

WORK InSights

Winter edition 2006

Editorial

In this edition of *Work InSights*, we bring you the first of a two-part look at mental illness in the workplace. With an estimated one in five Australians suffering mental health problems during their lifetime, it will be a rare employer that is not touched in some way by this issue. This first part looks at an employer's responsibility for the mental health of those that work for him or her. Next edition's article will focus on appropriate strategies to respond and preventative measures an employer can take.

As this edition goes to press, industrial relations continues to be a very live political issue, so it is timely that our other articles continue our "Work Choices" theme. One article deals with the factors that are relevant to a decision to use one of the Work Choices forms of agreement—very timely in light of the Federal Opposition's threat to abolish Australian Workplace Agreements if it gained power. We also look at Protected Action Ballots (necessary before there can be legitimate industrial action), and examine the "100 employees" rule which exempts some employers from some forms of unfair dismissal action.

We trust that you will find these articles both informative and practical.

Contents

- 1 Mental illness in the workplace—what you should know
- 5 Workplace Agreements—are they right for your workplace?
- 7 The 100-Employee Rule—who's in and who's out?
- 10 Industrial Action and Protected Action Ballots



Mental illness in the workplace —what you should know

David Stewart, Greg Robertson and Iona Goodwin

Executive summary

Employers who do not grapple with mental illness in the workplace now face significant exposure.

Employers that fail to heed warning signs of stress or depression, or treat employees with mental illness inappropriately, can face legal action for breach of contract and/or negligence, can breach anti-discrimination and occupational health and safety laws, increase their workers' compensation premiums, as well as suffer a loss of productivity caused by employee absences and low morale.

It is estimated that nearly 20 per cent of Australians are affected by mental illness.

A recent study (as reported in *The Age*, Sunday, 9 July 2006) reports that 6.7 per cent of employees at some of Australia's leading companies had symptoms of depression. Of those employees, about 66 per cent had not sought help.

The same study found that employees who did not seek treatment were less productive than those who did, costing employers an average of \$9,660 per employee per annum.

In this article, we examine definitions of mental illness and the extent of an employer's responsibility for the mental health of their employees, with reference to recent cases. In the second article (to be published in the Spring 2006 edition of *Work InSights*), we will look at strategies by which employers can deal most appropriately with these issues, taking a preventative approach and reducing their exposure.

What is a "mental illness"?

The National Mental Health Plan 2003–2008 (an initiative of the Federal and State Governments) states:

"mental health problems and mental illness refer to the range of cognitive, emotional and behavioural disorders that interfere with the lives and productivity of people...a mental illness is a clinically diagnosable disorder that significantly interferes with an individual's cognitive, emotional or social abilities..."

Like all illnesses, mental illness can range from the mild to the serious. Mental illnesses are often described according to classification systems. Common groupings include:

- **depression**, said to affect between 15 to 20 per cent of the Australian population at some time, this is perhaps the most readily recognised mental health issue in Australia. This group includes bipolar affective disorder, reactive depression,



post-natal depression and major depression (or unipolar affective disorder);

- **anxiety disorders**, including generalised anxiety disorder, paranoia, phobias, post-traumatic stress disorder, obsessive compulsive disorder and agoraphobia;
- **schizophrenia and psychosis**, both of which are serious illnesses. Schizophrenia is estimated to effect one in one hundred Australians; and
- **personality problems**, including behaviour disorders and personality disorders.

Work related mental illness

Due to the ramifications for employers, it is important to recognise the difference between a work related mental illness and a mental illness that occurs independently of work.

In essence, an employer must prevent the development or aggravation of mental illness due to work; ensure an employee's health, safety and welfare whilst at work; not discriminate against a person with a mental disability whether or not it is work related; and if it is work related there are additional obligations that flow from this, such as workers' compensation and protections against termination.

Employees who develop a mental illness as a result of their work may be able to access the relevant workers' compensation scheme in their State or Territory. For example, the work need only make a "material contribution" to the injury or illness to make it compensable: see the Federal *Safety, Rehabilitation and Compensation Act 1988*.

In New South Wales, it is a compensable injury if it is "arising out of or in the course of employment" (section 4 of the *New South Wales Workers Compensation Act 1987*).

In addition to this, there are legislative regimes that protect employees who have a workers' compensation injury from termination of employment: see, for example, Part 7 of Chapter 2 of the *Industrial Relations Act 1996* (NSW). A recent case in the New South Wales Industrial Relations Commission held that these protections for injured workers will continue to apply to workers in New South Wales, as they are not captured by the recent changes made to the *Federal Workplace Relations Act 1996* by the Work Choices reforms (see *Australasian Meat Industry Employees Union, Newcastle and Northern Branch (on behalf of B Fisher) v Inghams Enterprises Pty Ltd* [2006]).

These types of protections apply to a mental illness or injury as they would a broken arm that happens at work.

Some myths about mental illness

There are a number of myths about mental illness that could have adverse consequences for an employer who acted upon them. These myths are:

- Mental illness is the same as an intellectual disability or brain damage.
- The mentally ill are always violent and dangerous.
- People who develop a mental illness never recover.
- The mentally ill cannot tolerate stress as well as other employees.

In the workplace

The most common work related mental illnesses appear to involve stress, anxiety and depression related disorders. The cause of such an illness can be a single traumatic event or critical incident, but more commonly develop over longer periods.

Workplace stress, overwork and exhaustion are all words that quickly become familiar to anyone dealing with or examining the issue of mental illness in the workplace.

"Stress" is a catch-all term used to describe the feelings an employee can have in response to pressures they face in the workplace, particularly when they are subjected to demands, expectations and workloads that are misaligned to their abilities, skills and coping mechanisms. If stress or overwork are allowed to continue for too long, it can lead to mental and physical ill health (see *Preventing and Managing Psychological Injuries in the Workplace (Managers' Guide)* Comcare, Australian Government, at page 2). This "stress" reaction is exacerbated when an employee feels he or she has little or no control over their work.

Fairness and organisational change

The exacerbation of workplace stress by feelings of powerlessness is reflected in academic commentary and research regarding employee reaction to organisational change.

This link is of particular interest to employers in the current economic climate and managing in global markets.

Research into organisational justice demonstrates that where workers perceive themselves as being treated fairly, they "develop attitudes and behaviours required for successful changes—even under conditions of adversity and loss, but when organisational decisions are perceived as unfair, employees experience feelings of anger, outrage, and a desire for retribution" (Robert Folger and Daniel P Skarlicki, "Unfairness and resistance to change: hardship as mistreatment" (1999) 12 (1) *Journal of Organizational Change Management* at 35).

Unfairness is often more about the perception of a situation rather than the objective reality. In workplaces where change is occurring (and where isn't it these days?), if this change is not clearly communicated and smoothly implemented, employees may feel that something is being "done to them" by their employer (Folger and Skarlicki, (1999) 12 (1) *Journal of Organizational Change Management* at 36). They will probably feel powerless, as well as feeling they are being treated unfairly. This can lead to resistance to change, which is quite simply not good for the business, as well as increasing the stress and anxiety levels in your employees.

Legal overview

The intersection of the laws regulating the employment relationship presents a complex framework for employers in relation to mental illness in the workplace. Much, if not all the law in this area revolves around employer duties and obligations.

The Employment Contract

At common law, an employer has an obligation, implied as a term into every employment contract, to take reasonable care for the health and safety of the employee and to provide a safe system of work. Failure to take reasonable care for the health and safety of an employee can give rise to an action for breach of contract and liability for damages. It is also becoming more widely accepted that the employment contract contains a term that obliges the employer not to undermine the trust and confidence that the employee places in the employment relationship.

If an employer is found to have breached its contractual duty of care, or the term of trust and confidence, that employer may be liable in damages to the employee, for economic loss and the injury suffered as a result of the breach, including a psychiatric injury. However, the case below does set some boundaries on the extent of the employer's liability.

Last year the High Court handed down an important decision dealing with psychiatric injury in the workplace in *Koehler v Cerebos*. This case is relevant in relation to breach of contract as well as negligence.

Ms Koehler, a merchandising representative, notified her employer that the work she was expected to do was too much for one person in the time she was expected to do it. She repeatedly told her managers that the situation had to be changed and that she should be given more time in which to carry out her work.

Five months after starting work Ms Koehler became ill with what was eventually diagnosed as a psychiatric illness, caused by overwork.

The High Court rejected Ms Koehler's appeal, finding that a reasonable person in the position of the employer would not have foreseen the risk of psychiatric injury, and that the employer was not negligent. Furthermore, Ms Koehler had contracted with her employer to perform the duties required of her, and her employer had no reason to suspect she was susceptible to psychiatric injury.

In turn, the decisions in *Naidu v Group 4 Securitas Pty Ltd (Naidu)* (decisions in 2005 and 2006, discussed below) as well as occupational health and safety laws which contain strict liability provisions, suggest that a prudent employer will still take steps to guard against claims for mental illness or injury due to excessive work.

As well as protections for injured employees, it is also unlawful to terminate a person's employment on the basis of a temporary absence from work due to illness or injury or because of a mental disability (see section 659(2)(a) and (f) of the *Workplace Relations Act 1996*).

The recent case of *Nikolich* (23 June 2006) provides some further guidance.

On 23 June this year, Justice Wilcox, in the Federal Court handed down his decision in *Nikolich v Goldman Sachs J B Were Services Pty Ltd*.

Mr Nikolich, an investment advisor with Goldman Sachs J B Were Services Pty Ltd was found to have developed a severe depressive illness as a result of the hostile conduct of colleagues and his employer over a period of some six months. Mr Nikolich's employment was terminated, and he suffered considerable upheaval in his personal life.

Justice Wilcox found that in the circumstances of this case the employer's policies dealing with health and safety, harassment and grievance procedures were implied into the contract of employment, and that Mr Nikolich's employer had breached these policies (and therefore the terms of the contract) due to the manner in which it had treated him.

This is a significant case, as his Honour found that the facts presented an exception to the usual rule that courts should not award damages for any distress caused to an employee in the case of a breach of contract, and awarded \$80,000 in general damages; as well as \$305,869 for loss of past earnings and \$130,00 for loss of future earnings. It should be noted that an appeal against this decision has been lodged (but not determined) at the time of writing.

Discrimination

The Federal *Disability Discrimination Act 1992* includes mental disorder in the definition of a "disability" for the purposes of the Act. Relevantly, a mental disorder is defined as:

"a disorder, illness or disease that effects a persons thought process, perception of reality, emotions or judgement or that results in disturbed behaviour."

Similar definitions are contained in State anti-discrimination legislation, such as the *New South Wales Anti-Discrimination Act 1977*.

An employer discriminates against an employee on the ground of disability if, on the ground of the employee's disability or the disability of a relative or associate of the aggrieved employee, the employer:

- (a) treats the employee less favourably than in the same circumstances, or in circumstances which are not materially different, the employer treats or would treat an employee who does not have that disability or who does not have such a relative or associate who has that disability (**direct discrimination**), or
- (b) requires the employee to comply with a requirement or condition with which a substantially higher proportion of employees who do not have that disability, or who do not have such a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the employee does not or is not able to comply (**indirect discrimination**). (See section 49B *Anti-Discrimination Act 1977* (NSW)).

In *Wiggins v Department of Defence – Navy* (2006), Ms Wiggins had been employed in the Royal Australian Navy. As a result of discriminatory treatment at the hands of a senior officer, Ms Higgins developed a disability in the form of anxiety and depression, necessitating leave from work to attend medical appointments, as well as leave to recuperate. Ms Wiggins claimed she was subjected to adverse comments regarding her sick leave and was removed from her post without consultation. Federal Magistrate McInnis held that as a result of Ms Wiggins' disability she was subjected to discrimination in the form of the adverse comments and removal from her post, and that she was entitled to damages (to be assessed at a later date).

Occupational Health and Safety

Occupational health and safety laws in each Australian jurisdiction are cast in similar terms. Essentially, an employer has a strict duty to ensure the health, safety and welfare of employees while at work. While traditionally the statutory duty has focused on the physical health, safety and welfare of employees, the duty also extends to ensuring that risks to mental health, safety and welfare, such as stress, bullying, and excessive workloads are addressed.

Accordingly, there is a positive obligation on employers to protect the employee from harm, or potential harm, to their mental health as a result of the nature of, and processes and systems related to, their work.

There are significant fines for breach of occupational health and safety laws, and individual directors and managers may also be fined and in extreme cases potentially gaoled for breach of these laws.

In *WorkCover Authority (NSW) (Inspector Maddaford) v Coleman* (2004), the two directors of the company that employed a 16-year-old employee who was injured at work were personally fined \$9,000 and \$12,000 respectively, and the company was fined \$24,000. The employee had been subjected to a brutal "initiation" ordeal in which a group of his fellow employees set upon him, wrapped him in plastic wrap, secured him to a trolley with more plastic wrap, squirted wood glue into his mouth, and threw sawdust on him, after which a fire hose was used to wash the glue and sawdust out of his mouth. The Full Bench of the New South Wales Industrial Relations Commission commented that "it is imperative that the jurisprudence of this court is unambiguous in its condemnation of issues of violence and bullying in the workplace."

Workers' Compensation legislation

As mentioned, a work related psychological injury or illness is a compensable injury under workers' compensation legislation. However, in NSW compensation is not payable for a psychological injury, if the injury was caused by "reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers" (section 11A, *Workers Compensation Act 1987*).

Claims for psychological injury do not make up a large proportion of the total number of workers' compensation claims, but their cost is the highest of any claim type—they can be four times greater than the cost of other types of claims (*Preventing and Managing Psychological Injuries in the Workplace (Managers' Guide)*, at 3).

Negligence

Failure to take reasonable care for the health and safety of an employee can give rise to legal action based on the negligence of the employer. The employer's duty of care extends to the mental health and safety of employees, including an injury that occurs as a result of conduct in the workplace.

In *Naidu*, Justice Adams, in the Supreme Court of New South Wales found that Mr Naidu had been subjected to a regime of grossly improper conduct, resulting in Mr Naidu developing a mental illness.

Mr Naidu had been employed by Group 4 Securitas Pty Ltd ("Group 4"), from whom Nationwide News Ltd ("News") contracted security services at its premises. He worked mainly under the direction of Mr Chaloner who was the News Security and Fire Manager. For over four years, Mr Chaloner subjected Mr Naidu to appalling conduct including daily verbal racial abuse and profanities, threats regarding job security, insults to Mr Naidu's wife, requiring him to ask permission to go to the toilet and demands that Mr Naidu assist in manual labour at Mr Chaloner's home, under threat of losing his job.

Justice Adams found that it did not require medical expertise, but rather it was "a matter of common sense and human experience" that Mr Chaloner's behaviour could have created a risk of psychological injury. Furthermore, foreseeability should be evaluated by reference to the effect that the impugned conduct would likely have on a person of "normal fortitude" unless a particular fragility is known to the employer. Justice Adams held that Mr Chaloner's conduct was so brutal, demeaning and unrelenting that it was reasonably foreseeable that if continued for a significant period of time it would be likely to cause significant, recognizable psychiatric injury.

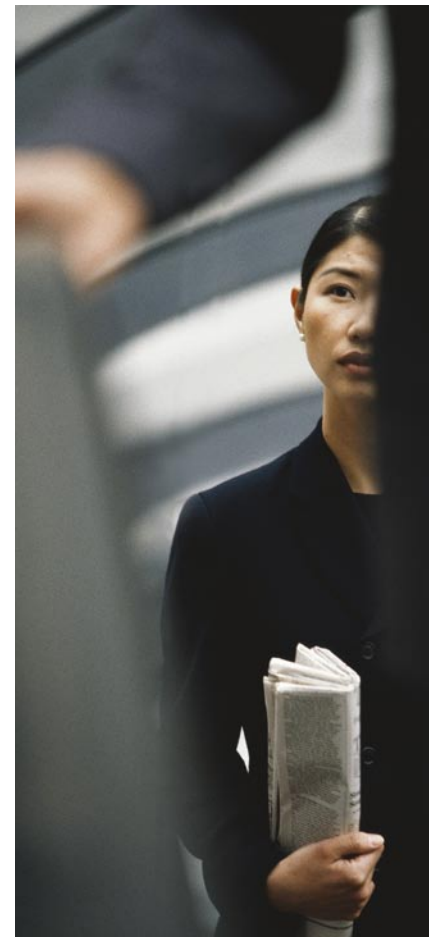
His Honour found that Group 4 and News were both liable in negligence, and Group 4 in contract, for the psychological injury Mr Naidu incurred at the hands of Mr Chaloner.

Ultimately, both Group 4 and News were found to be liable, and Mr Naidu was awarded \$1,946,189.40 in damages plus interest, and exemplary damages of \$150,000.

Conclusion

Mental illness affects a significant proportion of the Australian population. It is important that employers are cognisant of their obligations in relation to employees who may be struggling with mental illness or mental health problems. While the legal framework may appear complex, the simple message is that an employee with a mental illness should be treated appropriately taking into account the circumstances. Care should be taken to ensure that the employer complies with its duties and obligations arising in contract, negligence, discrimination law, occupational health and safety law, and workers' compensation. In essence, that the employee is treated fairly.

In our article in the next edition, we will be addressing the methods by which employers can prevent, as well as deal with mental illness in the workplace. We will also look at a number of cases to identify what could or should have been done to prevent the exposure of the employee.



Workplace Agreements—are they right for your workplace?

Shana Schreier-Joffe and Louise Keats

Every employer faces the issue of how to regulate the terms and conditions of employment of its staff. There are a number of options available to employers, including, for employers covered by the new post-Work Choices Federal system (the majority of Australian employers), entering into one of the types of workplace agreements contained in the Federal *Workplace Relations Act 1996*. In this article we look at the various options available to employers and consider whether workplace agreements are the best way forward.

Employment options

Every employment relationship is underpinned by a common law contract. This contract may be written, but need not be. It could also be verbal or implied by the parties' conduct or by law or a combination of all. Implied into every employment contract is a range of both employer and employee duties. These exist automatically—the parties do not need to agree to them first. One such duty is the duty of employees to comply with their employer's lawful and reasonable directions.

In addition to the common law employment contract, there is a range of different industrial instruments which may regulate an employee's terms and conditions of work.

Employees who fall within the jurisdiction of the Federal Act may currently be covered by any one of the following industrial instruments:

- a notional agreement preserving State awards ("NAPSA") (a transitional instrument which is derived from a State award and/or State industrial law which, prior to the commencement of the Work Choices reforms on 27 March 2006, covered employees who are now under the Federal Act);
- a preserved State agreement ("PSA") (another sort of transitional instrument which is derived from a State agreement);
- a pre-reform Federal award;
- a new Federal award (that is, a Federal award which came into existence after 27 March 2006);
- a pre-reform Federal certified agreement;
- a pre-reform Australian Workplace Agreement; or

- one of the new agreements provided for by the Federal Act (together known as "Workplace Agreements").

Some employees, particularly more senior employees, may not be covered by any of these industrial instruments, in which case their common law employment contract may be the only source of their working conditions, other than for certain statutory rights under either the Federal Act or surviving State legislation (such as long service leave legislation).

There is no doubt that one focus of the current Government is to encourage employers and employees to negotiate agreements to regulate their specific employment situation. There has been a significant scaling back of the impact and operation of Federal and pre-reform State awards, and a strengthening of agreements made between employers and employees.

Employers are now faced with the question of whether to ask their staff to enter into a Workplace Agreement. Where agreement can be reached, employers have the option of moving their employees to an individual or a collective agreement.

An agreement between an employer and an individual employee is known as an Australian Workplace Agreement ("AWA").

There are a number of different collective agreements. For employers who already employ employees, they can enter into the following collective agreements:

- employee collective agreements (between an employer and numerous employees);
- union collective agreements (between an employer and a union); and
- multiple-business agreements (either a union or employee collective agreement that relates to one or more single businesses or parts thereof carried on by one or more employers—these need the prior authorisation of the Employment Advocate to be made or varied).

For employers establishing a new business, the following two types of collective agreements are also available:

- employer greenfields "agreements" (the employer is the only party to this type of agreement); and
- union greenfields agreements (between an employer and a union).

The Act establishes a hierarchy of each of the different types of industrial instruments. In broad terms:

- AWAs prevail over all other types of instruments, including other collective agreements;
- collective agreements prevail over all other types of industrial instruments;
- next come PSAs, which prevail over any applicable Federal award; and
- finally, Federal awards prevail over NAPSA's, so that a NAPSA ceases to operate when the relevant employees become bound by a Federal award. Federal awards also prevail to the extent that a common law employment contract attempts to exclude their provisions.

Are Workplace Agreements the way to go?

Before deciding whether or not to enter into one or more Workplace Agreements with staff, employers need to understand the advantages and disadvantages of such a move. The main **advantages** to employers in entering into a Workplace Agreement are as follows:

- No other industrial instrument has effect in relation to an employee while he or she is covered by a Workplace Agreement, other than the common law employment contract. This means that employers can effectively exclude the operation of an otherwise applicable Federal award, PSA or NAPSA by entering into a Workplace Agreement with their employees.

This exclusion of industrial instruments which would otherwise apply means that employers drafting Workplace Agreements are free to choose whatever work terms and conditions they wish, so long as they comply with the minimum entitlements contained in the new Australian Fair Pay and Conditions Standard ("Standard") and do not include any "prohibited content" (as set out in the *Workplace Relations Regulations 2006*). Importantly, there is no longer a "no disadvantage" test. That test previously required that an AWA or certified agreement not be approved unless the agreement did not disadvantage the employee when compared with underlying award and legislative entitlements.

- Workplace Agreements offer employers a significant long-term bargaining advantage. When an employee enters into a Workplace Agreement, any NAPSA or PSA which would otherwise have covered that

employee permanently falls away. So too does a Federal award (including a pre-reform Federal award). Other than any “protected award conditions”—that is, a condition which relates to one of the matters specified in the Act, including rest breaks, incentive-based payments and bonuses, and annual leave loadings (and for employees not covered by a Federal award, there will be none)—the only safety net which remains for employees who have been party to a Workplace Agreement is the Standard. In this way, a Workplace Agreement “clears the decks” and, moving forward, it enables employers to negotiate their next agreement without any regard to previous State agreements and State awards and with regard to Federal awards only insofar as they contain protected award conditions. When presented with the choice of either a new Workplace Agreement or employment governed only by the Standard (and any applicable protected award conditions), many employees will find a new Workplace Agreement the more attractive option.

- Workplace Agreements allow employers who have workers in numerous States to overcome State differences in terms and conditions and create uniformity across their workforce. Where a variety of State instruments apply, these instruments can be avoided by entering into a Workplace Agreement, allowing employers to create national consistency across their employees’ conditions of work.
- Similarly, where employees are currently covered only by common law contracts, entering into a collective agreement may help to create consistency across the workforce and bring employees who are currently

under different contractual terms onto the same working conditions.

- For an employer with staff previously covered by State Awards, the exclusion of NAPSAs which would otherwise apply offers the advantage that employers do not need to consider or apply the “more generous” test. Under the Federal Act, if a NAPSA provides a “more generous” entitlement than the Standard in relation to annual leave, personal/carer’s leave or parental leave, then that entitlement prevails over the Standard. This can be a confusing process for employers and can result in inconsistent entitlements in their workplace. A new Agreement will resolve those issues.
- Under the pre-reform Federal workplace relations system, certified agreements and AWAs had a maximum nominal expiry date of three years. The Work Choices reforms have extended this maximum nominal expiry date to five years and where no nominal expiry date is included in a Workplace Agreement, the nominal expiry date will be taken to be five years. There is an exception to this for employer greenfields agreements which have a maximum nominal expiry date of one year. The five year nominal expiry date offers an important advantage to employers as it creates certainty and stability in their workplace during the life of the Workplace Agreement. This is of great benefit to those employers who have employees governed by NAPSAs which will cease to exist on 26 March 2009. It also offers immunity from industrial action, as the Act prohibits any employee or union bound by a Workplace Agreement from engaging in industrial action until the agreement’s nominal expiry date has passed.
- The five year maximum nominal expiry date gives employers some ability to circumvent, for a limited period, any changes arising from a change in Federal government. The Opposition has indicated it will abolish individual AWAs if it achieved government, but it seems unlikely that a Labor Government would overturn any collective agreements which are in force. Accordingly, employers using a collective agreement are likely to be able to avoid the disruption to their workplace which may otherwise result from a change in government.
- Entering into a Workplace Agreement with an appropriate provision means that employees can choose to cash

out annual leave in accordance with the Standard. Where a provision in an applicable Workplace Agreement entitles an employee to forego leave and receive pay in lieu, then half the employee’s leave can be cashed out every year. Importantly, employers are not obliged to cash out leave and employees cannot be forced to forego their annual leave.

- The Work Choices reforms have streamlined the process for entering into Workplace Agreements. Following the abolition of the “no disadvantage” test, employers simply need to follow some straightforward drafting and pre-lodgement rules, such as providing employees with an Information Statement at least seven days before the Workplace Agreement is approved, and then lodge the Workplace Agreement with the Office of the Employment Advocate (“OEA”). With the exceptions of multiple business agreements, which must be authorised by the OEA, there is no longer a requirement for the OEA to scrutinise Workplace Agreements prior to the agreements taking effect. Agreements simply come into operation on the day they are lodged. For employers who may have regarded the previous process as overly burdensome, the new agreement-making procedure removes a significant administrative barrier to employers contemplating Workplace Agreements.

The principal **disadvantages** to employers in entering into a Workplace Agreement are as follows:

- For some employees, otherwise not covered by any Federal or State industrial instrument, entry into a Workplace Agreement could give them rights to access unfair dismissal provisions which would not otherwise be available to them.
- Some employers are concerned that requesting employees to enter into a Workplace Agreement will adversely impact employee relations and invite union attention where there is currently none. Given the level of media interest surrounding Workplace Agreements at present and the continuing public debate over the Work Choices reforms, the fear of creating industrial angst in the workplace may well be justified. For those employers whose staff have taken or threatened to take industrial action over the reforms, this issue will be particularly pronounced. Employers contemplating entering into Workplace Agreements need to carefully consider





The 100-Employee Rule—who's in and who's out?

Greg Robertson and Bernard Ng

Introduction

Previous *Work InSights* editions have pointed out that the "Work Choices" amendments to the *Workplace Relations Act 1996* introduced a number of provisions that affect unfair dismissal claims for employees now covered by the new Federal industrial relations system. Perhaps the most well-known, but the most complex provision, is what is commonly referred to as the "100-Employee Rule". The 100-Employee Rule provides that employees may not bring an unfair dismissal claim if they are employed by an employer with 100 employees or fewer (in other words, less than 101 employees).

When the original form of the 100-Employee Rule was introduced to Parliament as part of the Work Choices Bill, there were concerns about the lack of safeguards that prevented employers from restructuring their businesses so that each employing entity had less than 101 employees. The effect of this sort of restructuring would be to preclude employees in each entity from bringing an unfair dismissal claim.

The amendments that were ultimately incorporated into the Federal Act introduced a new "related bodies corporate" qualifier that was intended to prevent business from restructuring themselves in order to escape unfair dismissal claims. As it now stands, when determining how many employees there are for the purposes of the 100-Employee Rule, employees in "related bodies corporate" must also be included.

The task of determining who's in and who's out when calculating the number of employees for the purposes of the 100-Employee Rule may not be very straightforward. This article is intended to highlight the important considerations and explain some key definitions to make the task just a little easier.

Does the 100-Employee Rule apply to all employers?

No, there are two limits on the application of the Rule.

The Rule applies only to those employers who are covered by the amended Federal legislation. It is estimated that 85% of all Australian businesses will be covered by the new provisions. Employers who will be covered include "trading" and "financial" corporations, the Federal Government

the best strategy for implementing such a move. Proper consultation with employees and sensitivity to employee concerns will be crucial to maintaining workplace harmony and morale.

- Not all employers wish to comply with the Standard, whether because it provides entitlements which are more generous than they currently give or because the new 38 hour maximum ordinary hours of work provisions cause problems in their workplace. Where those employers' staff are covered by a PSA, maintaining that PSA is advantageous because the Standard does not apply to an employee while he or she is covered by a PSA. Entering into a Workplace Agreement would erode this benefit.
- For employers with employees covered by a NAPSA, the hours of work component of the Standard does not apply while a NAPSA is in place. While for many employers this will be of little practical value, particularly because NAPSA's only exist for a maximum three year transitional period following reform commencement, for those employers whose employees work hours which significantly exceed 38 per week, this may be a short-term deterrent to entering into a Workplace Agreement.
- While the administrative burden is less than it was prior to Work Choices, entering into Workplace Agreements does require careful adherence to the requirements and for individual

agreements for a number of employees this can still be a significant burden. Unlike contracts of employment, which can be ongoing, Workplace Agreements will need to be regularly renewed.

- There remains some political risk with entry into at least some forms of Workplace Agreement. As noted above, the Opposition have indicated that their policy is to abolish AWAs. There is also some risk with legal challenges to the legislation currently unresolved. For some employers, the risk of disruption to the workplace by political or legal change will mean that until issues become clearer, it will be better to stick with current arrangements, even if the legislation puts a limit on the life of those arrangements.

One final point to note is that the Standard prevails over both a Workplace Agreement and a common law employment contract to the extent that the Standard provides a more favourable outcome. Therefore, employers cannot avoid the Standard by staying on their common law contracts instead of moving to Workplace Agreements—the Standard must be complied with either way.

Before entering into Workplace Agreements, employers should consider the particular features of their workplaces and current employee regulation in light of the advantages and disadvantages set out above.

and Federal authorities, a business which employs flight crew, maritime employees or waterside workers, and businesses in Victoria, the Australian Capital Territory and the Northern Territory. There will be some employers who will not be covered, for example, because they are not incorporated, or because they are not "trading" or "financial" corporations. An example would be a large partnership, which by its nature is not incorporated, or a charity which, whilst incorporated, does not engage in trade of any kind in pursuit of its funds. For these employers, the State systems will still apply, and there is no "100-Employee Rule" in State legislation, so that "unfair dismissal" claims can be brought in a State industrial tribunal even if there are less than 100 employees.

It is also important to note that the 100-Employee Rule also only applies to "unfair" dismissal claims, that is, claims based on the dismissal being "harsh, unjust or unreasonable". It does not apply to claims that are based on "unlawful" dismissal, that is, claims based on such prohibited grounds as discrimination on such grounds as race, colour, sex, age or disability; trade union membership or non membership; temporary absence because of illness or injury; or taking of maternity leave. On those grounds, an employee can lodge a claim even if the employer is covered by the federal system and has less than 101 employees.

When is the headcount taken?

If the employee was terminated with notice, the headcount is taken at the time when the employer gave the employee his or her notice of termination.

If the employee was terminated without notice (for example, if an employee was summarily dismissed for serious misconduct), the headcount is taken at the time when the employee was dismissed (see section 643(12)(a) of the *Workplace Relations Act 1996*).

Which types of employees are included in the headcount?

You should include:

- (a) full-time employees;
- (b) part-time employees;
- (c) "regular casuals" (that is, casual employees that have been engaged for at least 12 months on a regular and systematic basis); and
- (d) the employee(s) that have been dismissed.

(See sections 643(10) and 636 of the *Workplace Relations Act 1996* (the latter for definition of "employee").

Each part-time and casual employee should be counted as one employee, regardless of how many hours that employee works

Now I have counted all the employees in my company, what about the "related bodies corporate" extension?

The concept of "related bodies corporate" is defined in the *Corporations Act 2001* (Cth). Employees that are employed by a "related body corporate" to your company must also be included in the headcount for the purposes of the 100-Employee Rule. The types of employees from a "related body corporate" that will need to be included in the headcount are the same as the types for your own company.

One body corporate is "related" to another if one of three conditions is met (see section 50 of the *Corporations Act*) (for convenience, we will refer to the companies as "company A", "company B" and "company C"):

- (a) company A is a holding company of company B;
- (b) company A is a subsidiary of company B; or
- (c) company A and company B are both subsidiaries of the same holding company C.

The definition of "holding company" in the *Corporations Act* means that whenever there is a subsidiary company, there will also be a corresponding holding company.

These diagrams below may provide a helpful illustration of these relationships:

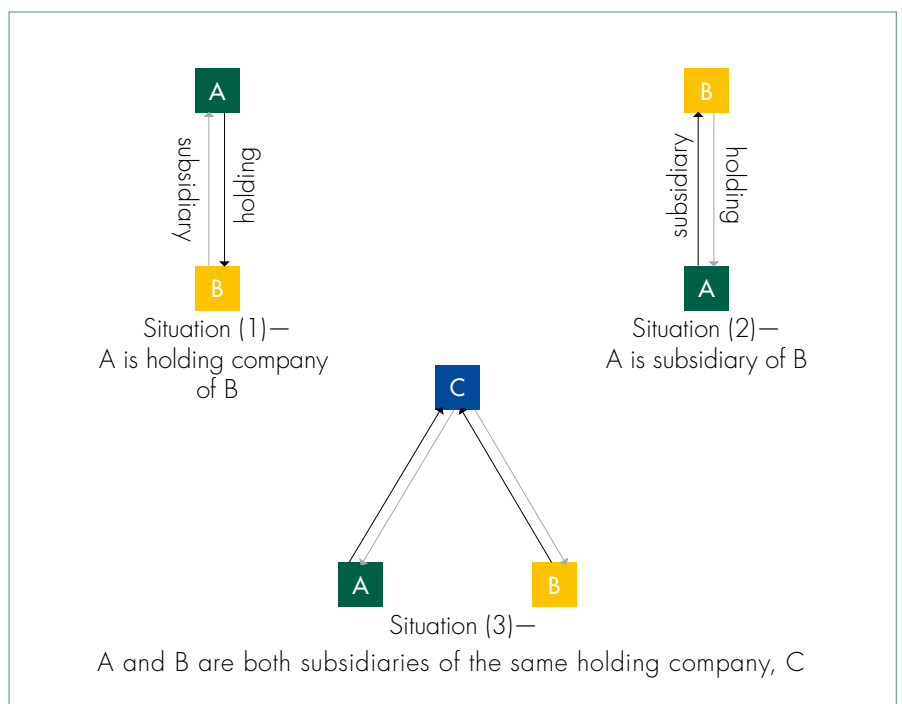
In each of Situations (1) and (2), companies A and B are "related" and in Situation (3), companies A, B and C are "related".

In determining whether company A is a subsidiary of company B (or in other words, whether company B is a holding company of company A), there are a number of relevant factors set out by the *Corporations Act*. According to the *Corporations Act* (section 46), company A will be a subsidiary of company B only if at least one of these conditions is satisfied:

- (a) company B "controls" the composition of company A's board; or
- (b) company B is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of company A; or
- (c) company B holds more than half of the issued share capital of company A (excluding any share capital that does not give company B the right to participate into the management of A's business affairs); or
- (d) company A is a subsidiary of a subsidiary of company B.

In general, under the *Corporations Act* (sections 47 and 48), company B "controls" the composition of company A's board if company B has the power to appoint all, or a majority, of the board of directors of company A.

In general, company B will be taken to have the power to "control" if appointments of persons to the Board of company A





cannot proceed without the consent of company B, or if board membership in company A flows automatically from the person's position in company B.

In rare cases, bodies other than incorporated bodies will need to be included. According to the provisions in the *Corporations Act* (section 9), a body corporate includes one that is being wound up or has been dissolved and an "unincorporated registrable body". The definition of "registrable body" includes "an unincorporated body" that under the law of its place of incorporation may sue or be sued, or may hold property, in the name of its secretary or other officer.

One recent case, *Baldacchino and Ors v Triangle Cables (Aust) Pty Ltd* (Australian Industrial Relations Commission, *Smith C*, 24 May 2006, "Triangle Cables"), has made it clear that the definition of "related bodies corporate" is not limited to companies that are incorporated in Australia. As such, you will also need to consider whether your company is a subsidiary or a holding company of an overseas "body corporate".

The decision provides a good example of some of the issues your company may need to consider in determining the headcount for the purposes of the 100-Employee Rule.

Triangle Cables—A Case Note

Triangle Cables ("Triangle Australia") dismissed a number of employees after the commencement of Work Choices. Those employees claimed that their dismissals were "harsh, unjust, or unreasonable". In addition, the employees claimed their termination was unlawful (that is, for a "prohibited reason", in this case, their trade union membership).

Triangle Australia was able to successfully establish before the Commission that it only employed 97 employees at the time the dismissals took place, therefore, the 100-Employee Rule applied and the unfair dismissal applications were struck out. It is important to note, however, the 100-Employee Rule only applies to unfair dismissal applications—the unlawful termination applications that the employees lodged were still on foot.

Triangle submitted that:

- the company itself employed 88 employees that were included in the headcount for the 100-Employee Rule; and
- there were 9 other employees that were included in the headcount from Triangle Cables (Singapore) Pty Ltd and Triangle Cables (New Zealand) Ltd, which were "related bodies corporate" of Triangle Australia.

That totalled 97 employees, which was below the 101 employee mark. Therefore, the dismissed employees were not able to bring an unfair dismissal application.

The Commission found that employees from these entities were not included in the headcount:

- employees in Triangle Cables (Thailand), because the Thailand operation was not a "related body corporate" to Triangle Australia—Triangle Australia did not exercise enough control to be a "holding company" of Triangle Thailand;
- Triangle Cables (Germany), Triangle Cables (USA), Triangle Cables (Italy) and Triangle Cables (Netherlands) were not incorporated entities (and hence cannot be "related bodies corporate");
- employees that worked at Triangle Australia that were employed by labour hire companies; and
- casual employees that have worked at Triangle Australia for less than 12 months, and hence were not "regular casuals".

Practical Steps

Here are some practical suggestions for you to consider if your company has close to 100 employees (bearing in mind you need to include in the headcount any employees that are employed by "related bodies corporate" to your company):

- ensure your company payroll system is up-to-date and comprehensively lists all employees;
- for records relating to casual employees, maintain information about how long the employee has been engaged for and how often is the employee engaged (this will be useful in determining whether a casual employee is a "regular casual" employee);
- on the day you decide to inform an employee that his or her employment is terminated, perform a headcount and document the results;
- do a companies search through the Australian Securities and Investment Commission or make inquiries to better understand the structure of the group of companies of which your company is part; and
- maintain regular contact with the management/human resources personnel in "related bodies corporate" to your company so you can determine the total headcount quickly and efficiently.

Industrial action and protected action ballots

Stephen Boatswain and Jenny King

In the Summer edition of *Work InSights* we provided you with a snapshot of how the Federal Government's workplace relations amendments (the "Work Choices" amendments), would affect industrial action.

One of the fundamental changes introduced by Work Choices is the requirement for employees to conduct a "Protected Action Ballot" before taking protected industrial action. An understanding of what is involved in a Protected Action Ballot and what is required in respect of these ballots may be important to employers, particularly if an existing agreement is approaching the end of its nominal term.

This article sets out the steps involved in a Protected Action Ballot, and includes a brief overview of some recent examples of ballots conducted under the Work Choices regime, and the implications for employers.

Industrial Action

If an employer, an employee, or a union want to make a collective agreement, they may initiate a bargaining period to do so. During that bargaining period, the parties may organise or engage in industrial action to support or advance the claims in the proposed collective agreement. This is known as taking "protected action".

While the concepts of "bargaining periods" and "protected action" existed prior to Work Choices, Work Choices introduces a number of changes to the rules governing industrial action. The most fundamental change is that employees or unions will not be permitted to take "protected action" unless the action has been authorised in advance by a Protected Action Ballot.

Protected Action Ballots – a step-by-step approach

The starting point for conducting a Protected Action Ballot involves an employee or a union applying to the Australian Industrial Relations Commission for an order for a Protected Action Ballot. This involves the following steps:

- Step 1:** File an application at the Commission during a bargaining period for an order for a Protected Action Ballot to be held. The application must contain specified content and materials required by the Act.
- Step 2:** Within 24 hours of lodgement, the applicant must give a copy of

the application to the other party and to the person nominated in the application to conduct the ballot.

Work Choices requires the Commission to "act quickly" and to determine an application for a Protected Action Ballot "within 2 working days" if reasonably possible.

- Step 3:** The Commission may notify the parties of a formal procedure for dealing with the application.
- Step 4:** The employer, the union, the employees, and the person nominated to conduct the ballot, may make submissions to the Commission, and apply for directions from the Commission, in relation to the application for a Protected Action Ballot.
- Step 5:** The Commission may make orders or give directions in relation to the application. In doing so, it is mandatory for the Commission to have regard to the desirability of ballot results being available within 10 days of the ballot order.
- Step 6:** It is mandatory for the Commission to order the applicant to hold a Protected Action Ballot if:
- (a) the applicant genuinely tried to reach agreement with the employer during the bargaining period; and
 - (b) the applicant is genuinely trying to reach agreement with the employer; and
 - (c) the applicant is not engaged in pattern bargaining.

However, it is also mandatory for the Commission not to order a Protected Action Ballot if the conditions in (a)–(c) above are not satisfied.

In addition, the Commission has a discretion to refuse an application if it would be inconsistent with the object of the Protected Action Ballot Division of the Act, or if the applicant has contravened the Division.

- Step 7:** If the Commission orders a Protected Action Ballot, then as soon as practicable the Commission must provide the

parties (and the ballot agent) with a copy of the ballot order made.

- Step 8:** If an order for a Protected Action Ballot has been made, there are limited circumstances in which the order can be challenged. For example, an order for a Protected Action Ballot can be set aside if it can be shown that during the proceedings a person contravened the Protected Action Ballot Division of the Act (unless it was merely a technical breach), or if a person misled the Commission.

However, once the Commission has validly made an order for a Protected Action Ballot, the ballot itself can be conducted. The first step in conducting a Protected Action Ballot is to compile a roll of voters.

- Step 9:** A roll of voters is to be compiled by the Commission, or by the person authorised in the order to conduct the ballot. The following people can vote in a Protected Action Ballot:

- (a) employees who were employed by the employer on the day of the Commission's ballot order, whose employment will be subject to the proposed collective agreement;
- (b) if the union made the application, the employees must also be members of the union on the date of the Commission's ballot order;

but, people employed under an Australian Workplace Agreement (an "AWA") whose nominal expiry date has not passed can not vote.

- Step 10:** Once the roll of voters is complete, the Protected Action Ballot can be conducted. Work Choices requires a Protected Action Ballot to be conducted by way of postal ballot, unless otherwise specified in the ballot order. This means that other forms of ballots, including attendance ballots, are possible.

The ballot agent specified in the Commission's order must conduct the ballot. The Australian Electoral Commission is the default ballot agent under Work Choices, unless the Commission

is satisfied that another person can properly conduct the ballot.

The Work Choices Regulations include a great amount of detail about the conduct of ballots, including rules about preparation of ballot papers, voting rules, and scrutineering.

Industrial action will be authorised by a Protected Action Ballot if:

- (a) at least 50% of people on the roll of voters voted in the ballot; and
- (b) more than 50% of valid votes approved the action; and
- (c) the industrial action actually commences during the 30-day period after the declaration of the results of the ballot (however this period can be extended by 30 days by mutual agreement).

As soon as practicable after a Protected Action Ballot closes, the ballot agent must declare the results in writing and notify the parties and the Industrial Registrar of the Commission of the result.

Step 11: Even after a Protected Action Ballot has been conducted, a party can challenge both the conduct of a ballot, and the ballot declaration. This can occur if during proceedings a person contravened the Protected Action Ballot Division of the Act (unless it was merely a technical breach), or if a person acted fraudulently, or if a person acted in a way to cause an irregularity in the ballot.

Step 12: If a Protected Action Ballot is successful and validly authorises the taking of industrial action, the employee or union must give written notice of their intention to take industrial action. In most cases 3 days written notice will be required.

Step 13: Once the notice period has passed, the employee or union can take the protected industrial action.

Step 14: Under Work Choices the general rule is that the applicant for a ballot order must pay for the cost of holding a Protected Action Ballot. However, there is a mechanism under Work Choices by which either the Commonwealth or the Australian

Electoral Commission can contribute 80% of the reasonable cost of a ballot.

Implications for Employers

It is apparent from the above analysis that the majority of the steps involved in a Protected Action Ballot must be taken by employees or by their union, not by employers.

However, the Protected Action Ballot process has a number of implications for employers, including:

- Employers will need to regularly review the accuracy of employee records, including records relating to employee names and addresses, and records relating to employees covered by an AWA.

This is necessary to ensure that a roll of voters can accurately be compiled for the purpose of a postal ballot. In April 2006 the Australian Nursing Federation sought an order for a Protected Action Ballot from the Commission, and Vice President Lawler issued preliminary directions to the employer (even before the order had been made) to commence preparation of lists of employees for the purpose of the roll.

Similarly, in May 2006 Vice President Lawler ordered the Department of Education and Training in the ACT to provide a list of employee details in a "Microsoft compatible spreadsheet", including details of each employee's surname, given name, address, date of birth, and AWA expiry date.

The need for diligent maintenance of accurate employee records will be particularly relevant for employers engaged in industries that involve multiple worksites such as construction, or with a transient workforce.

- Employers should be aware that it is possible for a Protected Action Ballot to be conducted by way of an attendance ballot, and it is not strictly necessary to conduct a ballot by way of a postal ballot.

In May 2006 the CFMEU obtained an order for an attendance ballot for employees of United Collieries Pty Ltd. This order was made in the context of the coal industry, which is an industry with a strong history of high attendance at workplace votes. The Commission has since ordered that an attendance ballot be conducted in other industries. For employers with a similar history, or for employers who have strong unions on site, it is possible that unions may utilise attendance ballots to overcome the time and cost that can be involved in a postal ballot.



- Employers should be aware that the Commission can order that they post notices on employee notice boards, notifying employees of the existence of an application for a Protected Action Ballot, and notifying employees that they are entitled to make submissions to the Commission in relation to the application.

As an example, in June 2006 Senior Deputy President Harrison ordered Hanson Construction Materials Pty Ltd to place a formal notice on its employee notice board stating that the employees could contact the Senior Deputy President to arrange attendance times at the Commission if they wished to make submissions.

- It would be worthwhile to check the status of any workplace agreements that they might be party to in order to assess whether they may be faced with a bargaining period in the near future. If such an audit revealed that an agreement is approaching the end of its term, an employer could initiate some measures to negotiate a new agreement while the existing agreement remains in term and therefore avoiding the prospect of protected action.

Accordingly, it would be prudent for employers to ensure that accurate employee records are maintained in a format that can provide a list of employee details promptly if required. It would also be prudent for employers to keep aware of developments in this area if they are party to any agreements, and wherever possible take proactive measures to head off the prospect of protected action from occurring by reaching agreement with employees before existing agreements pass their nominal term.

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 experience and expertise was recently recognised when we won **Employment Specialist Law Firm of the Year** in the *ALB Australasian Law Awards 2006*.

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.

Michael Harmer

Chairman & Senior Team Leader
michael.harmer@harmers.com.au

Joydeep Hor

Managing Partner & Team Leader
joydeep.hor@harmers.com.au

Stephen Boatswain

Partner & Team Leader
stephen.boatswain@harmers.com.au

Rowan McKenzie

Partner & Team Leader
rowan.mckenzie@harmers.com.au

Chris Molnar

Partner & Team Leader
chris.molnar@harmers.com.au

Emma Pritchard

Partner & Team Leader
emma.pritchard@harmers.com.au

Jamie Robinson

Partner & Team Leader
jamie.robinson@harmers.com.au

Shana Schreier-Joffe

Partner & Team Leader
shana.schreier-joffe@harmers.com.au

David Stewart

Partner & Team Leader
david.stewart@harmers.com.au

James Yeatman

Partner & Team Leader
james.yeatman@harmers.com.au

Sandra Marks

General Counsel
sandra.marks@harmers.com.au

Greg Robertson

General Counsel & Team Leader
greg.robertson@harmers.com.au

Margaret Diamond

Senior Associate & Team Leader
margaret.diamond@harmers.com.au

Bronwyn Maynard

Senior Associate & Team Leader
bronwyn.maynard@harmers.com.au

HARMERS

Workplace Lawyers

SYDNEY

Level 28 St Martins Tower
31 Market Street
Sydney NSW 2000
tel: (02) 9267 4322
fax: (02) 9264 4295
sydney@harmers.com.au

MELBOURNE

Level 2
417 Collins Street
Melbourne VIC 3000
tel: (03) 9612 2300
fax: (03) 9612 2301
melbourne@harmers.com.au

BRISBANE

Suite 16 Level 10
320 Adelaide Street
Brisbane QLD 4000
tel: (07) 3016 8000
fax: (07) 3016 8001
brisbane@harmers.com.au

www.harmers.com.au

© Copyright Harmers Workplace Lawyers 2006. All rights reserved. No part of this publication may be reproduced, in whole or in part, by any means whatsoever, without the prior written consent of Harmers Workplace Lawyers.

Disclaimer: This newsletter provides a summary only of the subject matter covered without the assumption of a duty of care by the firm. No person should rely on the contents as a substitute for legal or other professional advice.

Maclimages 33235