

It seems to us that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer he would have no title to the money: the position would be exactly the same as if the owner of some bank notes and coin put them in a bag and handed it to some person to keep for him. When the tronc money is shared out the waiters are dividing up *their own money*.<sup>67</sup>

The court simply assumed that the tips were initially the employees’ property, based on the presumed intention of the donor customers. It implicitly applied a trust perspective. *Wrottesley* suggests that when a system is created where tips are pooled and distributed independently of employer discretion, a trust can be created. While the employer may hold the funds on trust, employees in the distribution pool are the joint beneficial owners of the funds.

The tronc system was further examined in the context of minimum wages in the 2009 case *Annabel’s (Berkeley Square)*<sup>68</sup> which involved troncs established by employers in private clubs. The employers each appointed two senior managers as troncmasters for whom administration of the tronc through a bank account was part of their employment duties. The tips derived from a voluntary service charge, which was included on the bill and normally paid by cheque or credit card. After deduction of income tax by the troncmasters, distribution was by way of an established points-based formula and changes were only made by consultation with the employees. It was found that the employer had no power to control administration or distribution of the tronc. It was assumed that the money received by cheque or credit card was initially the property of the employers, but title passed to the troncmasters once it was given to them by the employers. The troncmasters were not acting on behalf of the employers but held the money on a discretionary trust consisting of ‘a fund constituting in equity the employees’ commonly owned property’.<sup>69</sup> Once given over by the employer, the tip money was in the same situation as identified in *Wrottesley*. Rimer LJ said:

The employer cannot claim that it paid the relevant money to the employee because it was not its money that was so paid. The employer may regard this as hard because the money so paid did admittedly derive from money that was once its own. The result, however, flows from a legitimate and genuine arrangement under which the

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<sup>66</sup> Ibid, at 280.

<sup>67</sup> Ibid, at 283 (emphasis added).

<sup>68</sup> *Annabel’s (Berkeley Square) Ltd v Revenue and Customs Commissioners* [2009] 4 All ER 55; [2009] ICR 1123; [2009] STC 1551; [2009] EWCA Civ 361.

<sup>69</sup> Ibid, at 68–9 per Rimer LJ.



administration and distribution of service charge money was to be handled exclusively and independently by the troncmaster ...<sup>70</sup>

### Resolving ownership: Implied terms

Two older English cases appear to assume or establish that, when cash tips are handed directly to an employee, the employee obtains legal title to the money.<sup>71</sup> In both cases the court found that where the giving and receiving of tips is ‘open and notorious ... [and] sanctioned by the employer’,<sup>72</sup> a term was implied in the contract that employees were allowed to retain tips. Consequently the tips could be included when calculating earnings under workers compensation. In *Penn v Spiers & Pond Ltd* the court found that ‘it was an implied term of the contract of employment that these “tips” should be part of his earnings in his employment, and by virtue of his employment’.<sup>73</sup> This implied term is not discussed at any length in the case and it is unclear whether the term was that employees were permitted to accept and retain tips, or that the employer would pass legal title and benefit of tips to the employees. The former version was held to exist in a later case, *Manubens v Leon*, where the court accepted that there was an implied term in the employment contract that the employee (a hairdresser) should be ‘at liberty to receive’ tips.<sup>74</sup> This implied term was not related to ownership, but to opportunity. The employer had an obligation not to prevent the employee from receiving the remuneration (including tips) that would have been received in the ordinary course of fulfilling the duties for which the employee was engaged. Again, the question of tip ownership was not considered directly. The reasoning in the case implies an assumption that tips never became employer property but this was because of the implied term.

The position may well be different when tips are paid by cheque or credit card. In *Nerva*<sup>75</sup> the court by majority reasoned that, as the tip payments paid by credit card and cheque were made out to the restaurant, this clearly gave the restaurant legal title, thus allowing the tips to be counted towards payment of the minimum wage. The majority rejected the argument that the money was being held on trust for the employees.<sup>76</sup> The judgment contained two differing opinions on the question whether, when paying the value of the tips into a tronc, the employer acted as agent for the customer. Staughton LJ in the majority said the transaction ‘does not look like an agency relationship at all’,<sup>77</sup> because customers did not have a right to revoke their supposed instructions and were under no liability if the employers kept the money. Aldous LJ issued a strong dissent on the issue of agency. He conceded that the employer may

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<sup>70</sup> Ibid, at 70 per Mummery LJ.

<sup>71</sup> *Penn v Spiers & Pond Ltd* [1908] 1 KB 766; (1908) 1 BWCC 401; *Great Western Railway Co v Helps* [1918] AC 141.

<sup>72</sup> This is the language used by an arbitrator, quoted in *Great Western Railway Co* [1918] AC 141 at 145. The term ‘notorious’ was adopted by Lord Parmoor at 146.

<sup>73</sup> [1908] 1 KB 766 at 770; (1908) 1 BWCC 401.

<sup>74</sup> *Manubens v Leon* [1919] 1 KB 208 at 209, 211.

<sup>75</sup> *Nerva v RL & G Ltd* [1997] ICR 11.

<sup>76</sup> Ibid, at 16.

<sup>77</sup> Ibid, at 17 per Staughton LJ. With respect, it is difficult to see what liability might arise on the part of the customer in the case of a gift of money.

hold legal title to the tips, but that this was as a result of the relationship of agency. By accepting an additional sum on payment, employers indicated ‘acceptance of the responsibility of discharging the customer's intention’,<sup>78</sup> and he did not see a material difference between cash and credit card tips. Compatible with the reasoning in *Wrottesley* based on customer intent, Aldous LJ contended that customers do not pay tips to increase the employer’s bank account or discharge its minimum wage obligation. Customers pay tips, and employers accept them, on the basis that they will be transferred to the pool and ‘divided in accordance with the custom of the establishment’.<sup>79</sup> Despite the logic in the reasoning of Aldous LJ, the common law position indicates that tips paid by means other than cash are the property of the business proprietor as payee. The decision in *Nerva* was confirmed and used as authority that tips paid by credit card or cheque are initially employer property in another minimum wage case, *Annabel’s (Berkeley Square)*.<sup>80</sup>

Apart from terms implied by law, implied terms can arise by either custom or the presumed intention of the parties. Terms can be implied in fact based on the presumed intention of the parties when necessary for the business efficacy of the contract.<sup>81</sup> Courts may imply a term into an employment contract that is not exclusively in writing, such as those found in hospitality employment, if implication of the particular term is ‘necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case’.<sup>82</sup> However the requirement that an implied term be ‘necessary’ is likely to defeat the possibility of implying terms regarding tips. This is because the minimum wages and conditions set by modern awards and national employment standards render additional income from tips unnecessary.<sup>83</sup>

While the approach taken in some of the English cases is consistent with a term implied by custom and usage in the industry, it is well-established in Australia that certain conditions must be met: the term must be ‘uniform, notorious, reasonable and certain’<sup>84</sup> and consistent with express terms.<sup>85</sup> In particular, the custom relied on must be so ‘well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to

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<sup>78</sup> Ibid, at 23 per Aldous LJ.

<sup>79</sup> Ibid, at 24.

<sup>80</sup> *Annabel’s (Berkeley Square) Ltd* [2009] 4 All ER 55; [2009] ICR 1123; [2009] STC 1551; [2009] EWCA Civ 361.

<sup>81</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 441–3, McHugh and Gummow JJ ; 131 ALR 422; [1995] HCA 24; BC9506439; Irving, above n 46, p 235.

<sup>82</sup> *Hawkins v Clayton* (1988) 164 CLR 539 at 573, Deane J; 78 ALR 69; [1988] HCA 15; BC8802597.

<sup>83</sup> See, eg, *Byrne* (1995) 185 CLR 410 at 446 per McHugh and Gummow JJ; 131 ALR 422; [1995] HCA 24; BC9506439; *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242; BC200506422 at [37]; Irving, above n 46, pp 248–9.

<sup>84</sup> *AssetInsure Pty Ltd v New Cap Reinsurance Corporation Ltd (in liq)* (2006) 225 CLR 331; [2006] HCA 13 at [60]; BC200601866.

<sup>85</sup> *Uszok v Henley Properties (NSW) Pty Ltd* [2007] NSWCA 31; BC200701027 at [23]. In *Qantas Airways Ltd v Joyce* [2014] WAIRC 01192, the implication of a customary term in an employment contract was defeated by inconsistent express terms.

have imported that term into the contract'.<sup>86</sup> The purported term must be established by evidence of widespread adoption, and a customary term cannot be implied from practice at one workplace.<sup>87</sup> The survey results indicate that these conditions would not be satisfied by current Australian hospitality industry practice. Survey participants detailed a wide range of tipping distribution methods and policy across hospitality establishments. There were significant differences between businesses on matters including: entitled staff roles in the distribution pool; frequency of tip distribution; ratio of tip distribution; and the employer's entitlement to tips. The effect of this significant variation is that employers and employees could not be presumed to include a term stipulating a particular tipping method or policy in the employment contract. Implication of a term by custom depends on evidence of its widespread adoption, and it has often been observed that it is difficult under Australian law for parties to establish implied terms arising from custom and usage across an industry.<sup>88</sup>

However, a more liberal approach to inferring or implying terms based on prior course of dealing<sup>89</sup> has sometimes been adopted in employment cases. Terms have been implied at an individual workplace level on matters including reasonable overtime, Sunday penalty rates, taxi provision and flexi-days.<sup>90</sup> Consistency in tipping policy (while perhaps not always adhered to by employers and employees) and the existence of the tipping policy on commencement of employment was typical of surveyed establishments. Only two research participants reported a change in tipping policy or distribution method during their time of employment (n=2/18).<sup>91</sup> This gives force to the argument that terms can be implied, but only at an individual workplace level.

### **Potential for statutory regulation of tips**

While there are no legislative provisions in Australia that directly regulate tips, there are several instruments that have some potential application. These include modern awards and enterprise agreements, provisions regarding unauthorised deductions and the Australian Consumer Law. The absence of legislative regulation has two key implications for employers and employees: there is a lack of general guidance in relation to tip management; and there are no formal dispute resolution procedures available to employees and employers who are aggrieved in relation to tips.

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<sup>86</sup> *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd* (1986) 160 CLR 226 at 241; 64 ALR 481; 60 ALJR 294; [1986] HCA 14 ; *Byrne* (1995) 185 CLR 410 at 423 per Brennan CJ, Dawson and Toohey JJ, 440 per McHugh and Gummow JJ; 131 ALR 422; [1995] HCA 24; BC9506439; see Sappideen et al, above n 46, p 142.

<sup>87</sup> See generally *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 at 61; 1 ALR 1; 47 ALJR 326; BC7300011; Irving, above n 46, p 253; *Richardson Pacific Ltd v Miller-Smith* [2005] WAIRComm 545 at [73].

<sup>88</sup> Sappideen et al, above n 46, p 141; N Seddon and M Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9<sup>th</sup> Australian ed, LexisNexis Butterworths, Chatswood, 2008, pp 465–6.

<sup>89</sup> See *Byrne* (1995) 185 CLR 410 at 443–4 per McHugh and Gummow JJ; 131 ALR 422; [1995] HCA 24; BC9506439.

<sup>90</sup> Sappideen et al, above n 46, p 142; see, eg, *Public Service Association v Zoological Parks Board* [2007] NSWIRComm 1080 .

<sup>91</sup> Interview with supervisor, bar 1 (Wollongong, 14 May 2014); interview with manager, bar 3 (Wollongong, 12 May 2014).

## Awards

There are four modern awards relevant to employees who receive tips.<sup>92</sup> None of these have any provision concerning tips. In order to be considered capable of award regulation, tips would have to be accepted as employer property. Otherwise, the tipping transaction would be between customer and employee, therefore falling outside the employment relationship. In any case, it is doubtful that modern awards are permitted to regulate tips under the Fair Work Act 2009 (Cth) (FW Act). Section 139 of the FW Act sets out the matters that may be included in modern awards. Tips do not fall clearly into any of the listed categories. Tips form a part of an employee's income; however they could not be included in a 'minimum wage' under the FW Act as their fluctuating nature would contravene the modern awards objective.<sup>93</sup> Tips could arguably be a form of 'bonus' or 'incentive-based payment'.<sup>94</sup> Payments such as these typically involve levels of employer discretion. It is interesting to note that many research participants described tips as a 'bonus' (n=8).

There is a possibility that tips could be considered an 'allowance'.<sup>95</sup> Allowances are not limited under the Act but include payment for 'responsibility or skill' not taken into account in rates of pay. This is not a strong prospect as allowances are typically used for matters such as dirty work, provision of tools, travel expenses and work in remote areas.<sup>96</sup> Regulating tips under allowances would take the provision outside its ordinary meaning and usage. Nor is it likely that tips would be considered an incidental matter, since such matters are limited to those which are essential to the practical operation of substantive provisions permitted under s 139.<sup>97</sup>

Even apart from its statutory powers, the historical experience of award regulation suggests that the Fair Work Commission would be reluctant to include tips in awards. Only a few historical awards have included reference to tips. Only one of these, the Striptease Industry Award, made provision that tips were gratuities received by employees and could not be used to pay wages.<sup>98</sup>

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<sup>92</sup> Hospitality Industry (General) Award 2010, above n 17; Registered and Licensed Clubs Award 2020 [MA000058], 17 November 2014; Restaurant Industry Award 2010 [MA000119], 17 November 2014; Fast Food Industry Award 2010 [MA000003], 17 November 2014.

<sup>93</sup> The modern awards objective requires that awards provide a 'fair and relevant minimum safety net of terms and conditions', including 'the need to ensure a simple, easy to understand, stable and sustainable modern award system': FW Act s 134(1)(g). Tips could also contravene the equal remuneration principle at s 134(1)(e).

<sup>94</sup> FW Act s 139(1)(a)(ii).

<sup>95</sup> FW Act s 139(1)(g)(ii).

<sup>96</sup> *Re Commonwealth Bank Officers' Award 1990* (1997) 74 IR 446 at 449; see, eg, Restaurant Industry Award 2010, above n 92, at cl 24.

<sup>97</sup> FW Act s 142(1). There is a potential argument that an award provision setting out specific rights and responsibilities in relation to tips is 'essential' for the practical operation of a wage, bonus or allowance if tips were included under such provisions.

<sup>98</sup> Striptease Industry Conditions Award 2006 [AP847586], 19 November 2014 at cl 14.4. One award provided that employees could not receive tips: Adelaide Casino Award 1988 [AN15000], 19 November 2014 at cl 8(b)(ii).

## Enterprise agreements

Enterprise agreements may only contain content which deals with matters pertaining to the relationship between the employer and employees who are covered by the agreement.<sup>99</sup> As is well known by Australian labour lawyers, the ‘matters pertaining’ requirement is complex, but is generally limited to those matters which impact directly on the employment relationship as such.<sup>100</sup> On one view, tips clearly have a direct impact on employer-employee relations. They come about through work done by employees at their place of employment and form a part of their income as a result of this work. Disagreement regarding the distribution of tips can affect the employer-employee relationship. If tips are first employer property under common law to be transferred to employees by an express or implied term of the employment contract, this is clearly a matter pertaining to the parties in the role of employer and employee.

On another view, tips potentially fall beyond matters pertaining to the employment relationship due to the role of the customer as a party in the transaction. The inclusion of rights or obligations of parties outside the employment relationship will tend to take the matter outside the ‘matters pertaining’ requirement.<sup>101</sup> If title to tips transfers directly from customer to employee, then the employer is not involved as a party and the issue does not have a direct impact on the employment relationship. This approach is indirectly supported by a 2003 application for approval of an agreement. The employer argued that, because they recognised employees’ entitlement to tips, this benefit could be taken into account under the former ‘no disadvantage’ test.<sup>102</sup> Watson SDP rejected this contention, stating that ‘employees are entitled to retain gratuities. The agreement provides no benefit in this regard’.<sup>103</sup> If employers hold tips on trust for employees under a *tronc* scheme as indicated in *Wrottesley*,<sup>104</sup> this would not be a ‘matter pertaining’ to the employment relationship, as it would be a matter pertaining to the relationship of trustee and beneficiary. Similarly, if the employer role were that of agent as discussed in the dissent of Aldous LJ in *Nerva*,<sup>105</sup> the arrangement would not

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<sup>99</sup> FW Act s 172(1)(a).

<sup>100</sup> *Re Manufacturing Grocers’ Employees Federation; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341; 65 ALR 461; [1986] HCA 23; BC8601429; *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing & Engineering Employees* (1994) 181 CLR 96; 123 ALR 193; [1994] HCA 34; BC9404638; *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309; 209 ALR 116; [2004] HCA 40; BC200405590; *Australian Maritime Officers Union v Sydney Ferries Corporation* (2009) 190 IR 193; [2009] FCAFC 145; BC200909491; B Creighton and A Stewart, *Labour Law*, 5<sup>th</sup> ed, Federation Press, Sydney, 2010, pp 306–7.

<sup>101</sup> In *Bosch Chassis Systems Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2009] FWA 1173; BC200970833 at [19] a claim for the employer to take out private health insurance for employees and their families was held to be a non-permitted matter as it required ‘a payment to satisfy an obligation outside the employment relationship’. See also *Transfield Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2001] AIRC 879 where a creditor-debtor relationship was said to be involved.

<sup>102</sup> Workplace Relations Act 1996 (Cth) ss 170LT(2), 170XA.

<sup>103</sup> *Lone Star Steakhouse and Saloon Western Australia Certified Agreement 2002–05* (Unreported, AIRC, Watson SDP, PR930566, 22 April 2003) cl 9.

<sup>104</sup> *Wrottesley* [1951] 2 KB 277 at 283.

<sup>105</sup> *Nerva* [1997] ICR 11 at 19–25.

pertain to the employment relationship. The application of enterprise agreements is reliant on the position of tip ownership at common law.

Our research into tipping practices suggests that many employers regard their effective powers in relation to tip distribution as a significant aspect of staff incentive and reward. If so, it might be considered unlikely that employers would give up their discretion by agreeing to include provision for tips in an enterprise agreement. Nonetheless, a few such agreements have included provision for tips. One agreement stipulated that employees were never to accept gifts or gratuities except tips, which were to be placed in a communal jar for ‘social events’.<sup>106</sup> Another agreement acknowledged tips as an ‘entitlement’ of the employee.<sup>107</sup> However, the approval of these agreements does not indicate that tips pertain sufficiently to the employment relationship.<sup>108</sup>

### Unauthorised deductions

As already noted, several research participants reported that tips were used to pay for breakages and till shortfalls on either a case-by-case basis or as a consistent weekly percentage.<sup>109</sup> It appears that the benefit of tips is also being distributed to employees through staff social events. If an employee has a legal entitlement to tips as an amount payable from the employer ‘in relation to the performance of work’, the FW Act prohibits payments and deductions of this nature. Section 323 requires employees to be paid in full, in money, and at least monthly. If employees hold a personal right to be paid tips through contract or trust, distribution of tips to staff by means of social events is in breach of this section. One research participant reported being paid tips every 3 months, which would also be in breach of the Act if tips were an entitlement.<sup>110</sup> In addition, s 326 states that a term in an employment contract has no effect to the extent that the term permits the employer to deduct from the amount ‘payable to an employee’ if the deduction is for the benefit of the employer and is unreasonable in the circumstances. This would include deductions for breakages and till shortfalls, and may extend to ‘payment’ by means of social events. The effect of this provision is that the value of such deductions or payments is deemed never to have been provided, so that the employee could sue for non-payment.<sup>111</sup> Further, the Hospitality Award stipulates that employers must not deduct any sum from the wages or income of an employee in respect of breakages or ‘cashiering underings’ except in the case of wilful misconduct.<sup>112</sup>

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<sup>106</sup> *Atoma Sushi Pty Ltd T/as Atoma Sushi* [2013] FWCA 6445 cl 5.5.

<sup>107</sup> *Stakeco Pty Limited t/as Lone Star Steakhouse and Saloon re Stakeco Pty Ltd Enterprise Agreement 2009–13* [2010] FWAA 4543 cl 7.5.1.

<sup>108</sup> The Fair Work Commission is not required to scrutinise agreements for non-permitted matters. Such a matter would be a nullity: FW Act s 253(1)(a).

<sup>109</sup> Interview with supervisor, bar 4 (Wollongong, 12 May 2014); interview with supervisor, cafe 5 (Wollongong, 14 May 2014); interview with service worker, restaurant 5 (Wollongong, 7 May 2014); interview with supervisor, restaurant 6 (Wollongong, 12 May 2014).

<sup>110</sup> Interview with supervisor, restaurant 3 (Wollongong, 7 May 2014).

<sup>111</sup> FW Act s 327.

<sup>112</sup> Hospitality Industry (General) Award 2010, above n 92 at cl 38.

## Consumer law

The Australian Consumer Law provides potential rights and remedies for customers and employees. It is a tenable proposition that most customers assume that the tips they provide will be distributed to staff members at some point. When employers retain tips in whole or in part, or when tips go to a staff social event, a breach of the Australian Consumer Law may occur. For example, a distribution contrary to an express statement or implication made to a customer would breach the misleading or deceptive conduct provision.<sup>113</sup> This provision is only open to consumers, or employees in regard to the making or variation of an employment contract. The conduct must be ‘in trade or commerce’, and performance of an employment contract, including the ‘conveying of routine information’, is not in itself of a trading or commercial nature.<sup>114</sup> ‘Conduct’ under the Australian Consumer Law refers to the doing or refusing to do any act.<sup>115</sup> The acceptance of tips in cash or credit or the placement of a tip jar in an open, obvious place would likely satisfy the broad meaning of ‘conduct’ under the Australian Consumer Law. Conduct done in the course of dealings with actual or potential consumers has been observed to ‘always occur in trade or commerce’.<sup>116</sup> The provision of food, drink and service in a hospitality establishment would meet this requirement.

The conduct must also be misleading or deceptive, or likely to mislead or deceive. Misleading conduct is that which conveys ‘meaning inconsistent with the truth’.<sup>117</sup> Employers who retain tips in whole or in part, while potentially within their rights under the common law, arguably act against the normal social understanding of the function of tips. It could be put forward that Australian consumers hold a general understanding that tips go to employees of the business, not the business. This could be inferred from the method of payment by consumers. By placing a tip in a jar or giving it directly to a worker, the customer is clearly making provision separate from payment of the bill. It is not necessary to show that the conduct has actually misled or deceived anyone, only that there is a real or not remote chance or possibility of this occurring.<sup>118</sup>

There is a second provision in the Australian Consumer Law which may be used by employees. Section 31 prohibits conduct liable to mislead persons seeking employment as to ‘the availability, nature, terms or conditions of the employment; or any other matter relating to the employment’.<sup>119</sup> This section also has a broad reach: if tips do not fall within ‘terms and conditions’ of employment they would certainly be ‘any other matter relating to employment’. The interpretation of this provision has shown it applies only when an

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<sup>113</sup> Australian Consumer Law s 18.

<sup>114</sup> *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389 at 393; 105 ALR 339; (1992) ASC 56-130; BC9103606.

<sup>115</sup> Australian Consumer Law s 2(2)(a)–(b).

<sup>116</sup> S Corones and P Clarke, *The Australian Consumer Law: Commentary and Materials*, 4<sup>th</sup> ed, Thomson Reuters, Rozelle, 2011, p 54.

<sup>117</sup> *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 201; 2 TPC 303; ATPR 40-040.

<sup>118</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198; 42 ALR 1; [1982] HCA 44; BC8200090.

<sup>119</sup> Australian Consumer Law s 31.

employee was induced to accept employment based on the misleading conduct.<sup>120</sup> This still may have application as in some hospitality establishments tips are a significant proportion of income and may be a decisive factor in choosing to accept employment. This provision is beneficial to aggrieved employees as it relates directly to employment, and is an offence of absolute liability with criminal provisions.<sup>121</sup> The wide range of preventative and corrective orders under the Australian Consumer Law, and the relatively informal nature of complaints to the Competition and Consumer Commission, make action under this legislation a realistic option.<sup>122</sup>

### Other regulatory strategies

Uncertainty about the ‘right’ way to distribute tips, noted by both employers and employees in our study, as well as the potential for workplace grievances, provides a basis for some form of regulatory intervention. It is beyond the scope of this article to explore all the policy issues and possible regulatory approaches. However, two contrasting strategies are worth brief discussion. At the most prescriptive end would be an industry-wide rule determining the ownership of tips and the basis for distribution among staff. Such an approach has been taken in the United States where it has been held that tips are by default employee property in the absence of agreement between the employer and employee.<sup>123</sup> Such agreements appear to be common and easily found, particularly where tips are pooled. The Fair Labor Standards Act 1938 (US) (FLS Act) provides that the minimum wage for workers who are customarily tipped may include tips, although employers who take a ‘tip credit’ in this way must explain the position to employees and pay all tips to them.<sup>124</sup> The FLS Act was extended by administrative regulation to prohibit employers from retaining tips, while also prohibiting ‘non-tipped’ (back of house) employees from participation in tip pools. This approach has been controversial and has been declared invalid at first instance.<sup>125</sup> Two lessons are clear: any statutory regulation would need to be clearly stated and solidly founded; and issues of distribution among classes of employees are complex and not easily prescribed.

At the other end of the regulatory spectrum is a ‘soft law’ approach such as a code of practice providing guidance on tip retention and distribution. Such an approach is unlikely to receive support from employer and industry associations, which appear content to leave the issue to individual proprietors. The wide range of hospitality businesses would also make development of a simple code of this kind unlikely. A less prescriptive approach has actually

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<sup>120</sup> R Steinwall, *Annotated Competition and Consumer Act 2010*, LexisNexis Butterworths, Chatswood, 2012, at [14,655.15]; see, eg, *Wright v TNT Management Pty Ltd* (1989) 15 NSWLR 679; 85 ALR 442; 94 FLR 399; ATPR 40-929; *Robertson v Knott Investments Pty Ltd (No 3)* [2010] FCA 1074; BC201007322.

<sup>121</sup> Australian Consumer Law s 152.

<sup>122</sup> See Australian Consumer Law Ch 5.

<sup>123</sup> *Williams v Jacksonville Terminal Co*, 315 US 386 at 397 (1942); *Anders v State Board of Equalization*, 185 P 2d 883 (3<sup>rd</sup> Cir, DCAp Cal, 1947).

<sup>124</sup> FLS Act § 203(m); *Kilgore v Outback Steakhouse of Florida Inc*, 160 F 3d 294 (6<sup>th</sup> Cir, 1998); *Cumbie v Woody Woo Inc*, 596 F 3d 577 (9<sup>th</sup> Cir, 2010).

<sup>125</sup> *Oregon Restaurant and Lodging v Solis*, 948 F Supp 2d 1217 (D Or, 2013). The decision was under appeal at time of final submission.



been devised by the Australian Taxation Office (ATO), which has clarified that tips are assessable income for the business or employee who ultimately receives them.<sup>126</sup> The ATO recommends that businesses develop written policies and keep records in relation to tips, including details such as the method and distribution of tips as well as a dispute resolution procedure.<sup>127</sup> The ATO's approach has the advantage of flexibility, setting only a procedural standard which addresses the issues of uncertainty and arbitrariness in tip retention and distribution. It would be enforceable independently through the taxation system by requiring businesses to adopt policies and record-keeping or else incur tax liability for tips which have been distributed to workers. However, such an approach, while formalising tip distribution, would subject employees to a tax liability which is apparently now widely ignored. None of the participants interviewed said they declared tips as taxable income and at no surveyed business were written policies or records identified.

The involvement of customers in the tipping transaction raises a further perspective. If an establishment allows or encourages tipping, it appears to us that customers are entitled to know how the proceeds will be distributed. It does not seem far-fetched in such circumstances that the business should disclose this information to customers. This could be a matter of consumer regulation and also of consumer action. Based on our research, when customers tip in Australia, they should assume that the tips will be pooled in a non-transparent way, may be distributed by means of social events, and that proprietors and salaried managers will often take a proportion. Customers should think about what they are giving a tip *for* and to *whom*, and make plain their intention. At the very least it seems that if they want tips to go to employees, it is safer to give in cash rather than by credit card.<sup>128</sup>

## Conclusion

There is no universal answer to the question of who owns tips. Applying property law principles and the contractual duty to account, the default position is that employers own tips. It is notable, though, that judges have tended to assume that employees have a legal entitlement at least to cash tips, although such a view has never been the result of close consideration.<sup>129</sup> Such an entitlement could only arise by a contractual term or from the employer's representation or acquiescence. As our empirical research indicates, distribution methods involving the pooling of tips appear to be common. The establishment of such a system by the employer would provide evidence of an express or implied term giving employees legal rights to a distribution in accordance with the system. However, the practices identified often do not bear the elements of formality, certainty and 'arms-length' administration which are characteristic of a *tronc* scheme. It is doubtful, then, that employees

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<sup>126</sup> Australian Taxation Office, *Income Tax: Hospitality Industry Employees – Allowances, Reimbursements and Work-Related Deductions*, TR 95/D2, 1 June 1995; Australian Taxation Office, *Tips and Gratuities*, NAT 72667, December 2008.

<sup>127</sup> Australian Taxation Office, *Issue 26 – Restaurant Tips*, at <<https://www.ato.gov.au/Business/Bus/Issue-26---Restaurant-tips/>> (accessed 10 April 2015).

<sup>128</sup> See United Voice, *Cash is Best: Restaurant Workers, Tips and PIN Only Payments*, *Media Release*, 1 August 2014.

<sup>129</sup> See, eg, *Lyberopoulos v Reidwell Investments BT Pty Ltd t/a Coco Cubano Blacktown* [2015] FWC 4256 at [9] per Drake SDP.

usually gain a beneficial interest in the pooled property. Conversely, many of the methods described by our respondents indicate that a sufficiently clear system is in place to establish the existence of an express or implied term, which could then be enforced through the unauthorised deductions provisions of the FW Act. Any answer based on common law, or even more so in equity, is really only useful as the basis for asserting a right informally at the workplace. Individual employees generally do not have the resources to bring complaints to the courts, which are intimidating, expensive and time consuming.<sup>130</sup> That said, substantial amounts are often involved if the tips accumulate over several months, and it would be open for an individual employee to take legal action using civil remedies and small claims procedure.

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<sup>130</sup> J Riley, *Employee Protection at Common Law*, Federation Press, Sydney, 2005, p 31.