

# WORK InSights

Autumn edition 2005

## Editorial

Welcome to the Autumn 2005 edition of *Work InSights*, in which we aim to provide you with topical information and the relevant employment law tools to assist you in your workplace.

Our feature article in this edition highlights the themes emerging from discussions concerning potential workplace relations reform when the Government secures both Houses of Parliament from 1 July, 2005. Further articles outline the implications for public companies on remuneration and incentive arrangements with the adoption of the International Accounting Standards; how to conduct an investigation into employee misconduct; how formal exemptions to discrimination legislation can provide protection from challenges on the basis of discrimination; and finally, how employers may deal with the sensitive issue of drug and alcohol testing.

We are pleased to introduce our *Autumn Work InSights Boardroom Briefing Series* – April through June, 2005. We would be delighted to welcome you to our Offices for this complimentary breakfast, luncheon and cocktail series.

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## New federal workplace relations laws come closer

**Authors: Peter Smith and Philip Clarke**

### Key themes of legislative change

The federal government secures control of both Houses of Parliament from 1 July 2005. Not since 1975 has a federal government had control of the Senate, a body which was so memorably derided by a former frustrated Prime Minister as "unrepresentative swill". From 1 July 2005, the federal government will be unburdened of any such frustrations and will find itself well placed to fully implement major proposed workplace relations reforms. Rejected bills, policies released during the 2004 election campaign and developments since the federal election give a reasonably clear picture of the intended future direction of federal workplace relations laws.

The following key themes have emerged:

- a unified industrial relation system;
- further award simplification;
- reduction in the role of industrial tribunals including the crucial area of setting minimum wages;
- union right of entry restrictions;
- small business redundancy exemptions;
- excluded employees and unfair dismissal laws;
- unified approach to trade union bargaining fees;
- strengthening employers' response to industrial action; and
- simplified agreement making.

### Who will benefit?

The legislation is directed at securing enhanced flexibilities and advantages for employers. Employers therefore may look with optimism to the proposed new workplace laws. It is difficult to find anywhere in the proposals any new enforceable rights for employees or their representative organisations.

Nor is there much in it for States that want to run their own industrial relations systems. The move towards the unified industrial relations system will involve an incremental reduction of the State industrial relations systems. Some States have indicated that the proposed changes may be challenged on constitutional grounds. It remains uncertain as to whether the power given to the Commonwealth under the *Commonwealth Constitution* to deal with corporations, upon which it is understood that the greater majority of the new legislation will be based, can validly support all the proposed new industrial relations legislation. A High Court challenge seems inevitable.

## Some things to consider

Employers will need to carefully consider the impact of the proposed legislation on the particular circumstances of their individual businesses and any disruptive uncertainty that may arise from constitutional challenges and alternative union and employee strategies. In coming editions of *Work InSights*, we will be analysing in some detail various aspects of the raft of legislation which is to be soon introduced. These articles will assist businesses to develop strategies in the new regulatory environment and to best position to respond to any new union and employee challenges. For instance, it is anticipated that strong unions with established membership levels will continue to have relevance in workplaces whilst the unorganised areas of the workforce will become increasingly difficult for the unions to develop. Individual employees may look away from the federal system to available State jurisdictions (including State unfair contract and discrimination laws) and even the common law courts.

Employees will lose some minimum award standards which underpin the collective bargaining process. Conditions previously regulated by awards may now be subject to negotiation. The reduction in "allowable award matters" will assist employers to satisfy the requirements of the "no disadvantage" test for the certification of federal agreements, which, it is proposed, may operate for up to five years' duration.

Permitting five-year agreements may operate to provide a degree of stability for employers concerned to ensure that their preferred approach to the employer and employee relationship is not affected (or is affected to only a limited extent) by union campaigns and any further changes to the industrial relations system.

## Impact on bargaining

The continued focus on bargaining at the enterprise level is not, however, likely to seriously affect the ability of stronger unions to exert a degree of economic pressure on employers by engaging in "protected" industrial action. Stronger parties may incline towards agreements of up to five years duration, thereby "locking-in" relatively weaker parties to favourable certified agreements for extended periods. However, agreements of this extended duration may prove inflexible in the rapidly changing areas of industrial relations and business environments. Such agreements may well be preferred where a party has the "market" or "bargaining" power to attract the reluctant consent of another or where the parties are able to agree to include facilitative provisions



that permit further bargaining during the extended nominal term on key issues such as wages.

## Potential for other developments

It was noted previously that it is difficult to find in any of the legislative proposals any additional rights for either employees or their trade unions. Can employees or their unions look elsewhere for remedies?

The legislative proposals, for example, remove for small business employees the protections currently provided by unfair dismissal laws. Aggrieved employees may alternatively, as a matter of strategic necessity, opt to re-cast otherwise "unfair dismissal" claims by alleging either unlawful termination or discrimination in employment as a basis for seeking an order for reinstatement, compensation and/or a penalty against their employer of not more than \$10,000 under section 170CR(1) of the *Workplace Relations Act* or damages under applicable State or federal discrimination laws.

An aggrieved employee may also seek to commence an action alleging a breach of the contract of employment (including the implied employer's duty of trust and confidence), or a claim for breach of the *Commonwealth Trade Practices Act 1996*. These options are, however, often more costly and time consuming than actions commenced before industrial tribunals. Recent examples of these causes of action being pursued tend to be confined to senior executives otherwise excluded from the NSW unfair contract jurisdiction. The situation is further complicated by the fact that these causes of action have not been thoroughly tested by appellate courts in Australia (a situation noted by the Supreme Court of New South Wales earlier this year in *Heptonstall v Gaskin & Ors (No 2)*).

However, in a recent decision (15 July 2004), *Eastwood v Magnox Electric plc*, the English House of Lords, in considering actions commenced by two long serving employees engaged in the security section of a power station and a teacher alleged to have behaved inappropriately toward certain female pupils, expressed the view that the common law duty of trust and confidence may be utilised by aggrieved employees as a basis to remedy procedural defects preceding the dismissal decision of an employer. It follows that a cause of action may exist where an employee suffers financial loss from the psychiatric or other illness caused by his or her pre-dismissal unfair treatment, where the relevant conduct precedes, and is independent of, any subsequent dismissal. By contrast, an earlier but still recent decision of the Victorian Supreme Court, *Intico (Vic) Pty Ltd & Ors v Walmsley*, it was held that in exercising a contractual right in dismissing an employee for misconduct, an "employer is not bound to act reasonably, or to give reasons or accord the employee an opportunity to be heard". Clearly, the development of the Australian common law as it emerges out from under an ever diminishing industrial arbitration system will be an area to follow with interest over the mid to long term. (For more on these decisions, see *Work InSights*, Spring Edition 2004, pages 4 to 5.)

The pattern of litigation is also likely to be influenced by broader shifts in the nature of the employer-employee relationship. Current trends suggest that employees expect to change jobs frequently, and derive their sense of employment identity from an attachment to an occupation, skills cluster or industry, rather than from any ongoing relationship with a single employer. This no doubt has significant practical implications for business recruitment and retention strategies.

The shifting nature of the employment relationship may result in increasing litigation in respect of post-employment restraints, as employers seek to protect their confidential information and take a stricter approach to requiring that employees fulfil their obligations in respect of periods of actual notice. Employees, on the other hand, may resist this approach and otherwise attempt to assert ownership of their "human capital" and readily transition into other positions within the labour market (see, for a recent example, *ICAP Australia Pty Limited v BGC Partners (Australia) Pty Limited*, an interlocutory decision of the Federal Court of Australia, where damages and injunctions were sought when 14 employees at a futures desk resigned en masse and joined a competitor).

## Work and family implications

It is noted, finally, that the proposed workplace relations legislation is so far silent on the area of additional rights for employees returning from maternity leave and also in respect of the availability of periods of paid parental leave (although a decision about unpaid parental leave is expected from the Australian Industrial Relations Commission in the federal *Work and Family Test Case* during 2005). The rights of employees seeking to return to part-time work following maternity leave are therefore likely to remain regulated by applicable State and federal discrimination laws of which there is a growing body of (not always consistent) cases (see, for example, decisions on the Federal Magistrates Court in 2003 in *Mayer v Australian Nuclear Science and Technology Organisation (ANTSO)* and *Kelly v TPG Internet Pty Ltd*; and the 2004 decision of the New South Wales Anti-Discrimination Tribunal in *Reddy v International Cargo Express*, all dealing with part-time work issues).

Any further federal initiatives in the area of work/life balance may focus alternatively on tax and welfare reforms. In this respect, the House of Representatives Standing Committee on Family and Human Services has recently resolved to conduct an inquiry into and report on how the Australian Government can "better help families balance their work and family responsibilities". According to their terms of reference, the Committee is particularly interested in addressing issues relating to:

- (a) the financial, career and social disincentives to starting families;
- (b) making it easier for parents who so wish to return to the paid workforce; and
- (c) the impact of taxation and other matters on families in the choices they make in balancing work and family life.

## Conclusion

It is clear from the above that major legislative change to workplace laws is planned to occur during the current Parliamentary term. Although many of the details have yet been clarified, the legislative proposals which are discussed above continue the broad shift towards a more decentralised system of Australian industrial relations which will, it is intended, operate to enhance the ability of employers to further pursue direct relationships with its employees with minimal third party intervention.

## Harmers Autumn Work InSights Boardroom Briefing Series

April to June 2005

### Preparing for change – strategies for achieving optimal business outcomes in a climate of legislative reform

#### Presenters

Sydney: Michael Harmer, Managing Partner and Senior Team Leader, and Peter Smith, Senior Associate and Team Leader

Melbourne/Brisbane: Michael Harmer, Managing Partner and Senior Team Leader, Chris Molnar, Partner and Team Leader, and James Yeatman, Team Leader

With the Howard government gaining control of the Senate from 1 July 2005, the employment landscape has the potential to change very quickly. Informed organisations that are planning now will gain a significant competitive advantage over those that wait. Our firm has followed the proposed changes closely and been involved in lobbying in relation to the legislation for some of our largest clients. Michael, Peter, Chris and James will share their knowledge of the opportunities for those organisations that move now.

#### Sydney

Harmers Sydney Office

Level 28, St Martins Tower, 31 Market Street, Sydney

Dates: Thursday 21st April

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

Friday 22nd April

Breakfast Session: 7:15am for 7:30am to 9:00am

Friday 22nd April

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

#### Melbourne

Harmers Melbourne Office

Level 6, 50 Market Street, Melbourne

Dates: Thursday 2nd June

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

Wednesday 8th June

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

#### Brisbane

Harmers Brisbane Office

320 Adelaide Street, Brisbane

Dates: Wednesday 4th May

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

Thursday 5th May

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

#### RSVP

Friday 15th April to Jane Kewin at jane.kewin@harmers.com.au  
Tel: (02) 9993 8537

## The new IASB Accounting Standards and their impact on remuneration and incentive arrangements

### Presenter

David Stewart, Partner and Team Leader

The adoption of the International Accounting Standards in Australia is now upon us. The new Standards will have an impact on remuneration and incentive arrangements in business. The impact will primarily be in relation to the financial reporting of employee and executive share schemes, as well as bonus and profit sharing arrangements. The Standards also need to be seen in light of the wider reporting and disclosure regime for companies. David will share his views on the adoption of the new Standards and how to manage the risks and opportunities for your organisation.

### Sydney

Harmers Sydney Office  
Level 28, St Martins Tower, 31 Market Street, Sydney

Dates: **Wednesday 27th April**  
Breakfast Session: 7:15am for 7:30am to 9:00am  
**Thursday 28th April**  
Luncheon Session: 12:15pm for 12:30pm to 2:00pm

### RSVP

Thursday 21st April to Jane Kewin at jane.kewin@harmers.com.au  
Tel: (02) 9993 8537

Melbourne and Brisbane sessions will be scheduled in May.  
To register interest, please email Jane Kewin, Marketing Manager at jane.kewin@harmers.com.au.

## Risks of new OH&S legislative changes to your organisation and practical strategies for dealing with them

### Presenter

Jamie Robinson, Partner and Team Leader

OH&S legislation, particularly in NSW and Victoria, is going to evolve significantly in the next 6 months. This will mean significantly increased exposure for many organisations and you as directors and managers, yet there is a continuing failure of organisations to properly resource safety in the workplace due to the lack of transparency of benefit arising from the cost. Further, quite frankly, many OH&S systems fail to achieve results. Jamie, having practiced in the area for 14 years will share his views on the risks of the new legislation and some practical advice on the opportunities for your organisation.

### Sydney

Harmers Sydney Office  
Level 28, St Martins Tower, 31 Market Street, Sydney

Dates: **Tuesday 3rd May**  
Breakfast Session: 7:15am for 7:30am to 9:00am  
**Wednesday 4th May**  
Luncheon Session: 12:15pm for 12:30pm to 2:00pm

### RSVP

Friday 29th April to Jane Kewin at jane.kewin@harmers.com.au  
Tel: (02) 9993 8537



## Melbourne Construction Industry Forum

### Presenter

Chris Molnar, Partner and Team Leader, and James Yeatman, Team Leader

The Construction Industry Lunchtime Forum will examine the key features of the Building and Construction Industry Improvement Bill and its implications for employers. The forum is aimed at employers in the industry. The forum will consider an example of an industrial dispute in the industry and how the proposed legislation will make a difference to its management.

### Melbourne

Harmers Melbourne Office  
Level 6, 50 Market Street, Melbourne

Date: **Thursday 19th May**  
Luncheon Session: 12:15pm for 12:30pm to 2:00pm

### RSVP

Thursday 12th May to Helen Butler at helen.butler@harmers.com.au  
Tel: 03 9612 2300



## Investigation of serious misconduct in your organisation

### Presenters

Sydney: Stephen Boatswain, Partner and Team Leader

Brisbane: James Yeatman, Team Leader

Employee misconduct occurs in a wide variety of situations and is a reality of today's workplace that most employers must deal with at some time. For employers, knowing how to conduct an investigation into an allegation of misconduct is vital to minimising exposure to claims for reinstatement or compensation. Stephen and James will explore how your organisation should manage and investigate a situation of employee misconduct, and provide a practical guide through the steps that should be taken to conduct an effective investigation into employee misconduct.

### Sydney

Harmers Sydney Office

Level 28, St Martins Tower, 31 Market Street, Sydney

Dates: Tuesday 10th May

Breakfast Session: 7:15am for 7:30am to 9:00am

Wednesday 11th May

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

### Brisbane

Harmers Brisbane Office

320 Adelaide Street, Brisbane

Date: Wednesday 11th May

Cocktail Session: 5:30pm to 7:00pm

### RSVP

Friday 29th April to Jane Kewin at jane.kewin@harmers.com.au  
Tel (02) 9993 8537

## The opportunities for your organisation in improved management of part-time and casual employees and the risks of not doing so

### Presenters

Sydney: Jamie Robinson, Partner and Team Leader

Brisbane: Jamie Robinson, Partner and Team Leader, and James Yeatman, Team Leader

Media reports and unions constantly highlight the increasing casualisation of Australian workplaces. Various factors drive this phenomenon, not the least of which is increased workplace flexibility and decreased exposure to unfair termination claims. These benefits are only realised however if the casual and part time employees in our workforces are well managed, which unfortunately does not appear to be common. Jamie and James will share views on some of the key pitfalls associated with casual and part-time employment and some tips for avoiding them.

### Sydney

Harmers Sydney Office

Level 28, St Martins Tower, 31 Market Street, Sydney

Dates: Tuesday 7th June

Breakfast Session: 7:15am for 7:30am to 9:00am

Wednesday 8th June

Luncheon Session: 12:15pm for 12:30pm to 2:00pm

### Brisbane

Harmers Brisbane Office

320 Adelaide Street, Brisbane

Date: Tuesday 17th May

Cocktail Session: 5:30pm to 7:00pm

### RSVP

Friday 13th May to Jane Kewin at jane.kewin@harmers.com.au  
Tel: (02) 9993 8537

## Performance management

### Presenters

Sydney: Joydeep Hor, Partner and Team Leader

Brisbane: Joydeep Hor, Partner and Team Leader, and James Yeatman, Team Leader

Performance management is fairly universally regarded by line managers as one of their most daunting responsibilities. Understanding precisely what legal rights and responsibilities line managers have in this area is critical to an organisation's risk management strategy in dealing with potential employee litigation. In this session, the presenters will look at a series of cases that demonstrate, on the one hand, what the law expects of managers in addressing poor performance and, on the other hand, what the pitfalls are for managers in addressing these matters poorly. The session will focus, primarily, on translating an employer's theoretical obligations into tactics capable of utilisation by managers

### Sydney

Harmers Sydney Office  
Level 28, St Martins Tower, 31 Market Street, Sydney

Dates: Wednesday 15th June  
Breakfast Session: 7:15am for 7:30am to 9:00am

Thursday 16th June  
Luncheon Session: 12:15pm for 12:30pm to 2:00pm

### Brisbane

Harmers Brisbane Office  
320 Adelaide Street, Brisbane

Date: Wednesday 25th May  
Cocktail Session: 5:30pm to 7:00pm

### RSVP

Friday 20th May to Jane Kewin at jane.kewin@harmers.com.au – Tel: (02) 9993 8537

## Adoption of the International Accounting Standards – impact on remuneration and incentive arrangements in Australia

**Author: David Stewart**

### Introduction

The Australian Accounting Standards Board ("AASB") is implementing the Standards of the International Accounting Standards Board ("IASB") in Australia, for reporting periods commencing on or after 1 January 2005.

The primary Standards that will affect the workplace are AASB2 – Share-based Payments, and AASB119 – Employee Benefits, as well as AASB1046 & 1046A dealing with director and executive remuneration disclosures.

In essence, the Standards require reporting for employee share schemes, noting there has been no previous equivalent Standard. The introduction of the Standards will also have an impact on the volatility of profits of companies and so a flow-on effect to profit based bonus schemes. Additionally, AASB1046 & 1046A provide for certain disclosures to be made in financial reports and should be compared to those requirements under the *Corporations Act* in particular section 300A, as well as the ASX Listing Rules.

### Multi-disciplinary approach

We recommend that the impact of the new Standards on your employment arrangements should be considered with us, during their implementation with your accountants and commercial advisors.

We strongly recommend that these issues be attended to immediately as the changes and their implementation are well upon us.

### Change management

The implementation and adoption of the Standards should be part of a considered change management programme for your organisation involving the following:

- Understanding the impact of the new Standards on various aspects of your organisation, not just on employment arrangements but also, for example, on finance arrangements.
- A review and audit of your remuneration and share based arrangements should be undertaken.
- A rectification of any aspects be addressed as soon as possible as once the changes are implemented it will be difficult to do so.

- Ensure compliance with the Standards and the relevant disclosure requirements.

### Share-based payments – AASB2

There is no prior equivalent Standard to AASB2 dealing with share based payments.

The new requirements are to enable the users of financial reports to understand the following:

1. the nature and extent of the arrangements;
2. how fair value is determined; and
3. the effect of the transaction on the entity's profit and loss and on its financial position.

In essence, AASB2 provides that where goods and services received and acquired do not qualify as assets, they are to be recognised as expenses.

Accordingly, an entity is to recognise share based payment transactions in its financial statements including transactions with employees or other parties be they settled in cash, assets or equity interests.

For equity transactions, the entity must measure the goods and services received and the corresponding increase in equity directly, at the fair value of the goods received.

If the entity cannot estimate reliably the fair value of the goods or services, then the entity is to fairly value the equity instruments granted. This is particularly so for employees as in effect the entity is required to measure fair value of the equity instruments granted as it is typically not possible to reliably estimate the value of the services.

In relation to share options for employees, vesting periods are not taken into account instead the number of shares is taken into account for measurement of the transaction over the period, in other words, on a cumulative basis. Any valuation is to be based on market prices and valued as an arm's length transaction between knowledgeable and willing parties. It is noted that there is the possibility of variation for repricing. Of course, many options will not only have vesting requirements but will often have performance hurdles attached to them. For performance hurdles the estimate is to be the likely outcome of the performance hurdle being met.

Cancellation or "settling" of options during a vesting period, as often occurs on termination of employment, is taken as an acceleration of vesting.

The Standards provide a detailed set of examples. However, it will be important for an entity to understand how any share option or share based scheme (including any phantom scheme), may be counted as an expense and the effect on its profit and loss and financial position.

## Employee benefits – AASB119

AASB119 supersedes AASB1028. It requires accounting for employee benefits except those to which AASB2 applies, and it does not deal with superannuation as that is covered by AAS25.

The Standard sets out the accounting requirements for the following:

1. short-term employee benefits such as wages, salary, social security payments, annual leave, sick leave, short-term profit sharing and bonuses, being those where payment is made within 12 months of the period in which the employee rendered the service, housing and cars;
2. post employment benefits such as pensions, retirement benefits and post-

employment life insurance;

3. long-term benefits such as long service leave, bonuses, profit sharing and deferred bonuses when paid more than twelve months after the period when the services were rendered; and
4. termination benefits, for example, in redundancy situations.

Whilst a great deal of this is not particularly controversial it is noted that one significant issue that may arise is due to the potential volatility of profits arising from the implementation of the Standards. Due to this, profit based incentive plans may be significantly impacted.

A typical profit share plan usually provides that each year a number of participants will be entitled to a share in the profit of the company. An example of 3 per cent of net profit is in fact used in AASB119 itself.

Assuming that the net profit is impacted by the adoption of the Standards, the profit pool may go up or down, perhaps significantly.

This is problematic as a bonus or profit scheme is designed to encourage individual and company performance, and arguably a commitment to the organisation. The impact of external factors may create either a windfall profit or a "low" profit (or loss), that is not due to the efforts of those employees. This it is suggested would have a negative effect on retention and staff morale. In turn, if profits increase considerably the employee may receive a significant bonus that is not deserved.

In this area it is particularly important to undertake an audit and review of the remuneration schemes in place in your organisation.

On a different note, it has been suggested that a number of the accounting changes may lead to a greater outsourcing of functions for an organisation. This may increase a significant trend that has already been seen across the Australian workforce.

## Disclosures – AASB1046 & 1046A

AASB1046 became operative on 30 June 2004 and should be seen in the context of the changes to the *Corporations Act*, in particular CLERP 9. The Standard is designed to improve the quality of disclosures relevant to individuals responsible for the governance of entities. The disclosure goes to the remuneration arrangements of specified directors and specified executives, being the five executives with the greatest authority in the entity.

It is necessary to disclose components of primary remuneration, post-employment

arrangements, equity compensation and other benefits.

AASB1046A was instituted to bring AASB1046 into line with the adoption of AASB2.

It was noted during the Parliamentary Joint Committee on Corporations and Financial Services sittings in February 2005, in the Supplementary Report by Labor members, that a submission from KPMG identified the potential overlapping and inconsistency that exists between section 300A of the *Corporations Act* and AASB1046 with regard to disclosure of executive remuneration. The differences relate to the selection of the executives whose remuneration details are to be disclosed.

The Labor members acknowledged that Treasury and the AASB were working to resolve these issues. We also note their view that resolution of these differences was possible without alteration of the section 300A requirement.

In light of this, the Labor members stated that AASB1046 should be read as a supplement to the *Corporations Act* and read in conjunction with it, stating that Accounting Standards do not replace, and should not be seen as a replacement of the executive remuneration disclosure requirements contained in section 300A.

The ASX Listing Rules in relation to disclosures should also be considered for listed entities, as well as those of the Standards and the *Corporations Act*.

Businesses need to implement a sensible change management strategy that encapsulates the many different disciplines that are impacted by the introduction of the International Accounting Standards.

It is important to address these issues as the implementation of the Standards is well upon us.



# How to conduct an investigation into employee misconduct

**Authors: Stephen Boatswain and Jenny King**

Imagine this scenario:

*You are the HR Director of your company. It is 9:30 on a Monday morning and you have just received a phone call from a manager, who was calling to tell you that they suspect one of the employees has been manipulating the company's accounts and stealing money from the business. They want you to dismiss the employee. What do you do?*

For employers, knowing how to conduct an investigation into allegations of employee misconduct is vital to minimising a company's exposure to claims seeking reinstatement or compensation.

Employee misconduct can occur in a variety of situations. It may arise in the case of theft by an employee. Alternatively, an investigation into employee misconduct may be necessary where it is alleged that an employee has been violent towards other employees, or in cases of sexual harassment, or in cases of discrimination at the workplace.

This article aims to provide employers with a practical guide through the fundamental steps that must be taken to conduct an effective investigation into allegations of employee misconduct. In summary, these fundamental steps are to:

1. confirm the nature of the alleged misconduct and determine whether any process is established by any relevant Industrial Instrument or Policy, and then investigate the incident of alleged misconduct;
2. specify the allegations of misconduct;
3. meet with the employee to give them an opportunity to respond to the allegations of misconduct; and
4. give the employee an opportunity to be heard on whether they should be dismissed.



## Steps to conducting an investigation

In cases of alleged employee misconduct an employer has an obligation to provide the employee with both substantive and procedural fairness. That obligation translates into the following specific steps which the employer is obliged to take:

### Step 1: Investigate the incident

An employer must conduct an investigation into the incident of alleged misconduct to ascertain the circumstances relating to the incident. This investigation allows an employer to be informed of all the relevant facts that it may take into account in deciding what action to take against the employee. If there is a process established by a relevant Industrial Instrument or Policy, this process should be followed. An employer should inform the employee of the process that is to be followed at the start of any investigation.

In the unfair dismissal jurisdiction, in order for an employer to justify a decision to dismiss an employee summarily, the employer has the onus of proving that the alleged misconduct did in fact occur. An employer must be able to prove that it is far more believable than not believable that the employee did in fact engage in the misconduct alleged. A proper investigation of the incident is therefore an essential part of the overall termination process.

The extent of the investigation to be conducted by the employer will depend on the strength or weakness of the evidence available. Depending on the circumstances, an investigation may involve interviewing other employees to verify events or to gather further information about the incident. In the case of a complaint about an employee, an investigation may involve contacting the complainant to verify the allegation made. In a recent decision of the Full Bench of the Industrial Relations Commission of New South Wales ("NSWIRC") it was held that an employer is not entitled to take at face value an accusation of harassment made by one employee against another without undertaking some process of verification. The NSWIRC also stated that it is not reasonable to expect an employee to give a commitment to stop harassing an employee before the complaint had been verified, since such a commitment could be taken as an admission of guilt.

However, an employer is not expected to conduct its enquiries of the incident with the forensic thoroughness or skills of police investigators. Instead, an employer's obligation is to take all reasonable steps to investigate the allegations of misconduct against the employee.

In some cases an employer's investigation of alleged misconduct may run at the same time, or after, a criminal investigation into the same incident. It is not unusual for events involving employee misconduct to give rise to associated criminal proceedings. For example, an allegation of misappropriation of funds against an employee may result in a separate police investigation and criminal proceedings. This does not prevent an employer from conducting an investigation into the allegation. An employer is entitled to investigate alleged misconduct by an employee in the context of their ongoing employment, irrespective of whether a complaint has been made to the police.

If criminal proceedings have been concluded in relation to an incident of misconduct, then an employer is entitled to have regard to the result of those criminal proceedings during its own internal investigation of the alleged misconduct. However, this does not displace the employer's obligation to investigate the alleged misconduct in the context of their employment contract. If an employee is convicted of criminal charges, an employer is entitled to rely upon the conviction, together with the evidence revealed during the criminal proceedings, as demonstrating that the misconduct in question had occurred. Conversely, if an employee is acquitted from criminal charges, that will be a factor that may throw doubt on any subsequent decision by the employer to dismiss the employee for the misconduct. If criminal proceedings have not been concluded at the time of the employer's investigation different considerations will apply. These are dealt with below under the heading "A right to silence?".

### Step 2: Specify the allegations of misconduct

An employer must specify the misconduct alleged against the employee. In practical terms, this means that an employer must be able to describe to the employee in a way that would be clear to them, the exact nature of the alleged misconduct.

It is not enough for an employer to assert that the employee was "involved" in serious misconduct. An employer must specify how and in what particular manner it is alleged the employee was involved in the misconduct.

The reason for this step in the investigation is to provide the employee with an adequate opportunity to deal with the complaint against them. An employee is entitled to know sufficiently what is being said against them so that they can properly put forward their own case in response. This is the essence of procedural fairness.

### *Step 3: Meet with the employee to give them an opportunity to respond to the allegations of misconduct*

#### **The meeting**

An employer must meet with the employee to put the allegations of misconduct to the employee, and to give the employee a reasonable opportunity to respond to the allegations.

The employer must put the allegations of misconduct to the employee. This will usually involve the employer asking the employee specific questions about the incident. In most cases it will be beneficial for the employer to have a written script or agenda to guide the meeting and to prompt the questions which must be asked by the employer. An employee has an obligation to co-operate with the employer's investigation by making an effort to answer the employer's questions. An employee is obliged to communicate with their employer in a timely and constructive manner during any investigative process.

During the meeting the employee may raise additional information or offer alternative explanations that the employer had not previously taken into account. If this occurs, an employer has an obligation to investigate any new matters raised by the employee.

An employer's obligation to give an employee an opportunity to respond to allegations of misconduct means that the employer must furnish the employee with all the information that would reasonably enable the employee to understand and respond to the allegations. By way of example, a decision of the NSWIRC has held that in the case of alleged theft by an employee, the employee was entitled to be provided with the employer's records of the financial anomalies so that she had an effective opportunity to give an explanation or defence to the alleged misconduct being put to her during the meeting.



#### **Avoid delay**

The timing of this meeting with the employee is important. An employer is not entitled to delay giving an employee an opportunity to respond to allegations of misconduct. This means that even if an allegation is being investigated by a third party such as the police, if an employer wants to rely on the misconduct to dismiss the employee immediately then they must provide the employee with an opportunity to respond to the allegations within a reasonable time. An employer is not required to await the outcome of criminal proceedings relating to the incident of misconduct before dismissing the employee.

#### **Difficulties during the investigation**

This stage of the investigation can be fraught with difficulties. Employees may attempt to hinder the employer's investigation process by failing to attend scheduled meetings, by failing to co-operate with those conducting the investigation, by engaging lawyers to represent them (who seek to take control of the process) or by refusing to answer questions put to them regarding the misconduct.

It is important to appreciate that an employer is not required to take all possible steps to advise an employee of the allegations against them. However, an employer's obligation at this stage of the investigation is to take all reasonable steps to provide the employee with an opportunity to respond to the allegations. An employee cannot dictate how an investigation is conducted. Equally, conduct of the employee during an investigation itself can become grounds of dismissal (such as failing to attend interviews as directed). The key remains reasonableness, and the failure to take all reasonable steps can expose an employer to adverse findings. By way of example,

a decision of the Australian Industrial Relations Commission ("AIRC") has held that the termination of an employee for her failure to cooperate with an employer's investigation was unfair. This was because the allegations of misconduct were never actually put to the employee by the employer, even though it was the employee who did not attend any of the meetings scheduled by her employer. If an employee refuses to attend a face to face meeting, then an employer may be required to satisfy its obligation by setting out the allegations of misconduct in writing, and providing the employee with an opportunity to respond either in a later meeting, or if necessary, in writing. The emphasis is to ensure that an employee is given a reasonable opportunity to provide an informed response to the allegation. Where an employee has failed to attend a meeting as directed, it is always prudent to provide a final opportunity to respond to the outlined allegations that informs the employee of the potential consequence should the employee fail to attend or respond as requested.

#### **A right to silence?**

One issue that can confront employers during an investigation into alleged misconduct is that an employee may refuse to answer questions put to them by the employer. For example, an employee may refuse to answer an employer's questions until they have had an opportunity to discuss the matters with their lawyer or union representative. Alternatively, an employee may refuse to answer questions from an employer, on the basis that their answers may be used against them in an incriminating manner in associated criminal proceedings.

The NSWIRC has held that while an employee's right against self-incrimination does exist, the exercise of that right attracts certain risks. The risk for an employee of



staying silent is that he or she will lose an opportunity to provide an explanation to the employer to justify the alleged misconduct. From the employer's point of view, the risk is that the employer is forced to either postpone a decision to dismiss the employee, or to make an immediate decision to dismiss the employee based on the information available at the time (which excludes any response from the employee). If an employer opts for the immediate dismissal option, and the employee is able to establish at a later date some factor which might mitigate or justify the conduct, then the employee may be able to argue that he or she was denied procedural fairness and that the dismissal was unfair. The issue at an unfair dismissal hearing involving this conduct is whether the misconduct occurred, not whether the employer's decision at the time was reasonable on the information then available.

Again, it is a question of what is reasonable in the circumstances. If a short delay is proposed, it would be reasonable in most circumstances to agree. However, if a prolonged delay is proposed or encountered, it would be reasonable for an employer to direct the employee to attend at a specified time, and to have a witness provided if the union representative or lawyer cannot attend.

#### Limits on an employee's rights

While an employee is entitled to procedural fairness through a properly conducted investigation, there are limitations on an employee's rights during the investigation process.

One key limitation is that an employee is not entitled to confront his or her accusers. The right to confront your accusers, sometimes referred to as the right to 'natural justice', often arises in a judicial or administrative investigation, however

it does not ordinarily arise in the conduct of business affairs or the investigation of employee misconduct.

Another key limitation is that an employee is not entitled to control the investigation process. An employee (or their representative) does not have the right to determine the conditions under which he or she meets with an employer. This means, for example, that an employee is not entitled to dictate that an employer conducts its investigation in writing with the employee's legal representative.

#### Step 4: Give the employee an opportunity to be heard on whether they should be dismissed

Procedural fairness requires that an employer must give an employee a fair hearing on any question of penalty. This involves giving the employee an opportunity to provide reasons on why they should not be dismissed.

This stage of the investigation is important because even if an employee is caught in the act of misconduct, there might be mitigating factors which would lead a reasonable employer not to dismiss the employee. Mitigating factors may include:

- (a) the length of service and prior employment record of the employee;
- (b) the intention of the employee in carrying out the misconduct;
- (c) the employee's contrition and remorse; and
- (d) the circumstances surrounding the misconduct.

If any of these mitigating circumstances are offered by an employee, an employer must consider them when deciding what action to take against the employee.

#### Policies, awards or agreements

An employer's obligation to take the steps outlined above must be considered in conjunction with any policy, award or agreement that the employer has relating to the conduct of investigations into employee misconduct.

Where an employer conducts an investigation that is not in accordance with a predetermined procedure, the investigation may be procedurally flawed and unfair. However, an employer's departure from the process set down in a company policy will not of itself lead directly to a conclusion that the dismissal of an employee for misconduct is unfair. If there was a particular reason why the process was not followed, it should be

recorded in the investigation file or papers during the investigation to demonstrate the rationale for the departure (particularly if the departure was considered fairer for the employee). An employer's failure to comply with an established procedure will be one factor considered by a tribunal in determining whether the dismissal of an employee for misconduct was unfair.

Therefore, at the outset an employer should establish whether any obligations or procedures exist in any relevant policy, award or agreement prior to the commencement of any investigation. It is difficult for an employer to salvage an investigation into allegations of misconduct when the initial investigation into the allegations is inherently flawed. Accordingly, an employer should conduct its investigation with regard to the requirements of any applicable company policy, award or agreement. Any variation from established procedure should be carefully considered by the employer to ensure that it could not be perceived as detracting from the right of the employee to substantive and procedural fairness.

#### Conclusion

Allegations of employee misconduct are a reality of today's workplace that most employers must deal with at some time. Employers must be prepared to manage such allegations through an effective and efficient process. Conducting a proper investigation into allegations of misconduct is important because:

- employers are legally required to provide employees with both substantive and procedural fairness;
- it allows a business to effectively remove employees who are proved to be, for example, fraudulent or violent; and
- unless allegations of misconduct are managed appropriately by employers, they can have an adverse impact on both the employer's business, and the employee's reputation and livelihood.

It is equally important that the details of the investigative process are well known, that all managers are fully familiar with its mechanisms, their role within the process, and the reason for having such a process. As with any policy, to be effective all staff should be aware of and conversant with the terms of and reason for the investigative process. Managers should also regularly assess the adequacies of the established process for the relevant workplace, and whether training or refresher session should be undertaken.

## Lawful discrimination: do I need an exemption for that?

Authors: Chris Molnar and Leonie Green

Federal and State anti-discrimination laws prevent employers from discriminating on the basis of various attributes including age, gender, religion, race, family responsibilities and trade union activity. What amounts to discrimination, whether indirect or direct, will largely depend on the circumstances of each case. In some circumstances, formal exemptions to discrimination legislation can provide protection from challenges on the basis of discrimination.

Even in seemingly innocent circumstances, employers can find themselves having to justify the reasons behind what is a business decision and not a decision based on a prohibited attribute. For example, in Western Australia recently, a 45 year old man ("the Applicant") alleged that a company was indirectly discriminating against persons over the age of 25 when the company advertised positions for "recent" engineering graduates. The company considered "recent" to be graduation within the previous three years. The Applicant had graduated in 1978. He did not apply for a position, but said he would have applied had the three year limitation not been a criterion. He lodged a complaint. The company argued that persons who had graduated more than three years

prior to the application could apply for generalist (rather than graduate) positions. Further, the company argued that it was not the age group they were seeking (they had employed some graduates who were over 25) but rather access to recent learning on technology, gained from their study. The Equal Opportunity Tribunal found the requirement for recent graduation was reasonable, and the fact that the company did not provide a program for older employees did not make a program for younger employees unreasonable.

Although anti-discrimination legislation (federal and State) provide exceptions, in certain circumstances there remains the risk of litigation unless a formal exemption is granted by the relevant Commission or Tribunal. In coming to a decision on whether to grant an exemption, the Tribunal or Commission may typically consider whether the proposed exemption:

- is consistent with and will advance the objects of the relevant Act;
- is not otherwise covered by an exception under the relevant Act;
- would cover conduct that is otherwise prohibited under another law;

- targets a disadvantaged group;
- will be beneficial to the disadvantaged group;
- will not cause those excluded by it to suffer; or
- is otherwise reasonable and appropriate and/or in the public interest.

Examples of exemptions granted include the offering of employment to persons in the age group of 40 plus only, Shiatsu treatment offered at a reduced rate to indigenous patients, the provision of preferential seating to persons over 60, and massage services offered to women only.

In many cases, provided there is sufficient detail in the exemption application and the application is unchallenged, the relevant Tribunal or Commission may allow the exemption automatically without a hearing.

Due to the cross-over of State and federal legislation in this area, when seeking an exemption, it may be prudent to establish an exemption in both or all jurisdictions so as to rule out the ability for a person to challenge a company in a jurisdiction where the exemption does not apply.



# Walking the straight line – is drug and alcohol testing the answer?

**Authors: Greg Robertson and Alice Bunker**

The issue of drugs and alcohol in the workplace is a sensitive one. It is clear that work and intoxication do not mix but it is less clear how an employer should deal with the problem. Should an employer be curbing the social habits of its employees? Is a beer at lunchtime a danger and, if so, how as a practical matter can it be prevented? Should a distinction be drawn between persons taking illegal drugs and those addicted to caffeine or late-night soccer games?

Increasingly, testing for drugs and alcohol is put forward as an answer to employer concerns, with more and more companies advertising their services in this area. Is it the solution for all businesses? We examine here some factors that employers should consider before considering implementing such a procedure in their workplace.

## Reasons for concern

Employers are right to be concerned – employees affected by drugs, including alcohol, cause a number of concerns. These include:

- the personal “costs” associated with seeing a fellow employee decline physically and possibly lose job, family, home and human dignity;
- lost productivity and increased costs, associated with increased

absenteeism, lost or substandard production, damage to plant and equipment, injuries to self or other workers, increased workers’ compensation costs and rehabilitation costs;

- the impact on the morale of other employees, who have to deal with, and cover for, poor work performance, sometimes aggressive or unpredictable behaviour and stress associated with having to “dob in” a fellow employee for that employee’s own protection; and
- the safety risk involved in impaired performance.

The impact on productivity and the impact on safety are significant concerns for any business. Recent research estimates that, in Australia, drug and alcohol use costs business \$9.2 billion a year in lost productivity. Some 300,000 Australian workers are estimated to be drug and alcohol abusers. Safety risks are obvious in industries like transport or mining, where an affected driver or pilot or heavy machinery operator can put lives at risk, but risk to safety is not confined to such areas. The International Labour Organization estimates that 20 to 25 per cent of all workplace accidents result from drugs or alcohol, with up to 15 per cent of all fatal work accidents being attributed to drug or alcohol use.

## Occupational health and safety

The primary legal issue related to impaired employee performance through use of drugs and alcohol is occupational health and safety. Failure to act when drug and alcohol consumption impairs work performance may result in the employer being in breach of its legal obligations. Those legal obligations are extremely broad, very strict and attract high penalties. By way of example, in New South Wales an employer must

- ensure the health, safety and welfare at work of all the employees of the employer; and
- ensure that other people are not exposed to risks to their health or safety arising from the conduct of the employer’s undertaking while they are at the employer’s place of work.

In New South Wales the current maximum penalty for breach of these duties is \$825,000 for a corporation and \$82,500 or two years imprisonment for an individual. However there are debates currently ongoing in several States regarding the need to significantly increase these penalties or to introduce an offence of industrial manslaughter. For example, Victoria plans to increase the penalty for a corporation from \$256,250 to \$922,500 and for an individual from





\$51,250 to \$184,500. In New South Wales, draft legislation released for consultation in October 2004 proposes doubling the current penalties to a maximum \$1.65 million and up to five years imprisonment.

The risk of such penalties alone should be enough to ensure employers take steps to deal with the drugs and alcohol issue, quite apart from the financial and human toll that ignoring the problem can bring.

## Drug and alcohol policies and risk management

These statutory obligations mean that all employers should take active steps to identify and assess the health and safety risks of drugs and alcohol in their workplace. The magnitude of any risk will depend upon:

- the type of work done and the potential for accidents due to use of drugs and/or alcohol; and
- the likelihood of the risk becoming a reality.

Because drug and alcohol related problems can arise in any workplace, irrespective of size or nature of work, employers should assess and document the likely risks that may exist in their workplace. As well as obvious risk areas (driving or the use of heavy machinery, electrical equipment or hazardous chemicals) a risk assessment should also consider cultural and other factors which may contribute to excessive substance abuse, including general health and safety issues at the workplace, management style, work practices, hours of work, equipment design and any sources of staff tension or dissatisfaction.

Not only is it necessary to identify risks, but it is also good practice for all

workplaces to have a drug and alcohol policy, to reduce the likelihood of crystallisation of health and safety risks from drug and alcohol use. Depending on the level of risk assessed, the policy could be included within other workplace policies, for example, incorporated in a general occupational health and safety policy, or as part of a broader policy dealing with safety risks caused by various forms of impairment, for example, caused by stress, fatigue, illness and the like. In a large and complex industry, a stand-alone drug and alcohol policy may be necessary.

Drug and alcohol policies discourage employees from taking drugs or alcohol in such a way that compromises their performance at work. Policies have two main aims:

- to prevent adverse incidents through education and deterrence; and
- to cure any problems through rehabilitation and/or disciplinary action.

These aims are met by clearly setting out the company's expectations and the reasons behind the policy, and clearly explaining the consequences of a breach of the policy.

For a policy to be effective it should be introduced through a process of consultation, education and assistance (important as it allows any employee who does have a drug or alcohol problem to come forward voluntarily before the policy takes effect), all employees must be aware of it and it must be applied properly and fairly in all the circumstances.

If termination of employment is a potential consequence of a breach of the policy then proper implementation is particularly

important. If the policy is not introduced and followed correctly the employer may be at risk of a successful unfair dismissal claim. For example, employers' mistakes that have resulted in successful unfair dismissal claims (and in some cases orders for reinstatement) include:

- not ensuring that all employees are aware of changes to the policy;
- incorrectly describing the detail of the policy to an employee, for example, incorrectly stating that a zero alcohol rating was necessary to pass the test;
- inconsistency in application of the policy, for example, dismissing someone for a policy breach when, in the past, a similar breach resulted in a final warning; and
- not taking into account an employee's long and unblemished record of service.

It is therefore important for all staff to be aware of the details of a policy and for those responsible for administering it to be thoroughly trained.

## Other steps

Before moving to testing for drugs and alcohol, employers should be aware that there are other steps that can be taken to assist in reducing legal risks in this area.

An education campaign, particularly one before or associated with the introduction of a drug and alcohol policy, can be useful. Such training, which will need to be repeated from time to time as the workforce changes, should be designed to develop a workplace culture which is supportive of efforts to remain free from the influence of drugs and alcohol at work. Thus, training might cover what

constitutes acceptable use of drugs and alcohol, the long term effects of misuse, workplace and lifestyle issues that contribute to abuse, drug-free ways to deal with problems, advice on available resources, the consequences of failing to curb abuse, and who in the company to approach (on a totally confidential basis) to seek help. By offering advice and support, perhaps through an independent Employee Assistance Program, an employer can assist employees with substance addiction rather than making them fear dismissal, potentially missing the opportunity for rehabilitation.

Induction training in the area will also be important, so that all new employees are aware of the issue and aware of the company's policies on this topic.

Employers can also lead by example. Not only must management be totally supportive of the drug and alcohol policy, they must be seen as responsible in their own usage. For example, serving and using alcohol at management functions should be done in a moderate way. Non-alcoholic alternatives should be freely available and food should be available to go with any alcohol. Perhaps some work functions could be alcohol free.

## Testing for drugs and alcohol

Often the most difficult question for an employer is whether a drug and alcohol policy should include a testing component. A growing number of companies make tests available. Testing seems attractive because it purports to offer both proof and deterrence. If you have a reasonable suspicion that an employee is intoxicated, how can you prove it without a test? An employee appearing to be drug-affected could insist, for example, that he or she

was merely unwell. Similarly, random testing across all employees may be an effective method of deterring drug and alcohol use.

Testing, however, is not as simple as that and is not for every employer. Testing is expensive, there are significant issues in relation to privacy, is not always as accurate as portrayed, and does not necessarily prove impairment. It increases the risk of industrial action and the possible strain on the employment relationship may outweigh the benefits to be gained.

## Some practical issues to consider

In deciding whether to include testing in a policy, an employer is carrying out a risk assessment exercise. While safety is paramount, an employer has to decide whether testing will improve safety, or merely adversely impact the workforce without boosting safety levels. The following issues need to be considered:

### Accuracy – what type of test?

Testing options include breath, saliva, urine or blood tests together with more traditional performance tests such as walking in a straight line. Each has its advantages and disadvantages in terms of cost, ease and privacy of administration, reliability, timing and the link between the result and actual impairment of employee performance. Failure to choose an appropriate test may cause "results" to be challenged.

### Accuracy – proof of impairment

Most tests only show the presence of a drug, not when it was taken. With the exception of alcohol, a positive result

does not equate to any recognised level of impairment of the employee's ability to perform and hence to any safety risk. There are natural variations between individuals in terms of tolerance and thus the level required for a positive finding will have to be carefully chosen.

### Accuracy – false results

Certain foods and prescription drugs can cause a false positive test because they contain similar or even the same chemical compounds as the drug being tested for. For example, decongestants and diet pills can lead to a positive result for amphetamines and some herbal teas contain chemicals similar to those in cocaine. This means that a drug testing program often needs to be combined with a requirement for employees to report any use of medicinal drugs, giving rise to privacy concerns. "False positives" can also be the result of poor testing procedures. "False negatives" also can occur, either because of the limits of the testing regime, or because of interference with or substitution of samples. The result can be a false sense of security on safety issues or innocent employees accused of a drug problem.

### Privacy

Privacy concerns arise in a number of ways. Testing, particularly in front of other people (necessary to exclude tampering with samples) can be intrusive: consider employees asked to give urine samples in the presence of another person. In addition, privacy concerns arise over the way that test results are handled and stored, and strict measures must be put in place to cover these issues.

### When to test?

Should testing occur randomly, post-incident or on reasonable suspicion? The testing program must be related to managing health and safety risks alone. There should be clear descriptions of who can be tested, why and when so that employees cannot allege that they have been picked for reasons of sex, race or personal grievance. If testing is to be random then careful thought must be directed as to how this is to be achieved and explained to employees.

### Refusal to undergo testing

The possibility of an employee refusing to be tested must be considered and addressed in the policy. Is refusal to have the same consequences as a positive test or is it a distinct policy breach with different sanctions? Normally an employer has no legal right to force a test.



## What to test for?

When deciding what substances to test for an employer has to consider the question of what is a drug and what might affect safety? It should be remembered that a drug and alcohol policy is concerned with preventing risks to health and safety and the employer is not a policeman. Thus impaired performance must be at the heart of the policy, not the legality or otherwise of employees' habits. It is a complex issue because performance can be affected by many things other than drugs – too much coffee or lack of sleep, for example, or certain prescription drugs or over the counter remedies can all affect performance.

## Consequences of a breach of policy

Employees must be aware of the consequences of a breach and any disciplinary action must be applied fairly and consistently. This means that sanctions should take into account both the severity of the breach and whether the employee has breached the policy in the past.

## Costs

Tests cost money. Administration of a testing regime can be complicated and costly in terms of administrative time, the keeping of records and ensuring privacy concerns are met. If a testing program is commenced, there must be the commitment and funds to permit proper administration to best practices standards. A mishandled testing program may be worse than none at all.

## Relationships with unions and employees

Testing is a contentious issue, and trying to force it on employees increases significantly the risk of industrial action, unfriendly union attention or strained employer and employee relationships. For these reasons, it is generally recommended that testing is only introduced with the informed consent of the workforce.

Accordingly, most workplace testing tends to be implemented in industries where the occupational health and safety risks from use of drugs or alcohol are high. Industries where employee testing programs are common include the police force, railways, airlines, and the mining, transport and heavy equipment industries. Some of these are backed by special statutory provisions allowing testing.



## Successful examples of approved testing schemes

The industrial tribunals have agreed that drug and alcohol testing is a necessary risk management tool in certain industries or workplaces. In *Agnew v Nationwide News* employees were operating heavy machinery and forklifts and the company admitted to having “a difficult time over the years battling a culture of drinking during and before working time”. Thus in that workplace the risk was very tangible and implementation of a policy with a testing aspect was a reasonable and sensible approach to take. Similarly, in *BHP v CMWU* employees involved in mining had been caught smoking cannabis at the workplace. In addition, a death had occurred and the employee (whose truck overturned) was found to have cannabis in her blood at the time of death. BHP had difficulty in obtaining employee consent to a random testing program. In order to resolve the issue the company asked the Australian Industrial Relations Commission (“AIRC”) to make a declaration as to the reasonableness or otherwise of the program. The AIRC found that BHP’s program was not unreasonable, harsh or unfair. In making this finding it took into account both the context of the mining industry as well as the details of BHP’s proposed program. Factors taken into account included the extensive consultation that had taken place in formulating the policy, the cut off levels necessary for a positive test and their link to performance impairment, the fact that samples would be given in private,

the measures in place to protect and maintain confidentiality of records and the education, counselling and rehabilitation components of the program. The policy was therefore a reasonable tool to reduce the risk of such events in future.

## Summary

Drugs and alcohol pose significant safety risks for an employer where the use of such substances affects the workplace. An employer has an obligation to ensure the safety of people at work, and where performance is impaired because of drugs or alcohol, safety will be at risk. There are a number of steps an employer can take [see box] but care will need to be taken to ensure that a testing regime will really provide a boost to safety outweighing all the disadvantages that go with testing. For some industries, that will be the case, but for others testing will not be justified by any safety benefits such a regime may bring.

### Steps that can be taken

- Carry out a risk assessment
- Develop a drugs and alcohol policy
- Explain the rules to employees
- Run an education campaign
- Provide support for employees trying to rehabilitate
- Management lead by example
- Consider testing if the risk warrants it

## About Us

Harmers Workplace Lawyers focus on high quality problem solving and a preventive approach to workplace law as well as the identification of opportunities and innovations across all areas of employment and industrial law.

Harmers was established in 1996 as a boutique employment law firm and has since then grown into the largest workplace law firm in Australia. Currently, Harmers has offices in Sydney, Brisbane and Melbourne and has 85 staff across all 3 States.

Our client base is diverse and includes many of Australia's most prominent blue chip companies, employer associations, media personalities and senior executives. We also have a pro bono component consistent with our charter to ensure fairness in the workplace.

If you would like more information regarding Harmers Workplace Lawyers, or would like to discuss any aspect of this newsletter, please contact one of our experienced professionals.

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