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### Discretionary benefit or entitlement? Hospitality workers and the ownership of customer tips in Australia

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## Discretionary benefit or entitlement? Hospitality workers and the ownership of customer tips in Australia

### 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 business operator, the customer and the worker. It is almost completely unregulated by the labour law instruments of awards and enterprise agreements. This is a 'regulatory space' where labour law and consumer protection law may potentially intersect.

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. English case law indicates that it is the business operator/employer who owns tips, as tips are monies received by employees as an aspect of 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 may also operate to provide that employees are entitled to tips, either individually or jointly. The legal incidents of the customer-server relationship are even less clear.

The legal position regarding tips is unsatisfactory and runs contrary to customers' expectations. In this paper we will explore common tipping practices in Australia, the legal ownership of tips, and the potential for regulatory intervention.

### Keywords

australia, entitlement, hospitality, workers, benefit, ownership, discretionary, customer, tips

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**Discretionary Benefit or Entitlement?  
Hospitality Workers and the Ownership of Customer Tips in Australia**

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School of Law  
University of Wollongong

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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 business operator, the customer and the worker. It is almost completely unregulated by the labour law instruments of awards and enterprise agreements. This is a 'regulatory space' where labour law and consumer protection law may potentially intersect.

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# Discretionary Benefit or Entitlement? Hospitality Workers and the Ownership of Customer Tips in Australia

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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 paper 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 '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 whereby 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 is no clear 'rule' about where, why or how people should tip.

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\* LLB (Hons) graduate, University of Wollongong. This paper is largely based on research conducted for the LLB Honours research project.

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

<sup>2</sup> Daniel Suarez, 'Restaurant Tipping: Short-Circuiting the Morality of the Market' in Donald C. Wood (ed), *Economic Development, Integration, and Morality in Asia and the Americas* (Research in Economic Anthropology, vol. 29), (Emerald Publishing, 2009).

<sup>3</sup> Avner 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; Yoram 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.

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 took tips into account when setting wages of ship stewards on the principle that there was no justification for resultant 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 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.

### **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

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<sup>5</sup> John Frank Burgess, 'Tipping in Australia' (2012) 36 *Journal of Australian Studies* 377; Martin 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> Scott Bolles, 'Gratuitous Behaviour', *Sydney Morning Herald*, 26 October 2010, good living section at 7.

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

<sup>8</sup> ABS, *Labour Force, Australia, Detailed, Quarterly, August 2014*, cat 6291.0.055.003, table 6, spreadsheet. 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 Leah F Vosko, Martha MacDonald and Iain Campbell, 'Introduction' in Leah F Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the Contours of Precarious Employment* (Routledge, 2009) at 4-8.

<sup>10</sup> ABS, *Employee Earnings and Hours, Australia, May 2012*, cat 6306.0, all employees – occupation by sex, spreadsheet (category 4312 cafe workers, 4315 waiters).

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 consumer law, while liability under competition law may also be involved.<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 factual circumstances the tipping transaction may create new legal relationships between customers, employers and employees such as that of agent and principal or trustee and beneficiary. The existence of these relationships, or the potential for these relationships with new legal roles, has been observed in UK case law.<sup>13</sup>

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 and employment law is normally applied.<sup>14</sup> Analysis of multilateral work relationships has typically been limited to agency, subcontractor and franchising arrangements, rather than situations which directly involve customers.<sup>15</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>16</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) tips could be applied by the employer to make up the minimum wage until 2009.<sup>17</sup> While this may technically be the case in Australia (assuming that employers

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<sup>11</sup> *Competition and Consumer Act 2010* (Cth) sch 2.

<sup>12</sup> *Eg Work Health and Safety Act 2011* (NSW) s 28.

<sup>13</sup> *Wrottesley v Regent Street Florida Restaurant* [1951] 2 KB 277 at 283 (CA); *Nerva v RL & G Ltd* [1997] ICR 11 at 24-25 (CA).

<sup>14</sup> Paul Davies and Mark Freedland, 'The Complexities of the Employing Enterprise' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006) at 273-4.

<sup>15</sup> Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) at 44.

<sup>16</sup> Einat Albin, 'Labour Law in a Service World' (2010) 73 *Modern Law Review* 959 at 970-71; Einat Albin, 'A Worker-Employer-Customer Triangle: The Case of Tips' (2011) 40 *Industrial Law Journal* 183. Albin draws on the identification of employer functions in Mark Freedland, *The Personal Employment Contract* (Oxford University Press, 2003) at 40 *et seq.*

<sup>17</sup> *National Minimum Wage Regulations 1999* (UK) reg 31(1)(e) (SI 1999/584); replaced by *National Minimum Wage Regulations 1999 (Amendment) Regulations 2009* (UK) reg 5 (SI 2009/1902). For the US position, see US Department of Labor, Wage and Hour Division,

own tips), the Australian tradition of labour regulation has always assumed that the obligation to pay minimum wages lies directly on the employer,<sup>18</sup> so that such potential conflicts are less apparent.

### Tip Distribution Practices

As there is little current research regarding tips and tipping practices in Australia, qualitative research was undertaken to identify common practices and issues concerning the handling and distribution of tips among workers. Interviews were conducted with persons identified as knowledgeable about the practice of workplaces at 18 hospitality establishments (6 restaurants, 6 cafes and 6 bars) within the central business district of Wollongong during May 2014.<sup>19</sup> Family-operated establishments were not included. Following human ethics approval,<sup>20</sup> semi-structured interviews<sup>21</sup> were conducted to determine workers' experience and meaning in relation to tips, how tips were currently 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.

Cash tips may be either 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, tips are included 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). Tips paid by credit card were noted to be uncommon in most hospitality establishments,

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*Tipped Employees Under the Fair Labor Standards Act*, fact sheet 15 (revised July 2013) <http://www.dol.gov/whd/regs/compliance/whdfs15.htm>. Regulations under the *Fair Labor Standards Act 1938*, 29 USC 201, provide that employees own tips, but s203(m) 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).

<sup>18</sup> Modern awards require that wages 'will' or 'must' be paid to the employee but do not specify the source of payment: eg *Hospitality Industry (General) Award 2010 [MA000009]* (at 29 June 2014) cl 20.

<sup>19</sup> With over 280,00 inhabitants, Wollongong is the 10th largest urban area in Australia. As it is only 90km from Sydney, workers and customers are familiar with wider tipping practices and there are no identifiable reasons why the establishments surveyed are not broadly representative of practices elsewhere in Australia. This is supported by media reports of practices in other Australian cities, eg Clay Lucas and Sarah Whyte, 'Waiters' Tips Grabbed by Owners', *The Age*, 28 January 2013.

<sup>20</sup> Human Research Ethics Committee, University of Wollongong, application HE14/103, approved 3 April 2014.

<sup>21</sup> David Silverman, *Interpreting Qualitative Data* (Sage Publications, 4th ed, 2011); Robert Yin *Qualitative Research From Start to Finish* (Guildford Press, 2011) at 134-139.

however at several restaurants it was noted to be common and a significant proportion of tip income (n=5).<sup>22</sup>

Once received, tips may be either 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); and
- allocating the total amount for a staff social event, such as the Christmas party or periodical dinners (n=7);
- retaining the tips for the business, either entirely or by percentage (n=6).

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>24</sup> The most complex distribution system involved a point 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 three months.<sup>25</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 which 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:

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<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 Restaurant 5 (Wollongong 7 May 2014); Interview with Supervisor, Restaurant 6 (Wollongong 12 May 2014).

<sup>23</sup> Sarah White and Clay Lucas, 'Hard to Swallow: Restaurant Staff Tips Taken by Owners, Says Union' *Sydney Morning Herald*, 29 January 2013; Rachel Lebian, 'Tipping Point: Why I won't Tip Restaurant Staff in Future', <http://thefoodsage.com.au>, 3 February 2013, and online comments.

<sup>24</sup> Interview with Service Worker, Bar 2 (Wollongong 12 May 2014).

<sup>25</sup> Interview with Supervisor, Restaurant 3 (Wollongong 7 May 2014).



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>26</sup>

### *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 concluded. Where tips are allocated to a staff social event, all staff members are 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>27</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'.<sup>28</sup> (n=4)

### *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 proportions. 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>29</sup>

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

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<sup>26</sup> Ibid.

<sup>27</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>28</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>29</sup> Interview with Supervisor, Restaurant 3 (Wollongong 7 May 2014).

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>30</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:

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>31</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 research 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 four 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>32</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>33</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>34</sup> and the proportion of tips that were cycled back into the business, or for 'breakages' under the distribution system.<sup>35</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>36</sup> Another research participant noted a time an employee was given a verbal warning for 'skimming tips' (taking funds prior to an even-split group distribution). The employee had felt entitled to a larger proportion of the tips as they worked more hours and had

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<sup>30</sup> Interview with Supervisor, Cafe 5 (Wollongong 14 May 2014).

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Interview with Manager, Bar 3 (Wollongong 12 May 2014).

<sup>34</sup> Interview with Service Worker, Restaurant 2 (Wollongong 7 May 2014); Interview with Manager, Bar 6 (Wollongong 12 May 2014).

<sup>35</sup> Interview with Restaurant 5 (Wollongong 7 May 2014).

<sup>36</sup> Ibid.

perceived themselves to have a higher skill level than their co-workers.<sup>37</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 workplace also paid staff members their tips in coin regardless of the total amount, which the former employee found demeaning.<sup>38</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>39</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>40</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>41</sup> Such deductions from pay would be unlawful but the employees were clearly unaware of this.<sup>42</sup>

### Overview

While there are certain methods of distribution that are 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. On the one hand, 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. On the other hand, 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. One restaurant owner expressed this view:

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<sup>37</sup> Interview with Manager, Bar 6 (Wollongong 12 May 2014).

<sup>38</sup> Ibid.

<sup>39</sup> Interview with Supervisor, Restaurant 6 (Wollongong 12 May 2014).

<sup>40</sup> Interview with Owner, Bar 5 (Wollongong 14 May 2014).

<sup>41</sup> Interview with Supervisor, Bar 4 (Wollongong 12 May 2014).

<sup>42</sup> FW Act ss 323; see below.

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.

## Legal Ownership of Tips

In law, a tip as defined here is a gift. On donation, legal title to the money *in specie* transfers to the intended recipient as objectively determined.<sup>43</sup> The problem is, however, that anonymous tips do not indicate who that recipient is intended to be. The situation is further complicated by the fact that the transaction usually occurs in the context of an employment relationship. Irrespective of the donor's 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 legal decisions have directly determined the general position regarding the ownership of tips; however several UK cases provide relevant authority in specific situations in the course of deciding questions of remuneration 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.

### *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>44</sup> The employee's duty to account means that if an employee receives money or other property in connection with their employment, the money belongs to the employer who gains legal possession of the property as soon as it passes into the hands of the employee. This right is enforceable by a restitutionary claim for money had and received, as well as by equitable remedies for breach of fiduciary duty. If tips are the property of the employer, 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>45</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

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<sup>43</sup> *Ilich v R* (1987) 162 CLR 110 at 139 per Brennan J; Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2008) at 46.

<sup>44</sup> Carolyn Sappideen, Paul O'Grady, Joellen Riley and Geoff Warburton, *Macken's Law of Employment*, 7th edn (Lawbook Co, 2011) at 242; Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2012) at 430, 434; Hugh Collins, K.D. Ewing and Aileen McColgan, *Labour Law* (Cambridge UP, 2012) at 147.

<sup>45</sup> *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339 357 per Cotton LJ, at 363 per Bowen LJ.

was liable to account to the master.<sup>46</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>47</sup> 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>48</sup> This however was apparently on the assumption that the servant was acting on the master's behalf and the donor intended to transfer possession to the master.

The duty to account was later extended beyond property specifically entrusted to the servant, as developing agency principles were applied in the employment context. The duty to account was formulated mainly in relation to agents and in the context of bribes and other secret commissions. A secret commission occurred wherever an agent obtained a pecuniary benefit undisclosed to their principal while engaging in transactions on the principal's behalf, and the amount of the secret commission could be recovered under the common law money counts.<sup>49</sup> The principle extended beyond secret commissions and was stated as deriving from public policy that:

all profits, which are made by an agent in the course of the business of his principal, belong to the latter.... Where the profits are made in the ordinary course of the business of the agency, it must be presumed, that the parties intended, that the principal should have the benefit thereof.<sup>50</sup>

Employees are often placed in a position of agency and the agency aspect of the employee's duties is still relevant.<sup>51</sup> It would certainly apply when an employee handles money in the course of their employment. However if such an extensive duty to account is based on a presumption, it could arguably be displaced by evidence of actual intention.

The absolutism of the duty to account was made clear in *Morison v Thompson* in 1874. 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>52</sup> The position was the same at common law and in equity, the only difference being that in law title to the money vested in the master as soon as it came into the

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<sup>46</sup> *Diplock v Blackburn* (1811) 3 Camp 43; 170 ER 1300 (KB); *Shallcross v Oldham* (1862) 2 J&H 609; 70 ER 1202 (Ch).

<sup>47</sup> *Thompson v Havelock* (1808) 1 Camp 527; 170 ER 1045 (KB). *Diplock*, *Shallcross* and *Thompson v Havelock* all involved ship captains, who were regarded as both servants and agents.

<sup>48</sup> Frederick Pollock and Robert Wright, *An Essay on Possession in the Common Law* (Clarendon Press, 1888) at 60, 139.

<sup>49</sup> *Williamson v Hine* [1891] 1 Ch 390; *Grant v The Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233 (CA).

<sup>50</sup> William Story, *Commentaries on the Law of Agency* (Little Brown, 9th ed 1882) at 235-6.

<sup>51</sup> See Hugh Collins, K.D. Ewing and Aileen McColgan, *Labour Law* (Cambridge UP, 2012) at 146 where the influence of agency on the employee's duty of fidelity is recognised.

<sup>52</sup> *Morison v Thompson* (1874) LR 9 QB 480 at 483 (emphasis added).

hands of the servant: 'the money, being the property of the employer, can only be regarded as held for his use by the agent, and must consequently be recoverable in an action for money had and received.'<sup>53</sup> Recovery of such a sum at common law from an agent was based in a broad notion of fraud but was not limited to situations where there was a fraudulent intent.<sup>54</sup> The principle stated in *Morison* applied whether or not the servant used the master's property to obtain the profit.

The duty to account applies not only when the employee is acting in the course of employment, but where there is a connection between the employment and the property.<sup>55</sup> In *Reading*, Denning LJ expressed the common law principle in more limited terms:

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>56</sup>

The duty to account applies whether the property is acquired in circumstances of dishonesty or of honesty. The finding cases establish that if an employee finds money left on premises occupied by the employer while the employee is acting in the course of their employment, the employer obtains a better title by reason of legal possession.<sup>57</sup> This is so because the employee's possession only came about as a result of the employee's duties,<sup>58</sup> and occupation of the premises gives better rights of possession.<sup>59</sup> There is no law or reason to conclude that this duty would not include tips. Provided that the employment provided the means and opportunity to obtain the property the duty to account will apply.<sup>60</sup> 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

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<sup>53</sup> *Morison v Thompson* (1874) LR 9 QB 480 at 486.

<sup>54</sup> *Salford Corporation v Lever* [1891] 1 QB 168; *Hippisley v Knee Brothers* [1905] 1 KB 1.

<sup>55</sup> *Att-Gen v Goddard* (1929) 98 LJ KB 743.

<sup>56</sup> *Reading v The King* [1948] 2 QB 268 at 275 (emphasis added). This statement was quoted with apparent approval by Lord Porter on appeal: *Reading v Attorney-General* [1951] AC 507 at 514.

<sup>57</sup> *Bridges v Hawkesworth* (1851) 21 LJ QB 75; *Willey v Synan* (1937) 57 CLR 200; *City of London Corporation v Appleyard* [1963] 1 WLR 982; *Irving, Contract of Employment* (2012) at 393, 396; cf *Byrne v Hoare* [1965] Qd R 135.

<sup>58</sup> *McDowell v Ulster Bank Ltd* (1899) 33 IrLT 223, cited in *Irving, Contract of Employment* (2012) at 396.

<sup>59</sup> See, eg, *Willey v Synan* (1937) 57 CLR 200; *Chairman, National Crime Authority v Flack* (1998) 86 FCR 16.

<sup>60</sup> Sapideen et al, *Macken's Law of Employment* (2011) at 242.

retain them.<sup>61</sup> Selwyn says that tips are ‘a recognised method of being paid and do not constitute a bribe which must be disclosed’; however no authority is provided for this assertion.<sup>62</sup>

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 money or tips that are ‘found’, applying to those tips 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 the best title to 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.

### *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 considered self-employed and were remunerated mainly by tips.<sup>63</sup> The practice developed whereby tips were placed in a *tronc* (from the French, meaning ‘trunk’, as in a box or case). 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 is 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>64</sup> in the context of determining whether the 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 distributed weekly to those entitled 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>65</sup> The customers’ intention was for tips to vest in the waiter, not the employer

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<sup>61</sup> FR Batt, *The Law of Master and Servant* (Pitman, 5th ed 1967) at 206, on the basis that in many areas ‘the receipt of “tips” is fully recognised by the employers or it is so notorious practice that they cannot complain of it.’

<sup>62</sup> Astra Emir, *Selwyn’s Law of Employment* (Oxford UP, 17th ed, 2012) at 312.

<sup>63</sup> Albin, ‘A Worker-Employer-Customer Triangle’ (2011) at 192-3.

<sup>64</sup> *Wrottesley v Regent Street Florida Restaurant* [1951] 2 KB 277; [1951] 1 All ER 566.

<sup>65</sup> *Wrottesley* [1951] 2 KB 277 at 280.

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>66</sup>

The court simply assumed that the tips were 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 independently of employer discretion, a trust can be created. While the employer may hold the funds on trust, they do not 'own' the tips. 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>67</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>68</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 administration and distribution of service charge money was to be handled exclusively and independently by the troncmaster...<sup>69</sup>

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<sup>66</sup> *Wrottesley* [1951] 2 KB 277 at 283 (emphasis added).

<sup>67</sup> *Annabel's (Berkeley Square) Ltd v Revenue and Customs Commissioners* [2009] EWCA 361; [2009] 4 All ER 55.

<sup>68</sup> *Annabel's (Berkeley Square)* (2009) 4 All ER at 68 [40] per Rimer LJ.

<sup>69</sup> *Ibid*; also Mummery LJ at 70 [51].



### *Implied Terms and Ownership of Tips*

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>70</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>71</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>72</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>73</sup> This implied term was not related to ownership, but 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.

The position may well be different when tips are paid by cheque or credit card. In *Nerva v RL & G*<sup>74</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 allowing the funds to be payable as wages. The majority rejected the argument that the money was being held on trust for the employees.<sup>75</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 'did not look like an agency relationship at all' because customers did not have a right to revoke their supposed instructions and were under no liability if the employers kept the money.<sup>76</sup> Aldous LJ issued a strong dissent on the issue of agency. He conceded that the employer may 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>77</sup> and he did not see a material difference in cash or credit tips. Compatible with the

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<sup>70</sup> *Penn v Spiers & Pond Ltd* [1908] 1 KB 766; *Great Western Railway Co v Helps* [1918] AC 141.

<sup>71</sup> This is the language used by an arbitrator, quoted in *Great Western Railway Co v Helps* [1918] AC 141 at 145. The term 'notorious' was adopted by Lord Parmoor: at 146.

<sup>72</sup> *Penn v Spiers & Pond Ltd* [1908] 1 KB 766 at 770.

<sup>73</sup> *Manubens v Leon* [1919] 1 KB 208 at 211.

<sup>74</sup> *Nerva v RL & G Ltd* [1997] ICR 11.

<sup>75</sup> *Ibid*

<sup>76</sup> *Ibid* at 17.

<sup>77</sup> *Ibid* at 23.

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>78</sup> Despite the logic in the reasoning of Aldous LJ, the common law position indicates that tips paid by means other than cash remain property of the employer. The decision in *Nerva* was confirmed and used as authority that tips paid by credit card or cheque are initially employer property in *Annabels (Berkeley Square)*.<sup>79</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>80</sup> Courts are more likely to imply a term into informal contracts such as those found in hospitality employment.<sup>81</sup> The requirement that an implied term be 'necessary' is likely to defeat the possibility of implying terms regarding tips.<sup>82</sup> This is because the minimum wages and conditions set by the Modern Award 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 certain and reasonable, it must be consistent with express terms and statutory provisions, and 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 have imported that term into the contract'.<sup>84</sup> The survey results indicate that these conditions would not be met 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 imply a particular term stipulating a particular tipping method or policy. It

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<sup>78</sup> Ibid at 24.

<sup>79</sup> *Annabel's Berkeley Square) Ltd v Revenue and Customs Commissioners* [2009] EWCA 361; [2009] 4 All ER 55.

<sup>80</sup> *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 441-3 per McHugh and Gummow JJ; Irving, *Contract of Employment* (2012) at 235.

<sup>81</sup> *Hawkins v Clayton* (1988) 164 CLR 539. Deane J stated at 573: 'in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, the court should imply a term by reference to the imputed intention of the parties, if, but only if, it can be seen that the 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*' (emphasis added).

<sup>82</sup> Irving, *Contract of Employment* (2012) at 248.

<sup>83</sup> See, eg, *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242.

<sup>84</sup> *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur (Australia) Ltd* (1986) 160 CLR 226 at 236-7; see Sapideen et al, *Macken's Law of Employment* (2011) at 142.

has been observed that it is difficult under Australian law for parties to establish implied terms arising from custom and usage in the industry.<sup>85</sup>

The strongest avenue for terms regarding tips to be implied into employment contracts is from the custom or practice of the parties, that is the employees and employer of a particular hospitality enterprise. A more liberal approach to implying terms based on the prior course of dealings between employers and employees now seems to apply. Terms have been implied at an individual workplace level on matters including reasonable overtime, Sunday penalty rates, taxi provision and flexidays.<sup>86</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>87</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 that have some potential application. This includes modern awards and enterprise agreements, provisions regarding unauthorised deductions, unfair dismissal 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.

#### *Awards*

There are four modern awards relevant to employees who receive tips.<sup>88</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). Section 139 of the 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 Act as their fluctuating nature would

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<sup>85</sup> Sappideen et al, *Macken's Law of Employment* (2011) at 141; Irving, *Contract of Employment* (2012) at 257-258.

<sup>86</sup> Sappideen et al, *Macken's Law of Employment* (2011) at 142; see, eg, *Public Service Association v The Zoo* [2007] NSWIRComm 1080.

<sup>87</sup> Interview with Supervisor, Bar 1 (Wollongong, 14 May 2014); Interview with Manager, Bar 3 (Wollongong 12 May 2014).

<sup>88</sup> *Hospitality Industry (General) Award 2010* [MA000009]; *Registered and Licensed Clubs Award 2020* [MA000058]; *Restaurant Industry Award 2010* [MA000119]; *Fast Food Industry Award 2010* [MA000003].

contravene the modern awards objective.<sup>89</sup> Tips could arguably be a form of ‘bonus’ or ‘incentive-based payment’.<sup>90</sup> Payments such as these typically involve levels of employer discretion. It is interesting to note that many research participants commonly described tips as a ‘bonus’ (n=8).

There is a possibility that tips could be considered an ‘allowance’.<sup>91</sup> Allowances are not limited under the Act but include ‘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>92</sup> Regulating tips under allowances would take the provision outside its ordinary meaning and use. 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>93</sup>

Even apart from its statutory powers, the historical experience of award regulation suggests that the FWC would be reluctant to include tips in awards. Only a few historical awards have included reference to tips. Only one of these, the (surprising) *Striptease Industry Award*, made provision that tips were gratuities received by employees and could not be used to pay wages.<sup>94</sup>

### *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>95</sup> As is well known by Australian labour lawyers, the ‘matters pertaining’ requirement is complex, but generally limited to those matters which impact directly on the employment relationship as such.<sup>96</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

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<sup>89</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 in s 134(1)(e).

<sup>90</sup> FW Act s 139(1)(a)(ii).

<sup>91</sup> FW Act s 139(1)(g)(ii).

<sup>92</sup> Rohan Price and Jennifer Neilson, *Principles of Employment Law* (Thompson Reuters, 4th ed 2012) at 196.

<sup>93</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>94</sup> AIRC, *Striptease Industry Conditions Award 2006* AP847586. One award provided that employees could not receive tips: *Adelaide Casino Award 1988*, AN15000.

<sup>95</sup> FW Act s 172(1)(a).

<sup>96</sup> *Re Manufacturing Grocers Employees Federation; ex p Australian Chamber of Manufactures* (1986) 160 CLR 341; *Re Alcan Australia Ltd; ex p Federation of Industrial, Manufacturing & Engineering Employees* (1994) 181 CLR 96; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press 5th ed, 2010) at 306-7.

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 are potentially outside the employment relationship due to the role of the customer as a party in the transaction.<sup>97</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>98</sup> Watson SDP rejected this contention, stating that 'employees are entitled to retain gratuities. The Agreement provides no benefit in this regard.'<sup>99</sup> If employers hold tips on trust for employees as indicated in *Wrottesley*,<sup>100</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>101</sup> the arrangement would not 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>102</sup> Another agreement acknowledged tips as an 'entitlement' of the employee.<sup>103</sup> The approval of these agreements gives support to the view that tips pertain sufficiently to the employment relationship, at least in the opinion of some members of the Fair Work Commission.<sup>104</sup>

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<sup>97</sup> In *Bosch Chassis Systems Australia Pty Ltd v AMWU* (2010) 62 AILR 101-049, a term requiring the employer to take out private health insurance for employees and their families was not permitted as it required satisfaction of an obligation 'outside the employment relationship, in part in respect of persons outside the employment relationship'. See also *Transfield Pty Limited v AMWU* (2002) AILR 4-538 where a creditor-debtor relationship was said to be involved.

<sup>98</sup> *Workplace Relations Act 1996* (Cth) ss 170LT(2), 170XA.

<sup>99</sup> *Lone Star Steakhouse and Saloon Western Australia – Certified Agreement*, PR930566, 22 April 2003.

<sup>100</sup> *Wrottesley v Regent Street Florida Restaurant* [1951] 2 KB 277 at 283.

<sup>101</sup> *Nerva v RL & G Ltd* [1997] ICR 11.

<sup>102</sup> *Enterprise Agreement between Atoma Sushi Pty Ltd T/A Atoma Sushi (employer) and Employees of Atoma Sushi*, PR541122, 2 September 2013.

<sup>103</sup> *Stakeco Pty Limited – Enterprise Agreement*, PR998408, 21 June 2010.

<sup>104</sup> Although the FWC is not required to scrutinise agreements for non-permitted matters. Such a matter would be a nullity.

### *Unfair Dismissal*

Apart from decisions of courts in property or contract disputes, unfair dismissal applications provide one of the few forums for resolution of disputes over tips.<sup>105</sup> However the FWC could not authoritatively determine ownership or distribution questions. The uncertainties of the common law and the vagaries of employer-established tip management systems could well give rise to a dismissal which might then be challenged as unfair, such as if an employee were dismissed for taking tip money contrary to a supposed policy. Workplace practices and employees' common understandings could then be a relevant issue in determining the fairness of a dismissal.<sup>106</sup> The vast majority of such applications are conciliated and no such adjudicated decisions have been identified. The issue of tip ownership has, however, arisen in the context of determining appropriate compensation, when the question was whether tips were part of remuneration.<sup>107</sup> A bartender was unfairly dismissed after two years of employment. Her average weekly tips were \$140, in fact exceeding her average weekly wage of \$104.<sup>108</sup> A full bench on appeal determined that tips did not constitute remuneration and so could not be included in the compensation amount. The full bench considered that the employer had no legal obligation to pay tips to employees as they were provided by customers.<sup>109</sup> Without a legal obligation to pay, tips cannot be considered remuneration in unfair dismissal proceedings.<sup>110</sup> The position may be different if employers have a legal liability to pay tips due to trust obligations or express or implied terms of the employment contract.

### *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>111</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 *Fair Work Act 2009* 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

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<sup>105</sup> A dispute arising under an award or agreement could be referred to the FWC or other person: FW Act ss 595, 738-740.

<sup>106</sup> FW Act s 387(h). A clear breach of policy would be a valid reason for dismissal under s 387(a).

<sup>107</sup> FW Act s 392(2)(c).

<sup>108</sup> *Savrimootoo v Entertainment Development Group Pty Ltd* (2005), AIRC, PR96523 at 72-75.

<sup>109</sup> *Savrimootoo v Entertainment Development Group Pty Ltd* (2006) AIRC FB, PR969028, 23 February 2006. It should be noted that the employee was unrepresented, and the potential arguments regarding tip ownership or obligation were not developed.

<sup>110</sup> *BMS Entertainment Pty Ltd v Sawiris* (2004) AIRC, PR953325.

<sup>111</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).

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 three months, which would also be in breach of the Act if tips were an entitlement.<sup>112</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>113</sup>

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>114</sup>

### *Consumer Law*

The *Competition and Consumer Act 2010* (Cth) provides potential rights and remedies for customers and employees. It is a tenable proposition that most customers believe 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>115</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 and commercial' nature.<sup>116</sup> 'Conduct' under the Australian Consumer Law refers to the doing or refusing to do any act.<sup>117</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 Act. Conduct done in the course of dealings with actual or potential consumers has been observed to 'always occur in trade or commerce'.<sup>118</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 a 'meaning which is inconsistent with the truth'.<sup>119</sup> Employers who retain tips in whole or in part, while potentially within their

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<sup>112</sup> Interview with Supervisor, Restaurant 3 (Wollongong 7 May 2014).

<sup>113</sup> FW Act s 327.

<sup>114</sup> *Hospitality Industry (General) Award 2010 [MA000009]* cl 39.

<sup>115</sup> *Competition and Consumer Act 2010* (Cth) sch 2, s 18.

<sup>116</sup> *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389 at 393.

<sup>117</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 2(2)(a)-(b).

<sup>118</sup> Stephen Corones and Phillip Clarke, *The Australian Consumer Law: Commentary and Materials* (Thompson Reuters Australia, 4th ed, 2011) at 54.

<sup>119</sup> *World Series Cricket Pty Ltd v Parish* (1977) 16 ALR 181 at 201.

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>120</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>121</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 employee was 'induced' to accept employment based on the misleading conduct.<sup>122</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>123</sup> The wide range of preventative and corrective orders under the *Competition and Consumer Act*, and the relatively informal nature of complaints to the Competition and Consumer Commission, make action under this legislation an attractive and realistic option.<sup>124</sup>

## Conclusion

There is no clear answer to the question of who owns tips. Assuming that duty to account applies, the default position is that employers own the tips. 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 usually gain a beneficial interest in the pool 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. Any answer based on common law, or even *moreso* in equity, is really only useful as the basis for asserting a right informally.

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<sup>120</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198.

<sup>121</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 31

<sup>122</sup> R Steinwall, *Annotated Competition and Consumer Act 2010 – 2012 Edition* (LexisNexis, 2012) at 11412 [14655]; see, eg, *Wright v TNT Management Pty Ltd t/a Comet Overnight Transport* (1989) 85 ALR 442.

<sup>123</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 152.

<sup>124</sup> See *Competition and Consumer Act 2010* (Cth) sch 2 ch 5.



Individual employees generally do not have the resources to bring complaints to the courts, which are intimidating, expensive and time consuming.<sup>125</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 small claims procedure.<sup>126</sup>

There also seems to be limited scope for statutory intervention, apart from situations where misleading conduct is involved. Since employer proprietors rarely give any indication of how tips will be distributed, such occurrences are likely to be exceptional, even where a labelled tips jar is deployed. However this is an area where consumer law has the potential to impact on practices. It is also a domain where 'soft' regulation might be applicable, through the development of a code of practice or default rules. It appears though that employer and industry associations are content to leave the issue to individual establishments. An industry-based approach is made more difficult by the range of businesses concerned: from fine dining restaurants all the way to cafes and the local takeaway shop.

The involvement of customers in the tipping transaction raises a further perspective. We believe that if an establishment allows or encourages tipping, customers are entitled to know how the proceeds will be distributed. It does not seem far-fetched in such circumstances that the business should display this information to customers. There is involved an element of customer choice, and perhaps responsibility. 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. As customers we can think about what we are giving a tip *for* and to *whom*, and make plain our intention. At the very least it seems that if we want our tips to go to employees, it is safer to give in cash rather than by credit card.<sup>127</sup>

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<sup>125</sup> Joellen Riley, *Employee Protection at Common Law* (Federation Press, 2005) 31.

<sup>126</sup> The procedure under FW Act s 548 is not available in these circumstances.

<sup>127</sup> See United Voice, 'Cash is Best: Restaurant Workers, Tips and PIN Only Payments', Media Release, 1 August 2014, <http://www.unitedvoice.org.au/press-releases/cash-best-restaurant-workers-tips-and-pin-only-payments>.