

WORK InSights

Autumn edition 2006

Editorial

Welcome to the Autumn 2006 issue of *Work InSights*. In this edition, we cover a broad selection of topics to assist you in your workplace.

In a year which has seen the most significant changes to Australia's employment and industrial relations law since federation with the commencement of the Federal Government's Work Choices legislation, Harmers Workplace Lawyers is delighted to have been recognised for its expertise in this area by being awarded with the **Employment Specialist Law Firm of the Year** award in the *ALB Australasian Law Awards 2006* on Thursday 6 April 2006. Peer nominations from a wide range of practitioners in our jurisdiction resulted in the firm being nominated as a finalist. The judging panel (composed of senior in-house lawyers), was provided with a submission detailing Harmers' successful outcomes for the calendar year 2005, together with further third party material to select the ultimate winner.

Additionally this year, Harmers is delighted to receive a ranking in the Top 25 Best Practice Organisations in Australia in the **National Work/Life Benchmarking Study** for the 5th consecutive year run by *Managing Work/Life Balance*.

The team at Harmers Workplace Lawyers would like to thank you, our valued clients, for your continued support.

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Work Choices: a vital update

Greg Robertson and Bernard Ng

Introduction – what is Work Choices all about?

In the Summer edition of *Work InSights*, we provided extensive coverage of the Federal Government's workplace relations amendments, often known as "Work Choices". In brief, Work Choices dramatically changes the workplace relations landscape by, among many other things:

- moving the majority of employers into the Federal workplace relations system;
- introducing legislative guarantees for basic terms and conditions of employment, known as the Australian Fair Pay and Conditions Standard ("AFPCS");
- simplifying the process of enterprise bargaining and agreement making;
- further downgrading the role of awards and encouraging agreement between employers and employees at the workplace or individual level; and
- curtailing the remedy of unfair dismissal by reducing the number of employees that can access the remedy and reducing the compensation payable in some instances.

At the time our Summer edition went to press, Work Choices was a Bill that was being debated by Parliament. Since that time, a number of significant events have occurred:

7 December 2005: Work Choices, incorporating amendments proposed by the Senate, passed both houses of Parliament.

14 December 2005: Work Choices received the Royal Assent. On that date, some provisions of Work Choices commenced (such as provisions relating to the establishment of the Australian Fair Pay Commission).

20 March 2006: Regulations for Work Choices were released.

27 March 2006: The substantive provisions in Work Choices and the Regulations commenced.

Amendments to the original Bill

The Work Choices Bill passed through Parliament with 337 amendments. While most of the amendments are technical, some are significant. We set out some key amendments below.

What happens when a workplace agreement is terminated?

The amendments now ensure that, in the event a workplace agreement negotiated under Work Choices is terminated, and if, previous to the workplace agreement, the employees were under an award,



the employees will fall back onto certain "protected award conditions". Protected award conditions include award penalty rates, overtime, public holidays, rest breaks, incentive-based payments and bonuses, annual leave loadings, and allowances.

How the 100-Employee Rule is calculated

One of the key changes in Work Choices is that employees in businesses that have 100 or less employees are not able to access the unfair dismissal jurisdiction. One amendment expanded the definition of "employer" to include related or subsidiary companies and was aimed at preventing employers from creating a number of smaller employing entities in order to avoid unfair dismissal laws.

New guarantee for frequency of payment

Provisions introduced by the amendments guarantee that employees are paid fortnightly in arrears if frequency of payment provisions are not set out in an

applicable Australian Pay Classification Scale, workplace agreement, or contract of employment.

Entitlement to public holidays

A change introduced by the amendments guarantees the right to have certain public holidays (referred to here as "Protected Public Holidays") as a day off. However, the employer has a right to require an employee to work on a Protected Public Holiday, and the employee has a right to refuse. These provisions provide a range of factors that determine whether an employee's refusal to work on a Protected Public Holiday is reasonable. Employees are protected from dismissal or other detriments if their refusal to work on a Protected Public Holiday was reasonable.

Excluding small businesses from redundancy pay

A new provision excludes small businesses (defined as businesses that employ 15 employees or less) from the obligation

to make redundancy payments. Terms in awards, State or Territory laws, among other instruments, that provide for redundancy payments for small businesses will have no effect.

Regulations

The regulations that accompany Work Choices ("**Regulations**") were released on 20 March 2006. Given the complexity and expansiveness of Work Choices, the Regulations are equally complex and lengthy, and it is not possible to give a detailed analysis of all the Regulations. However, some important provisions include:

What constitutes "Prohibited Content"?

There is an extensive list in the Regulations of clauses that will be prohibited and thus unlawful if included in Workplace Agreements. The subjects include:

- renegotiation of a workplace agreement;
- mandating union involvement in a dispute settlement procedure;
- deduction of union dues from employees; union right of entry;
- leave to attend trade union training;
- terms that discourage or encourage union membership;
- terms that allow a person to engage in or organise industrial action;
- terms providing for remedies for unfair dismissal; and
- matters not pertaining to the employment relationship.

A much more limited range of prohibited content applies to other types of transitional industrial instruments (that is, industrial instruments that were created before Work Choices).

Additional guidance as to the operation of the AFPCS

The Regulations clarify and provide guidance on specific aspects of the AFPCS, including how workplace agreements and contracts can be compared to the AFPCS by:

- setting out on what specific aspects in workplace agreements and contracts form the basis of comparison with the AFPCS; and
- on what basis does the AFPCS provide a "more favourable outcome".

Under Work Choices, if the AFPCS provides for conditions that are "more

favourable" than a workplace agreement or contract, the employee is entitled to the conditions offered under the AFPCS.

What happens to existing and potential proceedings under Workplace Relations Act 1996?

Certain proceedings relating to existing AWAs and Certified Agreements may continue to be dealt with under *Workplace Relations Act 1996* (Cth) as though it were not amended by Work Choices. Other matters are no longer able to be pursued (for example, extending the expiry date or varying a pre-reform certified agreement).

With minor exceptions, the Commission is restrained from dealing with existing industrial disputes. The Commission is further restrained (with some exceptions for "transitional employers" — employers that are currently in the Federal system but are not covered by Work Choices) from making or varying existing Federal awards in the settlement of a dispute or making recommendations about a dispute by consent of the parties. Proceedings of these kinds, if not caught by the exceptions, lapsed on 27 March 2006.

A number of other proceedings of the Commission relating to dispute settlement continue to be on foot and be dealt with under the provisions of former provisions. These include applications to vary awards to remove clauses that are discriminatory, ambiguous or uncertain in meaning, and orders to stop or prevent industrial action.

What happens to existing and potential proceedings under State industrial laws?

Work Choices operates to the exclusion of most State industrial laws, with some exceptions (such as occupational health and safety laws and laws relating to long service leave). The Regulations provide that, in general, industrial events that occurred before 27 March 2006 are not affected by Work Choices, and will continue to be dealt with under State Law where appropriate. This means if an employee was dismissed before 27 March 2006, he or she may continue to bring a claim under State unfair dismissal laws.

Proceedings relating to the termination of employment (including unfair dismissals) and unfair contract proceedings that commenced before 27 March will not be affected by *Work Choices*.

The Regulations also allow for the exclusion of certain other laws. Currently, the *Contracts Review Act 1980* (NSW), as so far as it applies to the employment relationship, is the first such exclusion.

The secret ballot process

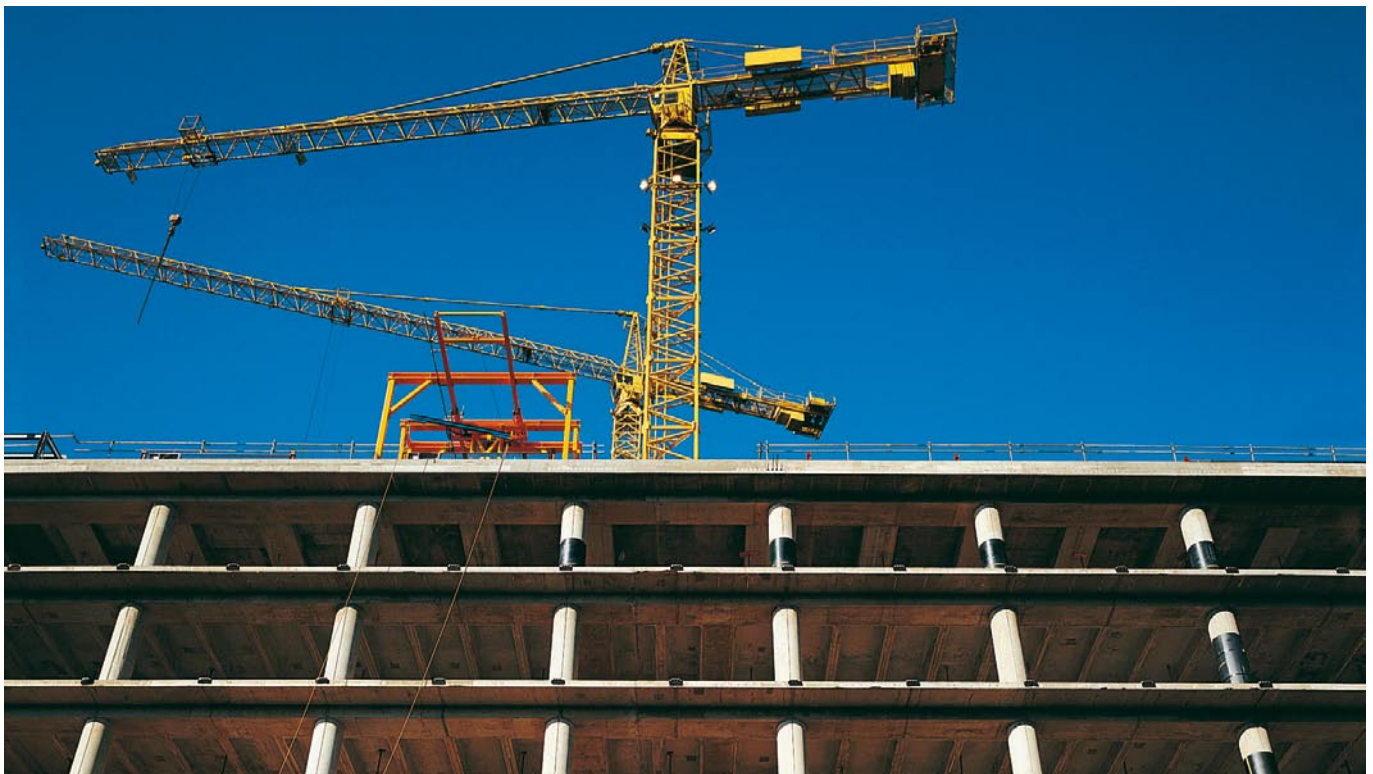
Details of the secret ballot process that has to be undertaken before protected industrial action can proceed — for example, the form of the ballot paper, how employees may vote, how scrutineers may be involved, and what materials must accompany an application for a secret ballot — are set out in the Regulations.

Keeping of employee records

Also set out by Regulation is the form of the employee records that are required to be kept under Work Choices. Records are to be kept in legible form and in a form that allows a workplace inspector to determine whether relevant conditions are complied with. Some examples of the types of required records include the nature of the employee's employment, what industrial instruments govern that employee's entitlements, hours worked, leave taken and superannuation contributions.

An employer may only be prosecuted for a breach of the record keeping requirements if the contravention occurs after 27 September 2006. This grace period does not apply to record keeping in relation to contract outworkers in the textile, clothing and footwear industry in Victoria. However, the Minister for Employment and Workplace Relations, Kevin Andrews, recently announced that certain of the record keeping requirements will be relaxed following complaints about the onerousness of the new record keeping requirements.

Harmers Workplace Lawyers regularly give advice to businesses about how to manage their workplace relations strategy in light of Work Choices, and we would be happy to assist any employer in the transition into the Work Choices era. Contact details may be found on the back cover of this issue.



can best manage and respond to the risks associated with a pandemic by developing a business continuity plan.

In developing such a plan, it is necessary to consider the legal issues that may potentially be faced by employers. Some key legal issues are considered below.

Key legal issues for consideration

Occupational health and safety

Perhaps the most important legal issue facing employers will be compliance with occupational health and safety ("OH&S") obligations. OH&S laws in each State and Territory (and the Commonwealth, where applicable) require employers to provide and maintain a working environment that is safe and without risks to health.

While specific OH&S duties vary between States and Territories, the following obligations will be relevant in the event of a pandemic:

- providing and maintaining systems of work that are safe and without risks to health;
- maintaining each workplace under the employer's management and control in a condition that is safe and without risks to health;
- providing adequate facilities for the welfare of employees at any workplace under the management and control of the employer; and
- providing information, instruction, training or supervision to employees as is necessary to enable those persons to perform their work in a way that is safe and without risks to health.

To ensure that they are able to satisfy OH&S requirements employers need (amongst other things) to identify and assess hazards and risks associated with a pandemic and must implement measures to eliminate (or minimise) the risks to employees and contractors. Measures which may be adopted by employers range from the mandatory quarantine of employees in the event of travel to infected areas by, for example, requiring them to work from home, to ensuring adequate facilities for washing hands.

Common law duty of care

Employers also have a general duty of care under common law to employees. Employees who suffer an injury or illness arising from an employer's negligence may claim damages under common law in respect of that injury or illness. It is important to note that the common law duty of care,

like statutory OH&S duties, does not simply apply to employees in the factory, shop or office but also employees who work from home, those who are required to travel for work, to contractors and suppliers that are engaged by the organisation, and to visiting clients or customers.

In order to satisfy the common law duty of care during any pandemic, it may be necessary for employers to ensure that:

- staff members have access to appropriate up-to-date information in relation to the virus;
- staff members have access to basic preventive strategies, such as masks (if required) or vaccination if possible;
- the workplace and work practices and systems are adjusted to minimise exposure to the virus;
- appropriate cleaning and hygiene is conducted; and
- staff travelling to high risk areas have access to information, preventive advice, vaccination and possible treatment.

Obligations under anti-discrimination legislation

These OH&S obligations must be balanced against obligations under equal opportunity legislation which prohibit discrimination in the area of employment on the basis of an employee's disability/impairment. An employee may argue that any action taken by an employer during a pandemic (for example, to quarantine the employee) constitutes less favourable treatment on the ground of disability and is therefore unlawful.

In these circumstances, it may be open to employers to rely upon one or more defences (depending on the relevant legislation) which broadly provide that discrimination will not be unlawful where it is reasonably necessary to protect the health and safety of a particular person or the public generally. By way of example, the *Federal Disability Discrimination Act 1992* provides that it is not unlawful for a person to discriminate against another person on the grounds of disability if the person's disability is an infectious disease and the discrimination is reasonably necessary to protect public health.

In order to manage their obligations during a pandemic, and for the purposes of developing a pandemic plan, employers should give careful consideration to the relevant provisions in the legislation.

Issues relating to the contract of employment

In developing an appropriate pandemic plan and deciding on the most appropriate action to control risks, employers also need to consider rights and obligations under the contract of employment.

An employer is under a common law duty to provide an employee with the opportunity to earn remuneration by providing work and allowing that work to be performed. Unless there is an express term in the contract of employment, employers do not have a right to suspend an employee without pay for any reason, including reasons outside the employer's control, such as a pandemic.

In most cases, employers will be able to stand-down employees on full pay on the basis that they are meeting their obligation to provide the employee with an opportunity to earn remuneration. However, the situation becomes slightly more complex in circumstances where employees are able to establish that the employer is also under a duty to provide work (for example, where the work is necessary to further an employee's career). Accordingly, prior to standing down a particular employee on full-pay, an employer must consider whether the duties owed to the employee extend also to the provision of work.

A right to stand-down an employee without pay may also arise under an industrial instrument. Some awards for example allow employers to deduct payment for any day on which an employee cannot be usefully employed because of any cause for which the employer cannot reasonably be held responsible. If such an award does apply, it becomes necessary to consider when an employee "cannot be usefully employed" and the reasons why the employee cannot be usefully employed. In the case of a pandemic, questions relating to whether the employee can usefully be employed may require consideration of factors such as whether the employee can usefully perform the work from home or from another area away from the workplace. Award "stand-down" clauses are seen as protecting both sides in emergency situations: the employer does not have to pay, and the employee, whilst not paid, retains continuity of employment. While Work Choices retains stand-down clauses as an allowable award matter, it will be difficult to vary an award to include such a clause and it would therefore be appropriate to consider such clauses at the time of making an award or when negotiating an agreement.

In the event that an employee is stood down in circumstances where there is no power to do so, the employee would be entitled to recover wages that would have been earned during that period.

Another important issue in connection with the contract of employment relates to the types of directions which may lawfully be issued to employees for the purposes of implementing any pandemic plan and generally managing the employer's risk. Two important considerations include:

- whether an employer is lawfully entitled to direct an employee to work from home or another area outside the office; or
- whether an employer is lawfully entitled to direct an employee to consult with a medical practitioner to assess whether the employee is capable of safely performing his or her duties. This issue becomes particularly relevant in respect of employees who have travelled to high risk areas both for personal and work purposes.

It is an implied term of the contract of employment that employers are entitled to give lawful and reasonable directions which must be obeyed by employees. Given the serious OH&S risks associated with infected employees attending work during a pandemic, a direction to an employee (who is suspected of being infected) to work from home or consult a medical practitioner for a medical assessment is likely to constitute a lawful and reasonable direction providing that the employer reasonably believes the requirement is necessary to ensure the safety of employees.

Entitlements to leave

Employees' entitlements to leave will also be a key issue. Whilst there will be little dispute in relation to an employee's entitlement to sick leave during the period of infection (or the entitlement to carer's leave for the purposes of caring for an infected family member), the issue becomes more complex if the employee seeks leave, either paid or unpaid, for "precautionary reasons".

Requests for such leave may be appropriate if the employee is at risk of contracting the virus. However, some employees may take an unnecessarily cautious approach and may request leave notwithstanding that the risk of contracting the virus is extremely minimal. Such requests for leave (if approved and taken) could place a greater strain on the employer's operations and may therefore need to be carefully managed. The issue should be

given careful consideration in preparing any pandemic plan. Potential issues for consideration should include:

- approach to unreasonable requests for leave relating to precautionary reasons;
- alternatives to leave (eg, working from home arrangements);
- approach in dealing with employees who take unauthorised leave; and
- managing the issue of high absenteeism and its effect on the organisation.

Privacy

In developing any pandemic plan, employers should also consider their obligations under privacy legislation. These considerations will be particularly important when decisions are being made about the way in which health information (or other personal information) relating to employees should be managed.

The Federal *Privacy Act 1988* provides legislative benchmarks for the handling of personal information through the National Privacy Principles which cover matters associated with the collection, use, disclosure of, access to and quality of personal and sensitive information, including health information. Whilst employee records are exempted from regulation, the definition of employee records needs to be carefully considered to determine whether the exemption applies in any particular case. Further, there may be similar obligations contained in other pieces of legislation relevant to the particular State in which the employer operates. By way of example, the *Victorian Health Records Act 2001* imposes obligations on organisations in respect of the collection, use, disclosure of and access to health information about individuals. There is no exemption relating to employee records.

Continuity planning/risk management

Companies may consider establishing a pandemic/continuity planning team, or alternatively request any terrorist/disaster risk management team already established to consider risk management strategies for a pandemic.

For smaller companies, it may be more practical to request the internal OH&S committee or like representatives to consider the ramifications and risk management options in the event of a pandemic.

In developing a pandemic plan, the risks and strategies required before, during and after a pandemic should be considered. Strategic and comprehensive

risk management will not only assist with the practical management of the business but will also reduce employers' exposure to claims in the event of a pandemic.

It is recommended that a risk assessment and strategic planning exercise involve thorough consideration of at least the following matters:

Business operations considerations:

- consider the likelihood of disruption in the supply chain or shortage of materials, and how long the business can survive those circumstances or significant loss of staff or a severe downturn in demand for a product/service;
- consider what parts of the business are most likely to be affected and what parts may be insulated from a pandemic;
- consider whether a controlled reduction of operations is possible;
- investigate the possibility of stockpiling where appropriate;
- plan for disruption to sewerage, water and electricity services;
- talk to customers and suppliers about their own preparations;
- consider marketing messages to protect image/assist long-term interests;
- assess existing insurance coverage; and
- establish an emergency communication plan.

Occupational health and safety considerations:

- review air circulation and filtration systems, cleaning of work premises and availability of enhanced cleaning practices;
- consider providing masks to employees and vaccinating employees against common influenza;
- encourage hygiene practices (particularly hand washing) and correct diet and exercise;
- consider how decisions may be made as to which staff members may receive employer-funded vaccination;
- consider stockpiling goods that may be necessary during a pandemic and that are likely to be in high demand at such



time, including gloves, masks, disinfectant, hand wash, alcohol wipes and paper towels.

Human resources considerations:

- review provisions in applicable industrial instruments (including the availability and application of stand down provisions);
- review workplace policies and consider whether revisions or amendments are necessary. Relevant policies may include, travel policies, leave policies (sick leave, carer's leave, bereavement leave, annual leave and unpaid leave), OH&S policies (including infectious diseases and health monitoring), and policies regarding flexible working arrangements (such as working from home);
- consider how flexible the workplace can be — for example, whether an increase in online options is possible to minimise face to face contact in the event of a pandemic;

- consider whether work hours may be staggered in the event of a pandemic (to reduce the spread of any contamination in the workplace by reduced contact with others);
- consider how the company may cope with absentees of 25–40% of staff on any given day;
- investigate alternative labour sources;
- consider the availability of psychological support for employees before, during and after any pandemic; and
- establish a communication strategy with employees — communication is fundamental to any strategic plan as employee understanding and cooperation will be required in the event of a pandemic.

Learning and development considerations:

- consider training staff in multiple positions — general continuity planning.

Immediate action

As an absolute minimum, employers should consider implementing the following actions in the short term:

- publicise accurate information in relation to bird flu (on the intranet, employee notice board, in the lunchroom etc);
- request that employees who are travelling to countries with confirmed bird flu cases advise HR/management prior to going on leave (this may also be done by requesting this information at the time application is made for annual leave);
- provide detailed information and updates on the virus to any employees currently working in countries where there have been confirmed cases; and
- designate an employee (for example, an OH&S representative) to regularly review the information on the World Health Organisation website and like sources of reliable information for dissemination to employees and on-going assessment of risk.

Genetic screening in the workplace: an employer tool?

Chris Molnar and Leonie Green

Introduction

Human genetic technology has made rapid advances in recent years. Part of this technology has been the development of genetic tests which can give an indication of the likelihood of a person developing particular illnesses or health conditions as they grow older.

As the ability to perform these tests advances, there have been attempts to ensure that the law keeps pace with this capability.

The Federal Government recently responded to the Australian Law Reform Commission's Report — *Essentially Yours: The Protection of Human Genetic Information in Australia*. The Federal Government's response outlines a number of proposed changes to current legislation with the intention of regulating and protecting the use of genetic information. Of particular importance in the context of employment law, are the proposed changes to the *Disability Discrimination Act 1992* (Cth) ("DDA").

Science fiction or reality?

Genetic screening may sound like a tool of the future. The scenario comes to mind of employees being required to undergo genetic testing before being offered employment, in order to determine their pre-disposition for certain diseases or illnesses, such as:

- heart disease;
- high blood pressure; and/or
- depression.

In the science fiction film "Gattaca" (1997, Colombia Pictures) DNA (deoxyribonucleic acid — the substance that stores genetic information) is mapped at birth to determine life expectancy. In the film, Vincent, the central character, is given the following prognosis, seconds after birth:

Neurological condition: 60% probability

Manic depression: 42% probability

Attention Deficit Disorder: 89% probability

Heart disorder: 99% probability, early fatal potential

Life expectancy: 30.2 years.

As an adult, Vincent dreams of becoming an astronaut, and although otherwise



healthy, he is considered an "In-valid" as a result of his genetic pre-dispositions and finds it difficult to obtain employment at all, let alone in his field of choice. Vincent explains: "My real resume was in my cells".

While we have not yet reached this position as part of routine pre-employment screening in Australia, the variety and availability of genetic tests continues to increase. This will inevitably create some legal dilemmas.

There are obvious advantages to businesses in being able to screen for potentially costly health problems before taking on new employees. Such screening would, however, be likely to provide information only about possible future events and could have the result of eliminating employees from career opportunities on the basis of predicted health problems which may never develop. The individual's right to privacy and protection from unfair discrimination must also be balanced against the advantages which employers might gain from this emerging health technology.

It is in this context that the Australian Law Reform Commission undertook its inquiry into a range of implications of the technology, including in the area of employment law.

Genetic predisposition a disability?

As the Federal disability discrimination legislation currently stands, there is no explicit protection from discrimination for a person who is found to have a genetic predisposition to a particular condition or disease.

It may be possible to argue that the current definition of "disability" is sufficiently broad to cover some types of genetic pre-disposition, but this remains to be tested.

The current definition of disability under the DDA includes "the presence in the body of organisms capable of causing disease or illness" and "the malfunction, malformation or disfigurement of a part of the person's body" and this includes a disability that "may exist in the future" or "is imputed to a person".

The Federal Government has accepted that the position needs clarification and has announced that an advisory note is to be inserted into the DDA to clarify that the definition of disability for the purposes of the DDA includes a genetic predisposition to a disability.

Requesting genetic information/screening

Section 30 of the DDA, as it presently stands, makes it unlawful to request or require information in connection with, or for the purposes of doing an act of discrimination.

The Federal Government has announced that section 30 of the DDA is to be amended so as to clarify that it prohibits an employer from requesting or requiring information relating to a person's disability (including genetic information) except where the information is reasonably required for a purpose that does not involve unlawful discrimination. An example, already foreshadowed by the Federal Government, is where a request for information is for the purposes of compliance with occupational health and safety legislation.

Thus, in certain circumstances, it may arguably be lawful to request genetic screening. For example:

Company XYZ Pty Ltd is in the business of construction and demolition and wishes to employ a jackhammer and chainsaw operator. In order to ensure a safe workplace, the Company screens prospective employees for any genetic predisposition to diseases that would put its employees or others at risk. On the basis of the genetic screening, the Company refuses to employ individual A because her test results show 95% probability of epilepsy. Individual A does not currently have epilepsy, but the Company, on the basis of its occupational health and safety obligations, decides that the risk of Individual A having her first fit whilst operating dangerous machinery is too high.

It remains to be seen whether such discrimination will be considered lawful, however, as the technology for genetic screening develops and costs decrease, it is possible that such risk management may be deemed not only reasonable but responsible management.

It is also imaginable that the world of the future is likely to provide opportunities for employers to obtain samples of employee's DNA and to test for genetic predispositions without the knowledge or consent of the employee.

Inherent requirements defence

Section 15 of the DDA currently allows an employer to refuse to offer employment to a person or to dismiss a person, if the person (due to their disability) cannot carry out the inherent requirements of the position. The section allows consideration

of "relevant factors that it is reasonable to take into account" in assessing whether a person, because of his or her disability, would be unable to carry out the inherent requirements of the position.

The Australian Law Reform Commission recommended in its report that the DDA be amended so that it provided that, except where it was reasonable to do so, the assessment of an applicant or employee's ability to perform the inherent requirements of a job should not include an assessment of whether he or she will be unable to perform the inherent requirements in the future, on the basis of his or her genetic status.

The Federal Government does not propose to make this amendment to the DDA, but did say, in its response to the recommendation, that assumptions about a person's ability to perform the inherent requirements of a job in the future would probably be irrelevant and unreasonable in most cases.

The Federal Government has also announced that the inherent requirements defence in section 15 is to be extended to so as to cover all stages of employment, from hiring to dismissal. This, according to the Federal Government, will provide employers with flexibility – allowing them to (for example) change an employee's duties or refuse an internal application on the basis that the employee's disability inhibits their ability to perform the inherent requirements of the position. The Federal Government argues that, since this should allow employers to put in place alternative working arrangements if they employ a person who later becomes unable to perform the requirements of the job, it should minimise employer's concerns about employing people who may become unable to perform the inherent requirements of the job in the future.

Guidelines for genetic screening

The Federal Government has not supported a recommendation that national guidelines (or principles) for genetic screening be adopted by the National Occupational Health and Safety Commission ("NOHSC") at this time. However, it has indicated that it would be appropriate for NOHSC to make practical guidance material available to employers.

Privacy and genetic information

The Federal Government proposes to protect the privacy of genetic information by specifically including it in the definitions of "sensitive information" and "health information" under the *Privacy Act 1988* (Cth) ("Privacy Act"). In addition to this, the Federal Government has indicated that the protection of genetic information contained in employee records will be considered in the current review of the privacy protection afforded to employee records.

Conclusion

As new technologies develop, their potential use raises issues for the law in attempting to balance potential competing interests. The ability of medical science to predict a person's health future raises particular issues for both employers and employees. The Australian Law Reform Commission and the Federal Government have attempted to ensure that our existing Federal Disability Discrimination and Privacy law is appropriately adapted to deal with this emerging technology. As the capacity to predict a person's health future advances and attempts are made to utilise this capacity in the workplace, it will become clearer whether these attempts have been adequate.



Inheriting occupational health and safety risks – OH&S due diligence in business acquisitions

Jamie Robinson, Brad Buffoni and Iona Goodwin

Directors and managers involved in acquiring another business or company need to be aware that, in some circumstances, the acquiring company and its directors and managers may be exposed, from the date of acquisition, to prosecution for breach of occupational health and safety (“OH&S”) laws by the target company, even though the breach that gave rise to the prosecution may have occurred well before the acquisition. For that reason, the due diligence process prior to acquisition should include a complete review of potential OH&S exposures.

The risk

Some recent cases illustrate the risk:

- In *Diversified Industrial Services Pty Ltd v Moore* (2006) an employee was injured in January 2003 when a weld on a high pressure hose he was using failed. The weld was a result of a non-standard repair undertaken by previous management. There had been a change in ownership and management in November 2002, and the new owners, who had a very high safety standard, had immediately commenced a program to improve safety. The magistrate at first instance had held that the material relating to the company's change in ownership did not provide a good reason for not recording a conviction for an OH&S breach. The South Australian Industrial Relations Court on appeal noted that for the Company's argument to succeed, it would be required to go behind the corporate veil to allow the company to “avoid the undesired effect of an indivisible corporate personality”. The Court was not prepared to do so, the company's appeal against sentence being dismissed.
- The Department of Mineral Resources in *Morrison v Normandy Industrial Minerals Ltd* (2003) prosecuted Normandy Industrial Minerals, following a fatal accident in February 2000 when a fuel tank exploded during welding work. The shares in the company, held by Normandy Mining Ltd at that time, were acquired by an unrelated company, Unimin Corporation, in July 2000. Unimin put new safety features in place, undertaking detailed reviews of OH&S management systems and implementing new improved

approaches to safety. The Industrial Relations Commission fined the company \$42,250, even though it noted that the new owner was entitled to credit in the assessment of penalty for the improvement in safety. The Court stated “I give weight to the fact that whilst the defendant remains the same legal entity, the change in ownership has produced the beneficial result with respect to OH&S management”.

- In *WorkCover Authority of New South Wales (Inspector Wilson) v Chubb Security Australia Pty Limited (No.2)* (2005) Chubb was prosecuted following the fatal shooting of a security guard who was collecting cash takings from a club in September 2001. Chubb was acquired by United Technologies Corporation in August 2003. Chubb was fined \$246,000 even though the court commented that the evidence of the new owner's emphasis on OH&S was commendable. The Court commented that “specific deterrence” was relevant to sentencing considerations even though the change in ownership and that new owner's efforts should “properly temper” the deterrence factor in those sentencing considerations.

Clearly, therefore, in any consideration of an acquisition, regard should be had to the target company's OH&S position.

Reasons to include OH&S in due diligence

One reason for making this check is that penalties for failing to provide a safe workplace in Australia are high. Exposure to those fines is uninsurable. Potential fines include:

- New South Wales—the penalties for a corporate entity are up to \$550,000 for a first offence and \$825,000 for subsequent offences while first offender individuals remain liable for up to \$55,000, with subsequent offenders liable up to \$82,500 and up to two years in prison. Where a fatality is involved, since amendments in 2005, the *Occupational Health and Safety Act 2000* (“NSW Act”) provides for penalties of up to \$1,650,000 for a corporation and \$165,000 or imprisonment for five years or both for an individual.

- Queensland—if the breach causes multiple deaths the maximum is \$750,000 for a body corporate, or \$150,000 or three years imprisonment for an individual; for offences involving a single death or grievous bodily harm the penalty is \$375,000 for a body corporate, or \$75,000 or two years imprisonment for an individual; where bodily harm is involved or the incident involves exposure to a substance likely to cause death or grievous bodily harm a body corporate faces a fine of \$281,250 and an individual \$56,250 or one year's imprisonment. Otherwise the penalty is \$187,500 for a body corporate, or \$37,500 or six months imprisonment for an individual.
- Victoria—for a corporate entity the penalty is up to \$943,290 and for individuals it is up to \$188,658.

A second reason is that directors and managers can in certain circumstances be personally liable. The relevant section (26) of the NSW Act regarding offences by corporations and the liability of directors and managers provides that:

If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:

- (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

In Victoria, the *Occupational Health and Safety Act 2004* (Vic) (“Victorian Act”) provides that individuals may be liable if they can be said to be an officer of a company (body corporate) that has committed an offence under the Victorian Act. The meaning of “officer” is that given in section 9 of the *Corporations Act 2001* (Cth). The relevant provision (section 144) is similar to that in the NSW Act.

If a body corporate (including a body corporate representing the Crown) contravenes a provision of this Act or the regulations and the contravention is attributable to an officer of the body corporate failing to take reasonable care, the officer is guilty of an offence

and liable to a fine not exceeding the maximum fine for an offence constituted by a contravention by a natural person of the provision contravened by the body corporate.

In Queensland, section 167 of the *Workplace Health and Safety Act 1995* (Old) (“**Queensland Act**”) provides that if a corporation commits an offence against a provision of the Queensland Act, each of the corporation’s executive officers also commits an offence, namely the offence of failing to ensure that the corporation has complied with the provision.

If a corporation commits an offence against a provision of this Act, each of the corporation’s executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision.

The term “executive officer” is defined as “a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer”. Clearly, this definition has the scope to include middle managers, and others.

It is important to be aware that the OH&S authorities in each State are increasingly using these types of provisions to enforce compliance with their relevant legislation, leaving only a limited number of individuals within the management structure who may be able to avoid the ambit of the sections.

What should be looked at in an OH&S due diligence?

In order to ensure appropriate due diligence in relation to an acquisition, the following areas should be considered:

Compliance issues:

- Is there an OH&S strategic plan?
- Has a site-wide risk assessment been prepared for each site?
- Is there a written OH&S policy?
- Is there a written OH&S manual?
- Has training been provided in relation to OH&S issues to all:
 - managers and supervisors;
 - employees; and
 - contractors?

Are there proper training records?

- Is there an operational Job Safety Analysis for all of the major functions performed at each site?

- Have copies of each site’s asbestos register been reviewed?
- Have copies of registers of occupational certification—rigging, dogging, forklift etc—been reviewed?
- Are appropriate consultation arrangements in place, and are there minutes of consultation meetings?
- Are appropriate registers of registerable premises and plant maintained?
- Are there work method statements for major contractors?
- Have planned maintenance schedules been reviewed?
- Are procedures in place for the reporting of accidents and incidents?
- Have copies of all reportable incident reports for the last 12 months been checked?
- Are there specific emergency response plans?
- Has the target been issued with any Investigation, Prohibition, Improvement or Penalty Notices regarding any aspect of its operations? Has that Notice been complied with?
- Obtain details of all interaction with the relevant authorities over the last 12 months.

- Has there been any recent audit of OH&S compliance? If so, what were the results?
- Is a hazardous substances register kept for each site and current?
- Is a register of licence holders kept at each site and current?

Record-keeping:

- How long are OH&S incident records retained?
- What limitations, if any, are placed on the preparation of OH&S incident reports and statements?
- Are statistics retained in relation to OH&S incidents relating to:
 - medical treatment injuries;
 - lost-time injuries; and
 - other injuries.

Litigation:

- Are there any prosecutions currently on foot or pending against:
 - the company;
 - any individual managers; and/or
 - any individual employees?
- Are there any incidents currently being investigated by the WorkCover Authority or equivalent authority responsible for the enforcement of OH&S legislation?





- Has the target entered into any enforceable undertakings in relation to OH&S?

What other steps can directors take following acquisition?

To minimise exposure to personal liability in the event of an OH&S prosecution, directors should, as a matter of course, take action to:

- (a) conduct an audit of the current OH&S practices and process, including: understanding of obligations across the company; risk assessment processes; and reporting functions;
- (b) ensure that OH&S duties and obligations are appropriately delegated;
- (c) implement systematic management of OH&S within the company. This includes clearly delineating responsibilities and roles within the company with respect to OH&S;
- (d) properly document corporate and management structures;
- (e) allocate sufficient budgetary resources for compliance with OH&S requirements;
- (f) ensure that there is a system for identifying, reporting, assessing and responding to actual and potential hazards in the workplace;
- (g) establish safe work practices, procedures and controls that are specific to the hazards in the workplace;
- (h) ensure that the practices, procedures and controls in the workplace either meet or exceed the legislative requirements;
- (i) provide ongoing training and instructions to all employees, including supervisors and contractors;
- (j) regularly communicate with employees about foreseeable hazards to health and safety;
- (k) provide active support for and participate in OH&S committees and communications to all employees;
- (l) constantly monitor and review the company's workplace systems and OH&S policies and procedures;
- (m) make safety a performance issue—for example, make safety a consideration in the bonuses of management staff, or for career progression;
- (n) make OH&S part of job descriptions and specifications;
- (o) ensure there is regular reporting of: safety incidents; safety inspections; and safety reviews. This reporting should be done at every level in the company, and results should be available at every level of the company;
- (p) ensure that each of these steps and measures is clearly documented or recorded;
- (q) consider regular internal and/or external audits to ensure ongoing compliance; and
- (r) consider obtaining legal advice regarding any of the steps in this list.

Romance in the workplace: should employers get involved?

Joydeep Hor and Louise Keats

With Australians working longer hours, it is not surprising that more and more people are finding love in the workplace. Although employers may wish to turn a blind eye to office romance, they should keep in mind the impact co-worker relationships might have on their business. Some research suggests that workplace relationships have the potential to have a positive impact on work performance, with love-struck employees having greater loyalty to their workplace, spending more time at the office and bringing more enthusiasm to their job. While this may be true in some cases, employers need to be aware of the potential pitfalls of workplace relationships and how to address these.

Sexual harassment

Although co-workers in a relationship are unlikely to bring a sexual harassment claim against one another, the risk of such claims is heightened if the relationship ends. Sexual harassment is unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated, where that reaction is reasonable in the circumstances. Sexual harassment covers a virtually endless range of conduct, including repeatedly asking a colleague out on a date, smutty jokes or comments, sexual gestures and sexually explicit conversation.

Under both Federal and State legislation, an employer may be held "vicariously" liable for conduct of its employees which amounts to sexual harassment. Even

where an employee is sexually harassed by a colleague outside the workplace, the employer may be found vicariously liable. The test under Federal legislation is whether the harassment is "in connection with" the employee's employment.

In order to avoid liability for conduct which amounts to sexual harassment, employers need to establish that they took "all reasonable steps" to prevent the conduct. What constitutes all reasonable steps is not defined by the legislation and will depend in part on the nature of the employer. What is reasonable for a large corporation may not be reasonable for a small business.

One step available to employers is to have a blanket "no dating" policy which applies to all staff members. However, there are problems with such policies for employers. Firstly, employees may view a no dating policy as an illegitimate intrusion into their private lives which may in turn affect staff morale. Secondly, employers will need to consider how they can enforce such a policy (and whether they want to). Where a policy simply discourages dating, enforcement will be particularly difficult. It is important that a no dating policy is enforced consistently and in a gender neutral way, otherwise employers may face a claim for discrimination. This problem arose in the US case of *Zentiska v Pooler Motel Ltd* (1988) where an employer enforced its anti-fraternisation policy in respect of a female worker by firing her, but not in respect of a male

director who married a co-worker. The Georgia Federal District Court found the employer liable for sex discrimination.

A less problematic way for employers to address the potential pitfall of sexual harassment is to have a sexual harassment policy and appropriate procedures for dealing with any complaints. Employers should implement the policy in practice and monitor its effectiveness. Employers should also provide training in relation to its sexual harassment policy so that employees properly understand where the line between a lawful workplace relationship and unlawful harassment is drawn.

Where an employer is aware that an employee has sexually harassed a co-worker outside the workplace, the Federal Court has held in *McManus v Scott-Charlton* (1996) that it is lawful for the employer to give directions to prevent the repetition of such harassment so long as the harassment:

- can reasonably be said to be a consequence of the parties' relationship as co-workers; and
- has had a substantial and adverse impact on the workplace and/or the employer's business.

In this case, an employee called his co-worker at home in breach of a written direction that he refrain from contacting her. Consequential disciplinary action was taken against him. The Federal Court rejected the employee's argument that the written direction was not lawful.

Hostile work environment

Another potential pitfall of workplace relationships is the hostility and tension which sometimes arises if the relationship turns sour. This can affect not only the two people involved, but also their colleagues who may find such hostility affects their own work. Once again, while this may be addressed through a no dating policy, the difficulties posed by such a policy will probably deter most employers. Instead, employers can deal with any workplace hostility by counselling the relevant employees and transferring one of them to another department or offices if necessary (although this should be done with the employee's consent or it may amount to a constructive dismissal). Employers should also make clear to employees the workplace behaviour expected of them. While workplace hostility is a real issue for employers, this will not always be a problem, with one Human Resources survey suggesting that 55% of workplace relationships end in marriage.



Favouritism

Relationships at work have the potential to introduce favouritism into the workplace. This is a particular concern where one employee is more senior than the other and has the ability to dictate his or her partner's working conditions. Favouritism is likely to upset other staff members who may feel that they are being sidelined or that their position is threatened. Rather than prohibit workplace dating, employers may respond to this problem by having policies in place which prevent nepotism (which will also guard against favouritism between family members at work) and/or restructuring the workplace (for example, by removing any decision-making responsibility a couple has over one another), so that there is no opportunity for favouritism to be exercised.

Diminished productivity

Any new relationship has the potential to be distracting, but this is undoubtedly a bigger problem where the new love interest shares the office. Emails and internal phone calls become more frequent, visits to one another's work areas become longer and lunch breaks are extended. Employers who do not wish to place a total ban on workplace relationships can respond to this threat to employee performance through the normal measures they use to regulate workplace productivity, such as monitoring performance indicators and key competency areas and conducting performance reviews. It may also be appropriate to have an informal discussion with the employees involved to remind them of the behaviour expected of them at work. On the other hand, some suggest that workplace romance can boost productivity. As author David Eyler has observed in his book *More Than Friends Less Than Lovers* (Tarcher 1991): "Work is fundamentally one of the sexiest things that people can do together and it is high time we started taking advantage of all the energy in some constructive way."

In many cases, workplace relationships will not give an employer any need for concern. However, in order to protect their business and other employees, employers should keep in mind the range of problems that can arise and how to minimise and respond to these. While a blanket no dating policy can be introduced, employers may find the other options outlined in this article easier to implement and less intrusive into their employees' private lives.

STOP PRESS: Independent Contractors Bill

On Wednesday, 3 May 2006 the Federal Government announced that its new *Independent Contractors Bill* would be introduced into the Federal Parliament later in May.

The Government has stated that the effect of the legislation will be to protect the rights of independent contractors to be truly independent, in particular to prevent state laws effectively forcing them to be "employees", not "independent contractors". Also the Bill will replace the existing federal unfair contracts legislation which is in the *Workplace Relations Act*, and make it more accessible by providing that remedies may be sought in the Federal Magistrates Court.

Further analysis will be provided once the Bill has been introduced but it may mean that workers and principals/employers may need to review their arrangements to assess whether there is any impact.

New OH&S laws proposed for New South Wales

Occupational Health and Safety Amendment Bill 2006

The Minister for Commerce, John Della Bosca, released the draft *Occupational Health and Safety Amendment Bill 2006* on Thursday 4 May 2006. This Bill when



enacted will amend the *Occupational Health and Safety Act 2000* ("the Act"). The majority of the proposed changes to the Act are expected to commence on assent of the legislation, with the remainder commencing on 1 October 2006.

A significant change to the Act is the introduction of a specific duty on employees to take reasonable care for their own health and safety at work. Currently the obligation is for employees to take reasonable care for the health and safety of "people who are at the employee's place of work".

In addition the proposed amendments recognise that all risk may be impossible to eliminate and now provides that risk to health and safety must be eliminated as far as "reasonably practicable". In determining what is "reasonably practicable" the following are to be considered:

- what a person knows, or ought reasonably to know, about:
 - the hazards giving rise to the risk concerned; and
 - ways of eliminating or reducing the risk;
- the likelihood of the risk eventuating;
- the degree of harm that would result if the risk eventuated;
- the availability and suitability of ways to eliminate or reduce the risk; and
- the cost of eliminating or reducing the risk.

Other significant amendments introduced by the Bill include:

- where agreement cannot be reached between employers and employees, either can ask for WorkCover to arrange for an inspector to determine the issue;
- employees can be reinstated where they have been unlawfully dismissed for making an OH&S complaint; being a member of an OH&S committee; being an OH&S representative; or exercising any function conferred on them under the consultation provisions of the Act;
- where currently, the liability of directors and managers is attributed to a "person concerned in the management of a corporation", this is to be narrowed and replaced by "officers" of corporations (based on the definition used in the *Commonwealth Corporations Act*). "Officers" will only be held liable where they have failed to "take reasonable care". The matters

that will be considered in determining "reasonable care" include (but not exclusive to): an officer's knowledge and ability to make or participate in decisions about the matter; and whether the contravention is attributable to the acts or omissions of any other person. Officers who are volunteers will be exempted;

- clothing outworkers will now be provided with the same protection as other employees who regularly work away from their employer's workplace, but will be limited to matters over which the employer has control;
- a role for WorkCover in advising employers on OH&S issues and makes provision for WorkCover to issue guidelines on OH&S legislation and its application;
- power to the NSW Industrial Relations Commission to resolve disputes about right of entry powers;
- extending the existing right of entry provisions allowing representatives to enter a site to investigate suspected breaches of the OH&S Act, to include the ability to enter to discuss OH&S issues with employees. However, in the case of discussions, a union representative must have given 24 hours written notice to the occupier of the workplace;
- voluntary enforceable undertakings will be available as an alternative to prosecution. The undertakings must contain a commitment to remedy the contravention or alleged contravention of the Act;
- an OH&S committee chair or OH&S representative who has undergone training approved by WorkCover, may issue "safety recommendation notices" similar to provisional improvement notices. An employer who disagrees with the notice can request its review by a WorkCover inspector;
- introduction of an offence for fraudulently obtaining any financial benefit relating to OH&S. Further, WorkCover NSW will be allowed to communicate information obtained under the Act to an officer or authority engaged in administering or executing Commonwealth, State or Territory OH&S laws; and
- the removal of the right of appeal against acquittals in OH&S prosecutions ensuring the "double jeopardy" principle applies – that is, no person can be tried twice for the same offence.

New OH&S laws proposed for Queensland

Workplace Health and Safety and Other Acts Amendment Bill 2006

Meanwhile in Queensland, on 19 April 2006 the Minister for Employment, Training and Industrial Relations, Tom Barton, released the draft *Workplace Health and Safety and Other Acts Amendment Bill 2006*.

The draft Bill contains amendments to the State's Workplace Health and Safety Act 1995 (Qld) ("WHS Act") which will strengthen the right of union representatives (to be known as "authorised representatives") to enter a workplace or relevant workplace area to investigate suspected breaches of the WHS Act.

Authorised representatives will need to be appointed by the Industrial Registrar of the Queensland Industrial Relations Commission, but once appointed will have wide ranging powers to:

- enter a workplace or relevant workplace area;
- inspect any plant, substance or thing;
- observe work being carried on;

- speak to workers, the occupier and others;
- require production for inspection of documents, including employment records; and
- require a person to give the authorised representative reasonable assistance.

In relation to the Bill, the Minister made the following comment:

"The involvement of employee organisations in occupational health and safety matters at workplaces can result in beneficial safety outcomes. In Queensland, union representatives currently have right of entry under industrial relations legislation, which may include matters relevant to workplace health and safety. The new federal industrial relations laws override these laws but provide for union right of entry under state workplace health and safety laws. With the introduction of the federal legislation, clarity is needed about the powers that union representatives have to enter a workplace on workplace health and safety grounds."

The Bill also introduces into the *Workers Compensation and Rehabilitation Act 2003* (Qld) the Protection of Injured Employees provisions which are currently found in the *Industrial Relations Act 1999* (Qld).



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 one of the largest workplace law firms in Australia with offices in Sydney, Brisbane and Melbourne.

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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