HARMERS
Workplace Lawyers

WORK InSights
Winter edition 2005

Editorial

Once again, we are pleased to welcome you to *Work InSights*.

In this winter 2005 edition we examine some recent changes to State and Federal legislation. The New South Wales *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* introduced in June 2005 a new offence and increased penalties for work-related deaths. That month also saw the commencement of that State's *Workplace Surveillance Act 2005*, regulating the ability of employers to conduct surveillance of employees by camera, tracking systems or computer, including email and Internet use.

Federally, we explain changes to the *Superannuation Guarantee (Administration) Act 1992* that from 1 July 2005 oblige employers to offer employees a choice of superannuation fund.

In further articles, we explore recent cases highlighting the need for businesses to carefully construct post-employment restraints to protect goodwill, trade secrets and customer connections. We also look at the controversial issue of cashing out of annual leave and provide a step by step guide to managing redundancies.

We trust you will enjoy this edition, and that it provides you with constructive ideas and useful strategies to be applied across your workplace.

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Workplace death: new offence, new penalties, same obligations?

Authors: Stephen Boatswain and Jenny King

The *Occupational Health and Safety Amendment (Workplace Deaths) Act 2005* became operative on 15 June 2005. This Act amended the New South Wales *Occupational Health and Safety Act 2000* and is the response of that State's Government to the issue of deaths and serious injuries suffered at work and the calls for the introduction of industrial manslaughter laws (see *Work InSights*, June 2004, at page 10, for an article on the Industrial Manslaughter legislation in the Australian Capital Territory).

The amendments substantially increase the exposure of workplace participants that "recklessly" ignore their duties under the *Occupational Health and Safety Act*.

Set out below is a brief summary of the key parts of the amendments introduced by the Act.

The new offence

The amendments to the *Occupational Health and Safety Act* effected by the *Occupational Health and Safety Amendment (Workplace Deaths) Act* make it an offence for people who have occupational, health and safety duties (most workplace participants) to engage in reckless conduct that causes death at a workplace.

This is a change from the *Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004* that was submitted for consultation last year. This would have provided for increased penalties for certain offences involving workplace deaths, but would not have established a separate offence for workplace deaths caused by a person's reckless conduct.

That offence is now found in section 32A of the *Occupational Health and Safety Act*, which provides that:

A person:

(a) whose conduct causes the death of another person at any place of work, and

(b) who owes a duty under Part 2 [the general duty provisions] with respect to the health or safety of that person when engaging in that conduct, and

(c) who is reckless as to the danger of death or serious injury to any person to whom that duty is owed that arises from that conduct,

is guilty of an offence.

It should be noted that:

- A person's conduct causes death if it "substantially contributes to the death".

- A person or entity commonly are considered to be "reckless" if they can foresee a harmful consequence and nevertheless act with an indifference to, or disregard of, that consequence. However, this will need to be further defined by cases under the new provisions.
- People with duties under Part 2 include employers; employees; self-employed persons; controllers of work premises, plant or substances; and designers, manufacturers and suppliers of plant and substances for use at work.
- Directors and managers are also exposed to prosecution under the new provision but they will not be deemed to be guilty of an offence merely because the corporation which they are managing has committed an offence. However, directors and managers will not be able to rely on the defences under section 26 to argue that they were not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or that being in such a position, used all due diligence to prevent the contravention by the corporation.

Penalties

The new section provides that the maximum penalties for breaching section 32A are:

(a) in the case of a corporation, $1,650,000; and

(b) in the case of an individual, $165,000 or imprisonment for 5 years (or both).

Again, this is different to the consultation draft Bill released in 2004 which had provided for lesser penalties where the corporation or the individual was not a previous offender (more in line with the penalty regime in place under the general duty provisions of the *Occupational Health and Safety Act*). Under the now enacted amendments to the *Occupational Health and Safety Act*, the maximum penalties are the same whether an offender is a first offender or not and are a significant increase from the previous penalties which were:

(a) in the case of a first offence for a corporation, $550,000, and in the case of subsequent offences, $825,000; and

(b) in the case of a first offence for an individual, $55,000, and in the case of subsequent offences, $82,500 or imprisonment for 2 years (or both).

Rights of appeal

Prosecutions that result from section 32A of the *Occupational Health and Safety Act* will be heard by the Industrial Relations Commission of New South Wales in Court Session.

As with current prosecutions there will be a right of appeal to the Full Bench of that Commission, and (unlike current prosecutions) a further express right of appeal will lie to the Supreme Court, Court of Criminal Appeal where the sentence includes a prison term.

Defences

The current defences under section 28 of the *Occupational Health and Safety Act* will continue to be available. Those defences are that it was not reasonably practicable for a person to comply with the provision, or the offence was due to causes over which the person had no control and it was impracticable for the person to make provision for control.

In addition to the current defences under section 28 of the *Occupational Health and Safety Act*, persons or entities prosecuted under the new section 32A will also be able to avail themselves of a new defence that they had a "reasonable excuse" for the offending conduct.

Like the current defences though, we anticipate that prosecuted entities will find it difficult to establish the defences. The practical (and proper) effect in most circumstances where a person or entity is faced with an injury or death in the workplace is that they adopt some manner of remedial action thereby assisting the prosecution against them. The cases in which the section 28 defences have been successfully established are limited.

Who can prosecute?

Unlike the current position under the *Occupational Health and Safety Act*, prosecutions under section 32A will only be able to be commenced by a WorkCover inspector or a Mines inspector (in relation to mines), or by any other person with the consent of the Minister (contrast the ability under the general provisions of the *Occupational Health and Safety Act* for prosecutions to be commenced by secretaries of unions for example).

Implications for employers

The amendments to the *Occupational Health and Safety Act* are more in line with provisions that commenced in Victoria on 1 July 2005 and appear to bring the amendments into line with the stated intention of the Government—to be able to deal with the "rogue" employers that cause death in the workplace by disregarding their occupational health and safety obligations.

The amendments introduce elements of fault and negligence into a statutory system that is based on concepts of no fault, but absolute (general) duties to ensure workplace safety. The offence focuses on the seriousness of the injury that occurs rather than the existence of a risk of injury. Importantly, the absolute general duties imposed by the *Occupational Health and Safety Act* have not been displaced. The new offence imposes additional liability and penalties in circumstances where death or serious injury occurs at a workplace in breach of the existing absolute duties created by the *Occupational Health and Safety Act*.

In practical terms, it is necessary to view the new offence from the perspective of imposing additional exposure to that which currently exists. It would be prudent for a review of all existing occupational health and safety policies and procedures to be undertaken, with adjustments to these policies and procedures to ensure that the new offence is addressed. The new offence should be addressed both by formal incorporation into existing policies and through communication to the workforce both in terms of general instruction and, where appropriate, reference to any Occupational Health and Safety Committee that may be in place. It would also be appropriate for entities engaged in industries that involve activities with a heightened risk of serious injury or death (such as construction, mining, steel and aluminium production and the like) to undertake a formal reassessment of those activities which have the potential to result in the serious injury or death of a worker.

This reassessment should deal not only with the adequacy of the policy, procedures and any relevant work method statements, but just as importantly, also deal with ensuring compliance with the relevant policies and any work methods statements in the day to day performance of the work. This will be particularly important where workers are engaged offsite or on sites that are not directly controlled by the employer or in circumstances of diminished supervision.

What is necessary is demonstrating an enhanced application of existing policies and procedures coupled with a reaffirmation of the appropriateness of these measures. The amendments do not in that sense impose new or additional obligations to those that currently exist under the *Occupational Health and Safety Act*. The amendments impose additional liability through introducing a new offence, but that offence arises from a breach of the general duties that arise under the Occupational Health & Safety legislation in circumstances where death or serious injury occurs.

Therefore, this has not changed the need for proactive measures to manage the health, safety and welfare of attendees at workplaces created by the existing Occupational Health and Safety legislative regime. It remains essential for corporations, and those responsible for the conduct of workers, to demonstrate that genuine steps to manage the health, safety and welfare of attendees at workplaces have been taken, by establishing appropriate risk management systems and practices and ensuring they are rigorously followed. In satisfying this obligation, the corporation and those persons responsible for the management of the performance of work would need to be able to demonstrate that all reasonable, foreseeable measures were taken to provide a safe workplace. Such actions would demonstrate that the elements necessary to establish the offence did not exist and therefore avoid the prospect of a prosecution pursuant to section 32A of the *Occupational Health and Safety Act* being brought.

Such measures should result in only "rogue" employees who lack any systems and who have failed to adopt any reasonable measures to prevent death or serious injury to persons attending a workplace should be held to account by prosecution based on the new section 32A of the *Occupational Health and Safety Act*.

Accordingly, workplace participants who proactively take genuine steps to manage the health safety and welfare of attendees at workplaces should avoid any prospect of section 32A prosecutions being initiated.

No more big brother for employees in NSW? The *Workplace Surveillance Act 2005*

Authors: Greg Robertson and Prue Bindon

Introduction

The *Workplace Surveillance Act 2005* became law in New South Wales on 23 June 2005. This Act regulates the ability of an employer to conduct surveillance of its employees by way of camera, tracking devices or computer, including email and Internet use. In this article, we outline the main features of the Act and what restrictions it places on employers. We also briefly compare the position in other States and outline some practical steps when employers operate in more than one State.

What types of surveillance are covered by the Act?

The *Workplace Surveillance Act* replaces the Workplace Video Surveillance Act 1998, which prohibited video surveillance of employees unless the employer had satisfied certain notification requirements or had been authorised by a Magistrate. That Act had quickly become outdated as new technology, capable of being used for surveillance, developed.

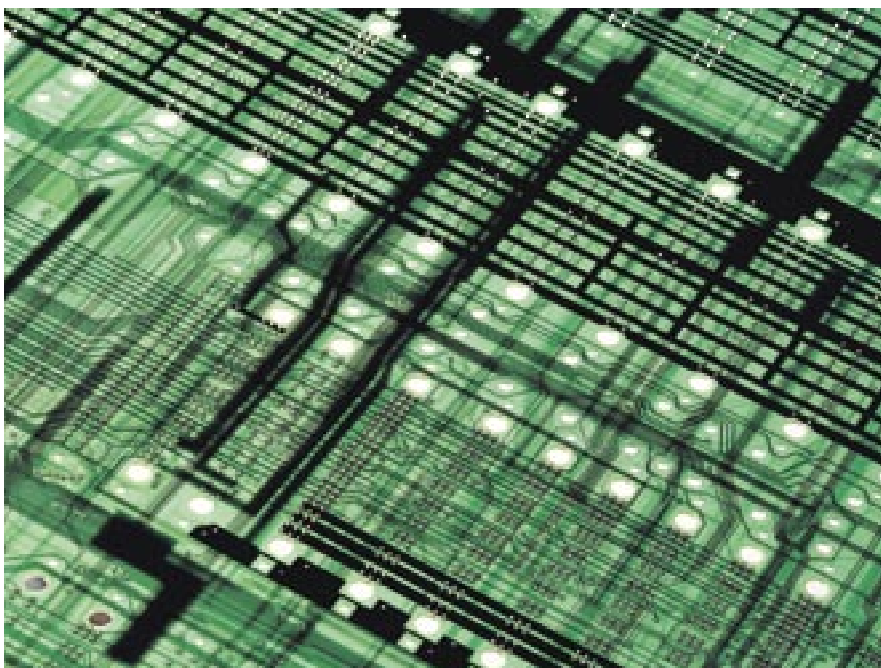
The new Act extends its coverage to other forms of technology, regulating three broadly defined forms of surveillance:

- Camera surveillance: surveillance by a camera that monitors or records visual images of activities (including, for example, "still" images as well as "moving" images).
- Computer surveillance: surveillance by software or equipment that monitors or records the information input, output or other use of a computer (including, for example, sending and receipt of emails and accessing of Internet websites).
- Tracking surveillance: surveillance by an electronic device the primary purpose of which is to monitor or record geographical location or movement (including, for example, global positioning systems ("GPS") installed in a vehicle used by an employee but not including things like mobile phone or credit card records which may incidentally demonstrate an employee's geographical location).

The Act does not cover surveillance carried out by a listening device, which will continue to be separately regulated through the *Listening Devices Act 1984.*

When can an employer conduct surveillance of an employee?

The principal obligation on employers is to be open and transparent about workplace surveillance. The Act does *not* prevent employers outright from conducting surveillance of employees, and, unlike some States, there is *no* requirement for consent to be obtained. Rather, the Act requires an employer to *notify* its employees that such surveillance will be conducted or to seek authorisation from a Magistrate.



Notification of surveillance

An employer must give the employee 14 days' written notice ***before*** surveillance commences. For a new employee at a workplace already subject to surveillance, the employee must be informed of the surveillance ***before*** the employee starts work.

The notification must contain details about:

(a) the **kind** of surveillance to be carried out (ie camera, computer or tracking);

(b) **how** surveillance will be carried out;

(c) **when** surveillance will start;

(d) whether surveillance will be **continuous or intermittent**; and

(e) whether surveillance will be for a **specified limited period or ongoing**.

Additional requirements apply to each kind of surveillance:

- Camera surveillance: the camera (or its casing) must be clearly visible and signs notifying people that they may be under surveillance must be clearly visible at the entrance to the place where the surveillance is being conducted.
- Tracking surveillance: a clearly visible notice must be on a vehicle or other thing being tracked, indicating that the vehicle or thing is subject to tracking surveillance.
- Computer surveillance: the employer must have a policy which sets out what computer surveillance may be conducted **and** employees must have been notified about this policy in a way that means it is reasonable to assume that they are aware of, and understand, that policy.

Covert surveillance

To conduct surveillance without satisfying the notification requirements, an employer must obtain a "covert surveillance authority" from a Magistrate. Any surveillance without such an authority and which has not been notified to the employee is unlawful.

A covert surveillance authority only permits a very restricted level of surveillance. Restrictions include:

- an authority may only authorise surveillance for the purpose of establishing whether or not the employee is involved in any "unlawful activity" (an offence against a state or federal law) while at work;
- covert surveillance *cannot* be conducted for the purpose of monitoring work performance and cannot be conducted

in any change room, toilet facility or shower or other bathing facility;

- in deciding whether to grant an authority, a Magistrate must have regard to whether the covert surveillance proposed might *unduly intrude* upon the employee's privacy or the privacy of another person; and
- use or disclosure of information obtained from carrying out covert surveillance is strictly limited to specified purposes set out in the Act or imposed by the Magistrate when granting the authority.

When can an employer block emails or Internet access?

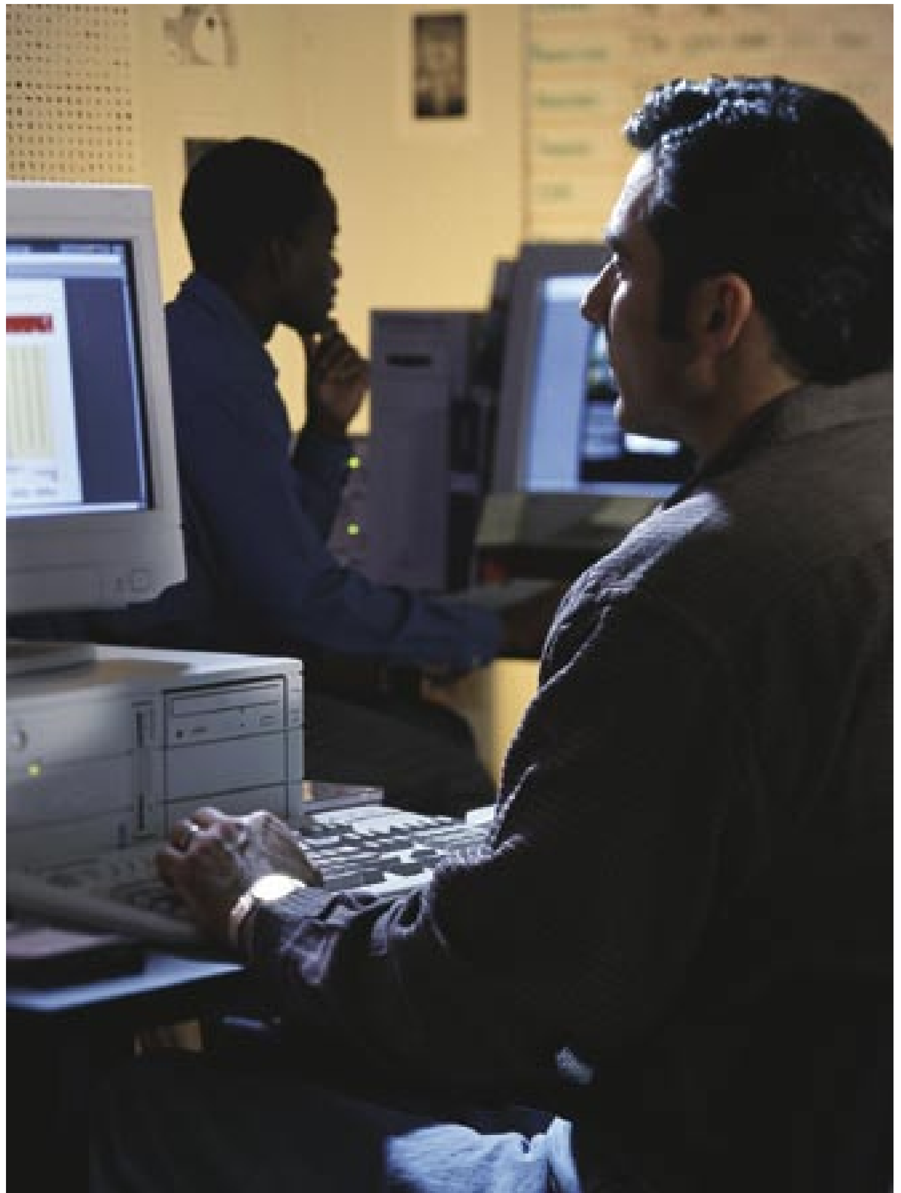
The Act also regulates the ability of an employer to block emails to or from an employee and an employee's access to Internet websites by requiring that:

- the employer have a policy that clearly sets out when emails and Internet access are to be blocked;
- employees are notified of this policy in advance in such a way that it is reasonable to assume that they are aware of, and understand, that policy; and
- when an email is blocked, the employee (whether the attempted sender or the intended recipient) is provided with a "prevented delivery notice" as soon as practicable (by email or other means), unless:
    - (i) the email was a commercial electronic message within the meaning of the *Spam Act 2003*;
    - (il) the content of the email or any attachment would or might have resulted in an *unauthorised interference with, damage to or operation of* a computer or computer network operated by the employer;
    - (iii) the email or any attachment would be regarded by a reasonable person as being, in all the circumstances, *menacing, harassing or offensive*.

One important restriction is that an employer must not block delivery of an email or access to a website *merely* because:

- the email was sent by, or on behalf, of a union or an officer of a union; or
- the website or email contains information relating to industrial matters.

This does not require that employees be given access to email from a union, but merely prevents employers denying employees access to union email or websites for that reason alone.



What can be monitored by an employer and how can the information be used?

Provided an employer properly notifies, there are few restrictions on what an employer may monitor. Surveillance cannot be carried out:

- in any change room, toilet facility or shower or other bathing facility at a workplace; and
- when the employee is not at work for the employer, unless it is computer surveillance of the employee's use of equipment or resources which have been provided by, or at the expense of, the employer.

The Act also imposes some limitation on an employer's ability to use or disclose records obtained from notified surveillance. The use or disclosure must be:

- (c) for a legitimate purpose related to the employment of its employees or the employer's legitimate business activities or functions; or
- (d) made to a law enforcement agency in connection with the detection, investigation or prosecution of an offence; or
- (e) directly or indirectly related to the taking of civil or criminal proceedings; or
- (f) reasonably believed to be necessary to avert an imminent threat of serious violence or of damage to property.

Further, the general law still applies. If an employer uses information, for example, to dismiss an employee unfairly or to discriminate against an employee on one of the prohibited grounds, then the employee may still take unfair dismissal or discrimination action.

What is the bottom line for employers?

Having a general surveillance Policy and following the checklist below will be useful for employers who want to preserve the ability to conduct surveillance of employees:

A practical checklist for compliance

1. Have a written Policy on surveillance that clearly sets out that employees may be monitored at work, including:
    - The method of surveillance (camera, computer or tracking device), where it will take place and the means (for example, random monitoring of inboxes/outboxes, examining logs of internet use, installation of cameras in certain areas, recording of keyboard input, etc).
    - Who will conduct surveillance (for example, IT staff, human resources and/or line managers).
    - Whether surveillance is continuous or intermittent.
    - Whether surveillance is for a specified limited period or ongoing.
    - When and what email or Internet websites will be blocked.
2. Ensure the Policy has been brought to the attention of all employees in such a way that it is reasonable to assume that employees are aware of and understand it. Ideally:
    - At least 14 days before surveillance commences, distribute the Policy to each employee.
    - Ensure that the Policy (including any consequences of failure to comply) is explained to employees. For a larger employer, this could involve induction and training courses; for a small business, individual discussion of the employer's policy with each employee.
    - Provide employees with regular reminders about the Policy (for example, by "all staff" emails, or via the staff noticeboard).
    - Ensure all new employees are informed of the Policy before they commence work.
3. If you block email (other than "spam", email which might damage the computer network, or menacing, harassing or offensive email), ensure there is a system that provides employees with a "prevented delivery notice" each time an email sent to, or by, the employee is blocked.
4. If you have installed camera surveillance, ensure the camera (or its casing) is clearly visible and the required signs are posted at the entrances of the area under surveillance.
5. If you have installed GPS or other tracking devices in any vehicle or thing used by your employees, ensure the required notice is clearly visible on that vehicle or thing.

What about employees in other States and Territories?

Outside New South Wales, regulation of the use of surveillance devices is generally not directed to the workplace in particular. While some legislation addresses video and tracking surveillance, none specifically addresses the monitoring of email or Internet usage.

Victoria, Western Australia and Northern Territory

Victoria, Western Australia and the Northern Territory each have a similarly worded *Surveillance Devices Act*. These Acts are not specifically directed to the workplace.

In summary, unless those who are being recorded, monitored, heard or observed have expressly or impliedly consented (or unless the surveillance has been authorised by the body specified in the legislation) these Acts prohibit the use of surveillance devices to:

- record, monitor or listen to a person's "private conversations" (through a "listening device");
- record, monitor or observe a person's "private activity" (through an "optical surveillance device" capable of being used to record visually or observe an activity); or
- determine or monitor the geographical location of a person or object (through a "tracking device").

"Private" conversations or activities are described as those where the circumstances reasonably indicate that the parties desire the conversation or activity to be observed only by themselves, but excludes any activity or conversation carried on in any circumstances in which the parties ought reasonably to expect that it may be observed or heard by someone else. In Victoria a "private activity" does not include an activity carried on outside a building.

In the workplace, there are likely to be at least some instances where it would be reasonable for an employee to expect conversations or activity to be private. If an employer wishes to conduct listening or visual surveillance in those circumstances, the express or implied consent of employees would be needed. Such consent would also be needed for the use of any tracking device, as the "private" activity limitation does not apply.

A practical way of obtaining the express or implied consent would be to:

- implement a policy on the proposed surveillance;
- circulate and explain this policy to employees;
- seek employee's consent (for example, by having employees sign and return a copy of the policy); and
- ensure that notices are installed in the areas (or vehicles) where surveillance is to be conducted.

If an employee received the policy and has had it explained, notices are installed and the employee continues to work without raising any objections to the surveillance, this would be sufficient to establish implied consent.

The legislation does not expressly cover monitoring of email and Internet use, although in Victoria and the Northern Territory, the prohibition extends to the use of surveillance devices which record and monitor the input of information into or the output of information from a computer (through a "data surveillance device"). This appears to cover devices which monitor, for example, key stroke input, but it is less clear whether it would cover the recording of emails sent from or received onto a computer or recording of Internet sites accessed.

However, the Victorian Law Reform Commission has been looking at the issue of surveillance in the workplace. It released an "Options Paper" in 2004, and is expected to issue a final report in the near future. The Options Paper proposed two main options for new legislation:

1. requiring employers to seek authorisation from a regulator before undertaking overt or covert surveillance, monitoring or testing in the workplace; or
2. placing responsibility on employers to comply with a set of principles on how to implement and conduct workplace surveillance, monitoring and testing.

The first option would introduce a more stringent regime on employers than that contained in the *Workplace Surveillance Act 2005* in New South Wales and would generally require extensive regulatory resources to implement. The second option could be less onerous for employers.

South Australia

The Listening and *Surveillance Devices Act 1972* in South Australia also prohibits the use of listening devices for the recording of "private conversations" unless there is consent or a warrant.

While visual or tracking surveillance is not prohibited *per se*, the Act requires law enforcement officers to obtain a warrant in order to enter or interfere with premises, vehicles or other things for the purpose of installing, using, maintaining or retrieving such a surveillance device. On one view, the fact that law enforcement officers must obtain a warrant suggests that others (including employers) are not permitted to use these surveillance devices at all. However, another view is that, absent any express prohibition, an employer is not prevented from using visual or tracking surveillance devices, as the premises or vehicle will be the property of the employer. An employer needs to exercise care before commencing surveillance and will need to consider not only the legality of the surveillance but also the admissibility of any evidence obtained by such activity.

Nothing in the South Australian legislation would appear to restrict the use of computer surveillance including the monitoring of email and Internet use.

Tasmania and ACT

Both Tasmania and the ACT have a *Listening Devices Act* that prohibits the use of listening devices for the recording of "private conversations" unless there is consent or proper authorisation. Neither Act regulates the use of camera surveillance (unless of course capable of being used to record a conversation), tracking surveillance or computer surveillance.

Queensland

There is no specific legislation in Queensland regulating the use of surveillance in the workplace. The *Industrial Relations Act 1999*

provides that an "industrial matter" about which a dispute may be notified includes the surveillance of employees in the workplace. Thus nothing prohibits the surveillance of employees by camera, computer or tracking devices, but such surveillance may lead to industrial disputation and may legitimately be the subject of an application to the Industrial Relations Commission for the control of the use of the devices by an industrial instrument or order.

Practical strategy for managing employee surveillance across borders

Only Victoria has current proposals to address workplace surveillance. Nonetheless, it is reasonable to expect that other States may follow, at least in part, the reforms introduced in New South Wales.

Yet, even without such reform, employers with operations that cover both New South Wales and other States may need to consider the effect of the legislative changes. Business travel by employees between interstate offices is common, and GPS-equipped fleet vehicles may cross State borders. National employers can face both legal and industrial issues. For example, would it be equitable or appropriate for an employer to:

- notify New South Wales employees that email and internet use was being monitored but not notify Queensland employees?
- provide signs and notification about camera surveillance in New South Wales premises but not in interstate offices?
- conduct covert surveillance of a New South Wales employee while he or she is visiting the Canberra office, when authority from a magistrate would be needed in the Sydney office?

Industrial disputes about surveillance have arisen in the past. A practical approach requires that a "highest common denominator" approach is applied in a uniform way across each State or Territory. Thus, an employer with employees in New South Wales and other States should have a uniform policy that meets the higher New South Wales requirements for all locations, and a New South Wales policy might include provision for consent if some employees work in a State that requires employee consent, such as Victoria. To that extent, the issue of if and when reform is introduced elsewhere becomes less critical, and employers can be assured that movement across borders does not result in inadvertent breach of any legislation.

Enforcing crucial post-employment restraints

Authors: David Stewart and Nicholas Furlan

Protecting important business assets like goodwill, trade secrets and customer connections is critical. Carefully constructed post-employment restrictions can provide some of that protection. The Summer 2004 edition of *Work InSights* dealt with post-employment restraints in some detail (see "When an employee leaves: protecting the business", *Work InSights*, 2004 Summer edition, page 9). We there pointed out that not all restraints will be valid and enforceable. If a restraint is unnecessarily wide it will not be upheld by a Court, and this can have very serious consequences for a business, especially in a competitive market.

A recent case in the Supreme Court of New South Wales, *Aussie Home Loans v X Inc Services* (7 April 2005), has highlighted the need for care in drafting restraint clauses in contracts of employment. In that case, the Supreme Court of New South Wales refused to enforce an employment restraint because it was too wide. The decision is a timely reminder of the need to draft restraints which go no further than is reasonably necessary to protect your legitimate business interests. We here briefly examine that case and cases decided after our earlier article was published.

Aussie Home Loans

The *Aussie Home Loans* case was about solicitation (or poaching) of contactors. Mr Kolenda (Aussie Home Loans' State manager for Victoria) left his employment to join a direct competitor. In his employment contract with Aussie Home Loans, Mr Kolenda agreed not to solicit, interfere with or endeavour to entice away any of Aussie Home Loans' employees or contractors for a period of twelve months after the termination of his employment. Before that twelve month period ended, Mr Kolenda persuaded several of Aussie Home Loans' contractors to follow him to its competitor.

The Court first considered whether such a restraint could ever be enforceable. The Court decided that it could, but that there would need to be a proper justification for the restraint. If an employee has had access to confidential information about the relations between the employer and its other employees it will be easier to justify a nonsolicitation restraint. Such information would include rates of remuneration and the particular qualifications of the employees.

However, in *Aussie Home Loans* the restraint was not enforceable because it went further than was reasonably necessary to protect the legitimate business interests of the employer. There were essentially three reasons for this:

- the geographical area of the restraint was too wide. Mr Kolenda had worked in Victoria, but the restraint covered employees and contractors anywhere in Australia;
- the period of the restraint was considered too long when compared with:
  - the one month notice provision in Mr Kolenda's employment contract; and
  - the one week notice period in the contractors' agreements which was consistent with their need to move readily to other brokers; and
- the scope of the restraint was too wide. It covered people who were employed or engaged by Aussie Home Loans after Mr Kolenda's employment had ended. Mr Kolenda could not have had any confidential information about Aussie Home Loans' relationship with such future employees.

The Court refused to uphold the restraint and, consequently, Aussie Home Loans was left without an important business protection. Because Mr Kolenda was a Victorian employee, the New South Wales *Restraints of Trade Act 1976* did not apply. This is an important statute which provides, amongst other things, for the Court to give some effect to a restraint which would otherwise have been unenforceable in its entirety.

The approach generally taken by Courts to employment restraints

Aussie Home Loans is illustrative of the strict approach taken by Courts in deciding whether to enforce a restraint. This is because the law has always been reluctant to uphold agreements which might restrict commerce. This is especially so in agreements that attempt to limit an individual's right to be employed and so earn a living.

However, Courts will enforce employment restraints in appropriate cases. An example of such a case was *Woolworths Limited v Olson* (20 October 2004). The New South Wales Court of Appeal upheld a six month restraint which prevented Mr Olson from joining one of Woolworths' major competitors after his employment had ended. The restraint was justifiable

because Mr Olson was a senior employee with access to very valuable confidential information giving Woolworths a significant advantage over its competitors.

This is to be contrasted with the outcome in the case of *ICAP Australia Pty Limited v BGC Partners (Australia) Pty Limited* in the Federal Court of Australia (18 February 2005). Employees working at ICAP's futures and swaps desks in Sydney resigned en masse to join its competitor, effectively closing a significant part of ICAP's operations in Sydney. The Federal Court refused ICAP's application for an injunction to prevent this and noted the absence of any post-employment restraints in the employees' contracts.

Strategies to minimise business exposures

You run a considerable risk if you elect not to use post-employment restraints. The consequences for your business can be potentially devastating, as seen in ICAP. However, given the difficulties typically encountered when attempting to enforce such restraints (*Aussie Home Loans* is an example of this) it is crucial to ensure that:

- post-employment restraints are properly and carefully drafted at the outset;
- such restraints can be justified by reference to a legitimate business interest;
- such restraints are no wider than is reasonably necessary; and
- consideration (some form of "payment") for the restrictive covenant is provided.

Remember, when deciding whether a restraint is valid, Courts will determine whether it was reasonable at the time it was entered into. So, it is very important to get things right from the outset. If in doubt, you should seek legal advice before finalising these significant employment arrangements.

Annual leave—can it be cashed out?

Author: Bruce Nettheim

Among the issues receiving coverage regarding the Federal Government's proposed changes to the federal industrial relations system is the issue of the current standard entitlement to annual leave. All Australian States and Territories provide for four weeks of leave per year as the normal standard.

The Federal Minister for Employment and Workplace Relations, Kevin Andrews MP, has indicated that as part of the reforms, employees under Australian Workplace Agreements would be entitled to "cash out" up to two weeks leave each year. The ACTU has responded with a warning that this will eventually see Australians lose their right to four weeks' annual holidays—"the beginning of the end of the family holiday for working Australians". Without becoming involved in the controversy, we set out below some comments on the current position about cashing out of annual leave.

Firstly, it is important to note that the discussion regarding the proposed federal changes concerns future ongoing entitlements to annual leave, rather than addressing the situation of an employee who has built up over the years a large bank of accrued annual leave.

Secondly, it should be noted that cashing out of annual leave is not unknown in Australia. A number of federal enterprise agreements allow employees to cash in part of their annual leave entitlement as it accrues. One estimate suggests that 10 per cent of current federal agreements have such a provision, although the proportion is higher amongst non-union agreements than those made with registered organisations.

One State, Western Australia, allows cashing out of up to two weeks of annual leave where the award or industrial agreement expressly allows that, or where the entitlement to leave is derived from that State's Minimum Conditions of Employment Act 1993 (which does not cover those whose entitlements come from awards or industrial agreements). It is estimated that some 150,000 employees in Western Australia have the right to cash in leave in this way. Similarly, some State Public Service regulations allow public servants (particularly at the senior levels) to cash out excess leave.

Many States have legislation that appears to prevent cashing in of leave. Even Western Australia, outside of the express provisions allowing for the practice, prohibits such payments under section 114 of the Industrial Relations Act 1979. Employers who pay out leave in breach of the section face prosecution. A typical provision is found in section 3(5) of the Annual Holidays Act 1944 in New South Wales, which provides:

- Except as provided in section 4 or section 4A, payment shall not be made by an employer to a worker in lieu of any annual holiday or part thereof to which the worker is entitled under this Act nor shall any such payment be accepted by the worker.

The issue of whether annual leave can in fact be cashed out where an employee has built up over time a large bank of accrued annual leave is one of long standing concern to employers. It is an understandable concern because the accrued bank of annual leave will still have to be paid out at the end of the employment relationship. In most cases, the end of the employment relationship is when the employee is on their highest rate of income, thereby making the cost of the annual leave greater than if it had been provided (or paid out) at about the time it accrued.

For this reason, many employers over the years have wished for a facility whereby large banks of stored annual leave could be cashed out during the course of the employment rather than at the end.

However, legislative provisions providing for the right to annual leave have, at face level and in accordance with long standing custom and practice, been seen as prohibiting the cashing out of annual leave except at the conclusion of the employment relationship.

However, such a view is not necessarily correct. A considered and detailed examination of this issue and the relevant legislation suggests that cashing out of a bank of accrued annual leave can in fact be done during the course of employment in appropriate circumstances (including obtaining the consent of the relevant employee), without waiting for the federal reforms.

Unfortunately, as anyone who has to operate in more than one Australian jurisdiction is undoubtedly all too aware, idiosyncrasies do exist between the State, Territory and Federal jurisdictions, so that advice regarding cashing out large banks of accrued annual leave will have to be tailored to particular circumstances.

There are other factors that employers will also need to bear in mind. Firstly, in some States the failure to give the employee the full holiday each year is itself an offence under the relevant legislation and the fact that the employee does not want to take leave does not excuse what is technically a breach of the legislation. Secondly, the fact that annual leave was an early form of "health and safety" legislation, with obvious benefits for employee wellbeing derived from regularly taking annual leave must still be a factor. If an employee's health suffers from not taking appropriate breaks, cashing out of entitlements will not excuse the breach of the occupational health and safety laws.

Nevertheless, employers facing the issue of large banks of accrued annual leave should seek advice as the issue may easily be resolved without waiting for federal changes.

Superannuation: offering a choice of funds update

Authors: Joydeep Hor and Leanne Davies

Introduction

As of 1 July 2005, changes to the *Superannuation Guarantee (Administration) Act 1992* (**"SGAA"**) mean (according to an estimate by the Association of Superannuation Funds) that around 5.2 million Australian employees will be entitled to choose their own superannuation fund. The changes require all employers, unless exempt, to provide employees with a choice as to which fund their superannuation guarantee contributions will be paid.

This article outlines employers' obligations as well as providing some practical tips in relation to the introduction and management of superannuation choice in the workplace.

Obligations of employers

Compliance with the new rules is mandatory. Employers must provide eligible employees a "Standard Choice Form"; and either:

- pay superannuation contributions into a fund chosen by an employee; or
- pay contributions into an eligible fund where no fund has been chosen by an employee.

Employees choose a fund either by filling in a Standard Choice Form (available from the Australian Taxation Office ("ATO")) or providing an employer with written notice as to their chosen fund. The deadline for supplying existing employees with a Standard Choice Form is before 29 July 2005. Any employees commencing work after 1 July must be given a form within 28 days of their start date.

The new rules provide that there are some circumstances where an employer either:

(a) is not required to offer employees a choice; or

(b) must offer a choice but can reject an employee's selected fund for a number of specified reasons.

Choice of fund is applied on an individual basis. There may be some employees in an organisation that must be offered a choice, and others to whom an employer is not obliged to offer it.

When choice must be offered

Employees will be ineligible to choose a superannuation fund, and therefore do not need to be provided with a Standard Choice Form, if their employer currently:

- makes superannuation contributions under, or in accordance with, a State award, an Australian Workplace Agreement or a State or Federal agreement;
- makes contributions to the Commonwealth Superannuation Scheme or Public Sector Superannuation; or
- makes contributions under a law of the Commonwealth or a State or Territory that is prescribed for the purpose of receiving choice contributions.

An employer will also be relieved of their obligation to provide an employee with a Standard Choice Form where the employee has already chosen a fund, and has provided written notice of this choice, by the time the Form was required to be given to them.

Must an employer accept the choice of fund?

The superannuation fund selected by an eligible employee can be rejected in the following circumstances:

(a) the employer is unable to make contributions into the fund on behalf of the employee at the date the choice is made (for example, because they are not a "participating employer");

(b) the employee has chosen a fund in the preceding 12 months;

(c) the employee fails to provide written notice of the required details of their selected fund;

(d) the selected fund is not an "eligible choice fund" (in other words, it is not a complying fund or a Retired Savings Account); or

(e) the employee is a member of a Defined Benefit Superannuation Scheme and would be entitled to the same amount of benefit from the scheme upon their retirement, resignation or retrenchment as they would be entitled to if they did not select a new fund, the scheme is in surplus or the employee has reached their maximum benefit in the scheme.

Note that if an employee's selected fund is rejected, they are entitled to request another Standard Choice Form and to nominate a different fund.

Strategies for implementing choice of funds in your workplace:

Review any relevant award or agreement to determine whether employees are eligible to choose a superannuation fund

All employees engaged under a Federal award are eligible to choose a superannuation fund. However, employees will not be eligible to choose a superannuation fund where they are engaged pursuant to a "State award" (defined under the SGAA as also including a registered State industrial agreement) and superannuation contributions are made on their behalf "under or in accordance with" the relevant instrument.

In its latest *Choice of Superannuation Fund Update*, the Australian Taxation Office indicated that the phrase "under or in accordance with" is a key element of the exemption and will require consideration of the relevant terms of the award. Until recently, there was very little certainty for employers (particularly where the instrument concerned is either vague or lacks detail) as to whether they qualified for this exemption.

The ATO has now released an Interpretive Decision which establishes that the phrase "under or in accordance with" requires the relevant award not only to make reference to superannuation, but to have a superannuation clause which creates a separate and enforceable legal obligation. Examples of clauses that could satisfy this requirement include where the employer "must" or "shall" make a contribution or where the clause specifies into which fund contributions must be made into.

Where the relevant clause of the award or agreement already requires an employer to give employees choice, the exemption will be available so long as there is an obligation to offer choice.

An employer will not be able to rely on the exemption where the relevant award or agreement:

- does not make any reference to superannuation;
- has a reference to superannuation that does not create any obligation on the employer's behalf; or
- goes no further than stating that the superannuation rights and obligations of the parties to the award or agreement are governed by "relevant legislation" or the *Superannuation Guarantee (Administration) Act*.

Establish a communication protocol to ensure employees are not provided with financial advice

The *Corporations Act* states that it is an offence for a "financial services business" to provide "financial product advice" without a license. The definition of financial product specifically includes superannuation interests and "financial advice" may include general statements of opinion by employers or managers as to the benefit of one fund over another which are either intended, or may reasonably have the effect of, influencing an employee's choice.

The safest course for employers to adopt for the purpose of avoiding potential legal exposure at both individual and organisational level is to advise managerial staff of this risk and develop a communication strategy designed to be factual rather than advisory. Employers may consider advising employees to seek financial advice if they have any questions or perhaps facilitating access to a financial advisor by, for example, making an advisor available onsite and/or free of charge.

Update employee records

Employers should document the choice of fund process in respect of eligible employees. A record in respect of details such as the date employees are given a Standard Choice Form, the date that any request to change funds is received, and the time within which the request was acted upon will be evidence available to assist an employer if required to demonstrate compliance with the SGAA.

Review contracts of employment

Contracts of employment should also be updated to reflect the change in the superannuation obligations of both parties where the relevant employee is eligible to exercise choice in relation to their fund. Contracts under which the employer previously nominated a fund for employees should be amended and instead employers should:

(a) advise the employee of their right to select a superannuation fund;

(b) briefly explain what the process for choosing a fund is; and

(c) nominate a default fund for contributions to be paid into if the employee does not choose a fund.

A step by step guide to managing redundancies in your organisation

Authors: David Stewart and Richard Lewin

In any organisation positions may become redundant and so the business faces the challenge of redeploying employees or potentially terminating their employment.

Here we look at a change management process by which redundancies can be implemented whilst minimising your exposure and ensuring fairness.

Important terms

Redundancy:	It is the position not the person that is made redundant. A position is made redundant when the employer no longer requires it to be filled by anyone.
Retrenchment:	A person is retrenched when terminated as a result of their position being made redundant.
Acceptable alternative employment:	Organisations often seek to avoid terminating employees by attempting to redeploy the affected employee into an acceptable alternate position. To be considered acceptable, the alternate position must be objectively compared to the redundant position with reference generally to its duties, responsibilities, status and remuneration. In offering acceptable alternative employment, an employer may potentially reduce its termination payment to an employee who refuses to accept the position.
Notice/payment in lieu of notice:	Notice is the period in which it will reasonably take the employee to find a comparable position in the market. It may be set by agreement or the law. Notice is distinct from severance.
Severance payment:	Severance payments are unique to a redundancy situation. They are a payment to compensate the employee for loss of continuity of employment such as future accruals for sick leave, annual leave and long service leave. This is why it is calculated in terms of weeks per year of service.
Change management:	When implementing change, it is imperative that a detailed and well planned change management strategy is effectively implemented. The strategy must look at each aspect that is affected by the change as well as planning for contingencies.

You will recall we looked closely at Change Management Strategies, in our June 2004 edition of *Work InSights* (at page 5) entitled "Developing an Effective Change Management Strategy".

Managing the steps

The ultimate goal in implementing change that leads to making a position redundant is to ensure successful implementation with minimal disruption to your organisation and ensuring those affected by the change are treated fairly. We set out below the three general stages in a redundancy process.

Establishing valid grounds

Positions are usually made redundant on the basis of one of four reasons, namely:

(a) economic downturn;

(b) takeover or merger with a competitor;

(c) restructure; or

(d) technological change.

However, the mere occurrence of one of the above circumstances does not automatically ground a valid redundancy. Accordingly, the organisation must objectively assess whether there is a necessity to remove a position as a result. Relevant considerations include:

- Economic downturn: Is the downturn temporary? What other cost saving measures exist? Are redundancies necessary to enable the long term survival of the organisation?
- Takeover/merger: Can positions be restructured to avoid redundancies?
- Restructure: Can employees be redeployed as part of the restructure?
- Technological change: What are the benefits of the new machine and/or process? Will the machine/process create new positions that will need to be filled? Can your current staff be usefully retrained?

All change decisions, including consideration of alternatives, should be relevantly documented.

Consultation

Consultation is an active process, not just a method of dissemination of information.

Consultation should be undertaken across the entire workplace, outlining the planned change and reasons behind it and clearly detailing the likely impacts on the change, particularly whether redundancies shall be necessary and any opportunities for redeployment. Employees should have an opportunity to ask questions during the process and, if appropriate, unions may be invited to be involved in the consultation process and to address members. This enables employees to be informed regarding the change process as well as providing an opportunity to seek clarity around any issues.

Selection of positions for redundancy

Upon implementation and finalisation of the change, the affected positions are made redundant and the employee in the position will either be required to be redeployed to an acceptable alternative position or retrenched.

Legal exposures upon implementation of change

Your organisation may face exposure where an employee challenges the implementation of change, as well as the treatment of the employee in making their position redundant.

Organisations face potential discrimination, unfair dismissal and/or unfair contracts actions (if in New South Wales or Queensland) arising from a position being made redundant. This can be managed through a fair redeployment and/or retrenchment process.

In turn, the implementation of change is predominantly considered by the courts as forming part of managerial prerogative and, if implemented fairly and lawfully, will be protected by one of the "Arbitral Principles." This provides that industrial tribunals will generally not interfere in a managerial decision unless it is unfair or unreasonable or contrary to legal obligations or industrial arrangements.

Retrenchment and redeployment—six steps to manage your risk

When making positions redundant, the organisation must determine which employees shall be selected for redeployment and/or retrenchment. To enable this, a six step approach is suggested:

Step 1: establishing fair selection criteria;

Step 2: applying the selection criteria to each affected employee;

Step 3: providing procedural and substantive fairness;

Step 4: considering redeployment;

Step 5: possibly offering voluntary redundancies; and

Step 6: managing any retrenchments.

Step 1: Establishing selection criteria for retrenchment

Once a pool of employees has been identified, it is necessary to establish fair criteria against which the employees will be assessed. The circumstances of each organisation will determine the precise criteria.

It is preferable that organisations base decisions primarily upon objective criteria since any challenge can be met with qualitative evidence.

Objective criteria are those where judgements can be verified against independent data or information. Subjective criteria are those where judgements cannot be independently verified and ultimately require a value judgement by the decision maker.

Examples of commonly used criteria are set out in the table below.

Objective	Subjective
Skills referable to future business	Attitude
Qualifications	Motivation
Experience	Ability to accommodate change
Client relationships	Teamwork
Objective performance measures (e.g. reaching sales targets, preparing internal reports on time)	
Past disciplinary issues	
Length of service	
Attendance (excluding consideration of sick leave)	

Some criteria, such as "performance", are hybrids that have elements of both objective assessment (KPI's and budgets) and subjective assessment (attitude and motivation). Where a hybrid criterion is used, the assessment must be clearly documented and each employee must be fairly assessed.

Step 2: Application of selection criteria

Upon selecting the criteria, they must be applied equally to every employee. Employers cannot "tailor" assessments to selectively retrench employees. Such an approach will expose the organisation to such claims as unfair dismissal or antidiscrimination actions. All assessments should be clearly documented in the event that a decision is subsequently challenged.

Step 3: Applying procedural and substantial fairness —opportunity to respond

Upon the application of the selection criteria, those employees selected to be retrenched or redeployed should be advised of the pending decision and the reasons behind it, which must be based solely upon the selection criteria and not upon any unlawful reasons such as age, disability or sex which would give rise to an antidiscrimination action.

In addition, each selected employee should be afforded an opportunity to respond to their selection, in an interview, by written process or both. Whilst an employer must be able to justify their decision, it is not intended that this be an appeal against the decision. It is preferable that the employee be offered a support person at the interview.

Step 4: Redeployment

Prior to retrenching an employee, organisations should attempt to redeploy employees into acceptable alternative

positions. When attempting redeployment it is necessary that the employer and employee carefully assess the proposed position to ensure compatibility.

It is best practice to offer a trial period to assess performance and suitability in the position. During the trial period the employee should be able to elect for retrenchment and equally the employer should have the option to retrench the employee if the position is not suitable. However, each party must exercise a degree of flexibility in this process.

Step 5: Voluntary redundancies

Allowing all employees to elect for retrenchment takes the decision away from management, so this must be carefully managed so that only those selected for retrenchment/redeployment are offered a voluntary redundancy.

A general call for voluntary redundancies should be avoided as it may mean employees that the organisation seeks to retain elect to leave and take additional benefits including severance payments. This can deprive an organisation of key employees.

Step 6: Retrenchment—notice and severance payments

Should an organisation not be able to redeploy the selected employees or there is an insufficient uptake of voluntary redundancies, the organisation will need to retrench those employees whose positions have been made redundant.

These employees are eligible to receive a payment in lieu of notice, potentiality a severance payment and any accrued but untaken annual leave and accrued long service leave (as well as any other entitlements).

The amount of notice and severance payments are dependent upon a number of factors, however where clear policies or contracts of employment are not in place at an organisation, reference should be made to underlying awards, enterprise agreements and any relevant legislative provisions. Your organisation may also consider providing a departing employee with outplacement assistance.

As a final protection to the organisation, retrenched employees may be asked to sign releases, and they should have sufficient opportunity to review and take advice upon any release, which will provide protection to the organisation against future legal suits.

Conclusion

Unfortunately, it is often the human variable in a change management process that is the most poorly managed. This will have an ongoing effect on the remaining workforce and externally through litigation from former employees.

By adopting a fair process to address redundancy and retrenchments within your organisation as part of an overall change management strategy, the risks to the business can be managed and minimised.

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 Workplace Lawyers 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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