

WORK InSights

Spring/Summer edition 2006

Editorial

The last 12 months has seen an unprecedented level of activity in Australian workplace relations. The Federal Government's Work Choices legislation which has been in effect since March has already had a significant impact on many of your organisations, particularly around the new compliance regime for record-keeping and the impact on awards, agreements and other industrial instruments. Regardless of one's views of the merits of the legislation, I am sure that most employers are thankful that the constitutional challenge has settled the status of the legislation, at least for a few years.

Even aside from Work Choices, we have observed a strong level of activity in the mergers and acquisitions arena, some significant cases in the area of restraint of trade as well as record damages being awarded in bullying and harassment cases. All of these have contributed to a dynamic year in workplace law.

Of course, our primary focus and business charter remains simple: delivering high-quality legal and strategic advice on workplace matters to you as business partners. As we head into a new year, we look forward to building on our relationships with each of you and continuing to add value to your people management practices.

On behalf of the team at Harmers, I wish you a safe and festive holiday season and the very best in 2007.

Joydeep Hor
Managing Partner

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Communication strategies in the workplace

Shana Schreier-Joffe and Megan Cameron

Many employers underestimate the value of good communications when dealing with their employees, sometimes with negative and avoidable consequences. A well planned and considered communication strategy is a valuable tool for attracting and retaining a stable and happy workforce. A lack of communication leaves a vacuum for gossip, and possibly an opportunity for others to fill the void and put their views, not the employer's view, to the workforce.

Why is communication important?

Communication is an important aspect of human interaction and thus impacts on everything you do as an employer. Good communication with employees will assist in ensuring that employees are aware of the business' goals, strategies, values and culture. Open and honest communication is the building block for the sharing of ideas. Good communication can keep employees engaged with the business and motivated to perform their particular roles.

On the other hand, poor communication can have a disastrous effect on employee morale because it can lead to employees being disengaged from the goals and values of the business and can lead to loss of productivity and high employee turn-over. It is also often responsible for misunderstandings, poor performance and performance related issues.

A good communication strategy should be well thought out, and should relate specifically to the employer's particular needs. When developing a communication strategy, the following should be kept in mind:

- What communication tools do you already have in place?
- Why do you need a communication strategy?
- Is the communication strategy going to involve an element of consultation?
- What is the message you want to get out to your employees?
- Has the message been clearly understood?
- Are there competing entities (such as a union) also communicating with your employees?



Why do you need to communicate?

There are three basic reasons for an employer communicating with its workforce.

- **Because you have to:** the law will often impose a duty to communicate. A clear example is found in the duties to consult found in occupational health and safety law, for example, ensuring staff are aware of safety issues, or ensuring staff are consulted about safety issues. Industrial legislation also often contains duties to communicate. The *Workplace Relations Act 1996*, for example, obliges employers to tell employees about the Employment Advocate removing prohibited content from Workplace Agreements, and obliges an employer to advise unions of impending action to terminate employment on reasons of an economic, technological, structural or similar nature. Even when there is no statutory obligation, Australian industrial tribunals have long recognised consultation and communication as a key component in the “arbitral principles” by which they judge the fairness of workplace conduct. Some awards and agreements also contain obligations to communicate.
- **Because it is good for business:** as noted above, proper communication from the employer to the workforce is good for morale, and this impacts on profit. Similarly, an employer who has staff freely communicating issues will often become aware of potential problems, resulting in the employer being able to avoid costs by being forewarned. In workplaces where there are competing voices for

employee loyalty, communication from the employer will help the employer win the “hearts and minds” battle that sometimes rages in such places. Whatever the situation, though, regular communication from the employer will improve the sense of loyalty and trust that is needed to ensure the success of a business.

- **Because it is the right thing to do:** communication is at the heart of the human condition. Employers who respect the fact that employees are fellow humans will attempt to communicate as much as possible merely because it is a way of showing proper respect for dignity of fellow human beings.

What communication tools are already in place?

Before embarking on a new communication strategy, you should examine the communication tools which are already in place to determine whether those tools can be used in the communication strategy. For example, are there regular staff toolbox or team meetings? Do all employees have access to email, and is it effective in disseminating information in your workplace? Are there other tools available, such as voicemail or noticeboards? Can information be included with employees’ payslips?

Almost all workplaces will have access to some means of communication, including regular staff meetings, notice boards, e-mail and voicemail. Of course, not all of these means of communication are suitable for all kinds of messages. It would be inappropriate for sensitive individual matters to be discussed in a team meeting, or to be posted on a notice board. However, information which is to be made generally available, and which

is not necessarily sensitive information, may easily be disseminated by way of e-mail, noticeboard or team meeting. These forms of communication should be utilised for day to day operational matters.

An appropriate strategy

A communication strategy should be tailored for the kinds of information which is to be communicated.

If the information which is to be communicated is of a general or on-going nature, then the communication strategy might be integrated into the general activities of the business. For example, if employees are regularly provided with information on developments in the industry in which they work, an ongoing communication strategy might be devised which was interlinked with regular employee training or staff meetings.

If the purpose of the communication strategy is to deal with a particular project, then it may be worthwhile to develop a particular means of communication which is adapted to the project. For example, in conducting an annual performance review process, a communication strategy about the timeline, expectations on staff and obligations of managers, should be communicated very clearly.

Similarly, a significant organisational change such as a change in rostering system or a change in business ownership, should be undertaken with a particular communication strategy in mind. Employers should also consider whether there are any obligations in awards or other industrial instruments which require them to consult with employees or the union about particular matters. In that case, it would be appropriate to use a combination of staff meetings, regular update e-mails, individual interviews and a nominated contact person to answer employees’ questions when they arise.

Who does the communicating?

Communication to employees can come from a variety of sources including:

- Managers;
- Supervisors;
- HR; and/or
- Marketing.

It will depend on the message, but thought should be given to the starting point because if it comes from an inappropriate source then it can be potentially harmful.

For example, if you wish to deliver an important message to your employees about significant changes such as a proposed change management strategy, it is far more appropriate for that message to be delivered by your General Manager or CEO as opposed to an employee's supervisor. In these particular situations sensitivity from management is advised.

Is consultation involved?

Some communication strategies involve a flow of information in many directions—when employees are consulted about their views. This should happen during the decision making process, after the employees have been provided with information about the relevant issues.

If there is consultation, then thought needs to be given to how information is to be disseminated to employees, the time the employees will need to consider the information, and how employees are to express their views. This may be particularly relevant if employees are likely to seek the assistance of a union in the consultation process.

In this situation, employees should be given a clear idea of their role in the process. 'Ground rules' need to be established—consultation is not the same as exercising a veto, and it cannot be expected that agreement will be reached. However, the essence of consultation is that everyone who is concerned with a particular issue ought to be able to express their views in a fair and just manner.

Where there is to be consultation, then the communication strategy should incorporate a single person (or a small team) being responsible for dealing with and collating the responses received

during the consultation process.

Good consultation is a valuable tool for enabling employees to deal with organisational change. Employees may feel less threatened by organisational change if they are provided with adequate information prior to the change about what is happening, and why.

Certainly, employees who are involved in the change by being provided with the opportunity to discuss the changes and have input into the change will have more ownership of the process. In these circumstances it is less likely that employees will fight the proposed changes, and will be more likely to positively adopt the changes.

Think about the message

A complex communication strategy may take place over weeks or months or even years. Before launching into a complex communication strategy, it is wise to think about the message which is to be disseminated.

In any communication strategy, sending a consistent message is essential. If a clear, consistent and truthful message is sent to employees, then they are likely to engage with the communication strategy, and understand and take on board the content of the message. Conversely, employees are unlikely to accept the message being communicated if it is unclear, inconsistent or dishonest.

Honesty is essential to maintaining employees' trust; for example, it would be unwise to develop a communication strategy along a "business as usual" strategy if it is apparent to employees that fundamental changes were occurring in the business.



Check that the message has been understood

Particularly in relation to larger projects, it is worthwhile to check with employees after the communication strategy has ceased, to determine whether the correct message has been communicated. If employees have not properly understood the message, then a follow up strategy might be adopted, to deal with any misunderstandings which have arisen.

An important part of any follow-up strategy is maintaining an 'open door' policy. If employees' questions about the communicated message can be answered quickly, then the message will be more effective and accurate.

Communication strategies ought to be developed with the aim of the communication in mind. Each strategy will be different, depending on the message to be communicated and the needs of the organisation. However, the success of a communication strategy will be greatly enhanced by undertaking such a strategy in a considered way, and preparing for the dissemination of the message to the wider workplace.



Mental illness in the workplace – strategies for employers

David Stewart and Iona Goodwin

Executive summary

In our article in the Winter 2006 edition of *Work InSights*, we examined the risks employers face in the event that they fail to heed the warning signs of stress, depression and/or anxiety in the workplace.

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.

In this article, we look at strategies employers can use to prevent or deal with mental illness in the workplace and to protect both staff and their business. To assist in this, we review a number of cases and suggest what could or should have been done to prevent the exposure of the employer.

Causes

While the exact cause of mental illness is unknown, it is widely accepted that mental illnesses can be caused by biological, psychological or environmental factors or a combination of these factors (see "Causes of Mental Illness", The Cleveland Clinic 2000–2005).

Biological factors include an imbalance of certain chemicals in the brain, genetics, brain injury, and/or prenatal injury.

Psychological factors include severe emotional trauma suffered in childhood (such as abuse), a significant loss in childhood (such as the death of a parent), or neglect.

Environmental factors are referred to by mental health professionals as "stressors", and can trigger an illness in a person who is susceptible to mental illness. Stressors include changing jobs, death of a loved one, divorce, feelings of inadequacy, low self-esteem, anxiety, anger or loneliness.

Workplace stressors

The biological, psychological and some environmental factors noted above have their genesis outside the workplace,

however, specific workplace stressors that can cause or exacerbate mental illness have also been identified. These stressors can cause or contribute to disorders such as depression, anxiety and a variety of other psychological and psychiatric conditions ("Analysis of Mental Disorder Claims", WorkCover New South Wales Information Paper, 1997 at 1).

The causes of workplace related mental illness have been divided into two broad categories of stressors ("Analysis of Mental Disorder Claims", at 4):

1. "acute psychological trauma" due to events such as bank robberies, hold-ups or other violent events; and
2. pressure from work, deadlines and other stress related factors.

The most significant hazard to mental health in the workplace is stress (see "Preventing and Managing Psychological Injuries in the Workplace", Australian Government Comcare). Stress can be a health risk in its own right, and it can contribute to anxiety and depression. Workers' compensation claims founded on stress are increasing in most States every year, and some reports indicate that stress is the second largest cause of workplace injury and illness behind physical strains and sprains (N Caulfield, D Chang, M Pollard and C Elshaug, "A Review of Occupational Stress Interventions in Australia" (2004) 11(2) *International Journal of Stress Management* 149–166 at 149–150).

Causes of increase

A variety of explanations have been put forward to account for the increase in stress as the cause of workplace injury and illness, including:

- "overemployment" resulting from a general decrease in the size of the workforce without a decrease in the amount of work required to be done;
- physically monotonous and repetitive work;
- poor management styles;
- difficult interpersonal relationships;
- a decrease in the number of full-time jobs, and an increase in part-time, casual and contract based employment;
- career concerns—increasing job insecurity and instability due to downsizing; and
- rapid globalisation and technological change causing changes in the nature of work.

Prevention strategies

Preventative (or primary) approaches are aimed at ensuring that stress and the accompanying negative mental health impacts do not arise in the first place.

Recruitment

The recruitment process is the first place an employer can take action to prevent or minimise mental health problems in the workplace. Carefully consider the demands of the job on offer and the pressures and demands that an employee will be subjected to in that role. Some employers may like to consider medical and or psychological tests prior to hiring. Sophisticated psychological personality tests can provide some indication as to how a person is likely to handle rapid change, increasing workloads and/or monotonous repetitive work. Of course, as noted in our previous article, an employer must not breach anti-discrimination laws.

Organisational Change

Employers can take steps to prevent stress becoming a problem in the workplace by making changes to the workplace organisation itself. Employers should approach this as they would an occupational health and safety risk assessment. This risk assessment can be a formal assessment, conducted by an accredited specialist, or a less formal, internal review of the workplace and workforce. In this context, this assessment will involve examining, and where necessary, changing the structure and organisation of the workplace.

Job Design

A risk assessment or organisational review could also mean changing the content or type of the work employees are expected to carry out. Employers should consider job design reviews and re-designing jobs, as well as ensuring clear career paths exist for employees.

Health and Fitness

Physical exercise and good health are invaluable in dealing with stress ("Recognising and Managing Stress", Mental Health Association of New South Wales Information Service Fact Sheet, 2006). Accordingly, employers should consider examining the levels of fitness of their employees and taking steps to encourage an improved level of physical fitness in the workplace. This could include provision of gym memberships or encouraging staff to exercise during the day by making it clear that time away from work for these sorts of activities is acceptable. Employers may also consider encouraging employees to eat healthy food at work by removing sugary or high fat snack food and high sugar soft drink vending machines, and providing access to fresh fruit snacks instead.

Management

Stress can be reduced by ensuring that employees are using time and energy efficiently as feelings of lack of control or powerlessness have been linked to increased stress, anxiety and depression (see "Recognising and Managing Stress"). Improving an employee's own management of their work can improve an employee's feeling of control. Employers can take preventative action by helping employees improve time management skills (see N Caulfield, D Chang, M Pollard and C Elshaug at 152).

Clear Rules on Behaviour

Workplace bullying and interpersonal conflict at work has been identified as a significant cause of the development of mental health problems in the workplace (L Turney, "Mental Health and Workplace Bullying: the role of power, profession and 'on the job' training" (2003) 2(2) *Australian e-Journal for the Advancement of Mental Health* at 1). Employers should ensure that the message is clear in the workplace that bullying, harassment and/or intimidation of employees will not be tolerated. Have a clear policy that all staff is aware of and is regularly re-visited, and ensure that those employees who breach the policy are dealt with appropriately.

Early intervention

Early intervention (or secondary action) aims to change the way an individual reacts to, and deals with, stress once it has arisen. Many, if not all, of the preventative strategies above can be applied as intervention strategies.

As part of early intervention, an employer needs to be alert to signs of increasing stress, depression and/or anxiety from their employees. It is important for employers to talk to employees regularly and make sure they know how people feel about their jobs.

Some signs to look out for include (this list is not exhaustive):

- increasing numbers of unplanned absences;
- conflict in the workplace;
- increased use of staff support services; and
- greater use or abuse of drugs and/or alcohol.

At an organisational level, employers can reduce stress by improving communication and decision making. Poor communication by managers, particularly about workplace changes and decisions that will impact on the work and careers of employees is a significant cause of employee stress.

Employers can also prevent or reduce stress by encouraging employees to recognise when they are becoming stressed themselves, and helping them to learn



and develop ways of dealing with stress as and when it arises, such as relaxation techniques, and knowing who to contact if they need additional assistance.

Employers can also assist individuals by encouraging the development of peer support groups at work or by encouraging dialogue between colleagues about stress, depression and anxiety in the workplace. For some employees just the realisation that they are not the only ones who have suffered or are suffering can be a great weight off their shoulders and a step in the right direction.

If an employer perceives that an employee is becoming stressed, anxious or depressed about their work and/or career, consider providing coaching, counselling, career planning, professional development and/or skills training to that employee.

Many employers now provide access to a confidential employee assistance program, whereby employees can access counselling services by phone, at no cost to themselves (see, for example, what was said about the benefits of this in the English decision of *Sutherland v Hatton* [2002] that "an employer who does have a system along those lines [that is, an Employee Assistance Program] is unlikely to be found in breach of his duty of care towards his employees").

Supporting employees

Employees who have developed mental health problems as a result of their work often require more intensive support from their employer. For the employer, this can mean an increased investment of time and money.

In some cases, particularly for those employees who regularly deal with traumatic or violent experiences such as the aftermath of traffic accidents or the risk of physical assault in the course of their routine duties, employers should provide post-traumatic stress counselling and treatment programs, as well as perhaps group psychotherapy.

For individuals who may have developed more serious mental health problems as a result of their work, employers should provide structured rehabilitation after sick leave, disability management and individual psychotherapy.

For those employees whose illness means they no longer want to, or are able to, remain at that workplace, employers should consider the implementation of vocational rehabilitation and outplacement schemes.

What works best?

Research (see N Caulfield, D Chang, M Pollard and C Elshaug at 161) indicates that actions taken by employers that involve improving working conditions through job redesign, monitoring the mental health of employees and risk factors, and improving psychological health services results in positive outcomes, including a significant reduction in the number and cost of workers' compensation claims.

Studies of programs that have focused efforts on the individual employee have been found to have a positive impact on assisting employees in dealing with stress, but not necessarily on reducing stress in the workplace (N Caulfield, D Chang, M Pollard and C Elshaug, at 161).

It must be noted that there have been few thorough studies on the implementation and effectiveness of individual and/or organisational approaches to mental health issues in the workplace in Australia (N Caulfield, D Chang, M Pollard and C Elshaug, at 162).

Who can you talk to?

There are a variety of options for anyone who wants to talk to someone about mental health concerns they may have.

Employers and employees alike can contact (this list is not exhaustive):

- their local GP;
- a Local Community Health Centre (see "Community Health Centres" in the White Pages);



- the Australian Psychological Society for a referral to a psychologist;
- the Mental Health Information Service for services in your local area; and/or
- the Australian Counselling Association.

Legal approach

Ware v OAMPS Insurance Brokers (2005)

Mr Ware had developed Attention Deficit Disorder and a severe depressive illness—it was not proved that his workplace had caused Mr Ware’s mental illness. As a result of his illness, Mr Ware regularly abused alcohol during work hours, was periodically absent from work without notice (and without communicating with his employer regarding his absence), had poor interpersonal relationships with workmates, and seriously neglected his duties. He regularly came into the office drunk after lunch on Fridays, and on one occasion urinated in a waste paper basket due to the level of his intoxication.

Mr Ware’s employer was aware of his illness, and was aware that Mr Ware had been hospitalised as a result of his illness. His employer had attempted to accommodate him to some extent; for instance he was given regular time off to visit his psychiatrist. Following Mr Ware’s hospitalisation, his employer accepted his return to work on a restricted basis, having regard to his disability. His employer set strict criteria, in writing, by which his performance would be judged. Mr Ware continued to absent himself from work (due to his mental illness), which led to a decision to demote him (and reduce his salary accordingly), and then two months later to terminate his employment.

Mr Ware claimed that he had been discriminated against on the grounds of his disability. The Court found that the demotion and the termination had been discriminatory; that Mr Ware’s performance had not been judged against the strict criteria set for him, and that he had been terminated due to his absenteeism. Essentially, the Court held Mr Ware was dismissed due to absenteeism; not because he did not meet the criteria. The Court found that a person without

Mr Ware’s disability would not have been treated the same way in the same circumstances, and that Mr Ware had been dismissed because of his disability.

The employer in this case had decided to give its employee the chance to prove himself after a period of poor performance due to his illness, by reference to specified criteria and a restricted set of duties. Theoretically this would be a laudable approach for an employer to take; allowing the employee to ease back into work. However, Mr Ware was never given an opportunity to prove himself and was not tested against the criteria. In the end, Mr Ware was awarded \$10,000 in general damages and \$16,923 in special damages plus interest.

Mr Ware’s employers should have applied their own criteria to Mr Ware and assessed him against it fairly. Having set up a new regime for him, with restricted duties to accommodate his illness, they should have then afforded him the same chance a person without a mental illness would have been accorded.

New South Wales v Mannall (2005)

For 19 months Ms Mannall was subjected to victimisation, harassment, humiliation and verbal abuse in her workplace at the hands of her colleagues, as a result of which she developed depression and an anxiety disorder, and had to leave

work. She was not able to return due to her health.

During this time, her direct supervisor Mr Singh was aware of the treatment Ms Mannall was being subjected to, and took no decisive action to stop it; and on occasion contributed to it by his demeaning treatment of Ms Mannall in front of other staff members.

The trial judge and then the appeal judge both found that Ms Mannall’s worsening mental health state were obvious to her workmates and managers for a long time; she was seen crying at work, and she expressed her need for help on occasion. Mr Singh was found to have been negligent in relation to his duty to Ms Mannall; he was more concerned said the trial judge, with remaining on good terms with the rest of his workforce than on ensuring the health safety and well being of his employees. As a result of the treatment she received resulting in the ruination of her health and career, Ms Mannall was awarded \$339,722 (this was upheld on appeal).

Ms Mannall’s employer was aware of the problems she was experiencing and of her worsening state of mental health. There were numerous steps that could have been taken to support her and ameliorate the problems, but instead, her employer chose to do nothing and in many ways compounded her illness.

The future

Mental illness affects a significant proportion of the Australian population, and employers face significant legal liabilities if they fail to deal with mental illness. There is little doubt that dealing with these issues is often very difficult for employers. However, an aware and supportive workplace can go a long way to reduce stress and anxiety which can be the cause of much deeper problems. This is also good for business.



Transmission of business after Work Choices

Jamie Robinson and Margaret Diamond

As any employer knows, workplace relations can be a heavily regulated and complex field. Historically, the Australian system—awards, agreements, and arbitration by Federal and State commissions—has meant that basic principles of contract law are well and truly overshadowed by a century of legislation, regulation and court decisions.

A purchaser of a functioning business or part of a business who decides to retain the employees of that business will be particularly impacted, as the new owner will be faced with the imposition of a whole set of legal obligations that shape the employment relationship. While some obligations—such as long service leave requirements—are imposed by legislation, most obligations are attached to industrial instruments such as awards and collective agreements.

Because workers in a transferred business are generally carrying on with the same work as before, in the same place, parliaments (both State and Federal) have seen it as desirable for those workers to carry on with the same pay and conditions, and also not lose any protections or entitlements that had been accumulating during the period of their employment. Logically this entailed continuing the operation of the industrial instruments which provided for most of those protections. Yet the provisions of those instruments had been reached by a process of negotiation and arbitration in which the incoming employer did not participate.

This article looks at the impact that the Work Choices amendments to the *Workplace Relations Act* have on Federal industrial relations law regarding transfer of businesses. Four things in particular are noticeable:

1. The legislation continues to support the basic notion that, when an employer acquires a business which has existing employees, the industrial instruments which apply to those employees should stay with them, at least for some period of time.
2. There has been an attempt to set out a more detailed picture of where the parties stand after a transmission of business.
3. There is a new limitation on the period of time for which the instruments which have been carried across with transferring employees will continue to apply. During that time, Australian Workplace Agreements (AWAs) and certified agreements which have been carried across can be replaced by new ones but cannot be unilaterally terminated in the usual way.

4. Large areas of how the law will apply in particular fact situations remain outside of the legislation and are ascertainable only by reference to court judgments.

Summary of the position before Work Choices

Before Work Choices, awards and certified agreements were in essence automatically carried across to the person or company that acquired a business.

Section 149(1)(d) of the pre-Work Choices *Workplace Relations Act 1996* determined who would be bound by an award—awards were binding on “any successor, assignee or transferee (whether immediate or not) to or of the business or part of the business of an employer who was a party to the industrial dispute, including a corporation that has acquired or taken over the business or part of the business of the employer”.

The circumstances in which a successor employer would be bound by a certified agreement already in place at a business were dealt with by section 170MB(1) of the pre-Work Choices Act. That section provided that “the successor, transferee or assignee (whether immediate or not) of the whole or a part of the business” was bound by a certified agreement that bound the previous employer, and the previous employer correspondingly ceased to be bound.

Some flexibility in relation to the application of certified agreements to employers who acquired an existing business were introduced by amendments to the *Workplace Relations Act* in 2004, with section 170MBA empowering the Commission to make an order that the new employer would not be bound by the

certified agreement, or bound only to a specified extent or for a specified period. However, that power was restricted by the factors that the Commission was required to address in exercising it.

Thus, prior to Work Choices, an enterprise that acquired employees as part of a transfer of business was not only bound by the industrial instruments that had applied to those employees pre-transfer, but actually stayed bound for the life of the instrument. Although the new employer was able to seek an order releasing it from being bound by a certified agreement inherited from the former employer, the legislation limited the circumstances in which such a release could occur. Hence, although employees were protected from changes to their terms and conditions following a change in business ownership, an incoming employer was faced with much less flexibility.

The legislation did not spell out what constituted a succession, transmission or assignment of a business and a number of court cases resulted as parties sought to determine the limits of the terms and the concepts involved. As has so often been the case in Australian industrial relations law, comprehensive sets of legislation had to be supplemented by reference to a range of court decisions. As we will see, to a large extent this is still the case, because Work Choices has not attempted to define these terms.

How Work Choices deals with transmission of business

Perhaps the best way to demonstrate the changed approach under the Work Choices amendments to the *Workplace Relations Act* is to give a quick run through of the relevant segments of the amended legislation. Part 11 concerns transmission of business rules. It consists of ten divisions, the first two of which deal with definitions and the application of the provisions, while the last permits the



making of related regulations; there are also some schedules, which cover things like transitional arrangements.

The seven divisions in the middle of Part 11 deal with the transmission of AWAs, collective agreements, awards, preserved redundancy provisions, Australian Pay and Condition Standards and entitlements which arise under these standards and notice and enforcement requirements.

Definitions and Application

Note that the definitions in the first division of Part 11 do not include the key term “business”, nor does the word appear in the definitions section that applies to the Act as a whole. As a result, comprehension of the limits of the legislation will require reference to the legal principles articulated in judgments given over the years by Australian courts.

According to section 580, Part 11 applies to situations where a person (called the “new employer” for the purposes of the part) becomes the successor, transferee or assignee of the whole or a part of the business of another person (the “old employer”). The words “successor, transferee or assignee” are not defined anywhere. The important term “transmission period” is introduced and defined as the period of 12 months commencing at the time of transmission.

Section 581 provides that a “transferring employee” is a person who was employed by the old employer immediately before the transmission; who ceases to be employed by the old employer; and who then becomes employed by the new employer in the business being transferred within two months of transmission. In this way the definition of transferring employees seeks to ensure that the new employer cannot avoid the transmission of business obligations by delaying the employment of employees of the old employer. The concept of “transferring employee” is also extended to cover a person whose employment by the old employer was terminated within the month before transmission for genuine operational reasons (or for reasons that include genuine operational reasons), but who then becomes employed by the new employer in the business being transferred within two months of the transmission occurring. This limb of the definition of transferring employee is also an anti-avoidance provision intended to prevent obligations being avoided by means of the old employer terminating the employment of the employees shortly before the time of transmission.

Under section 582 an employee is considered to be a transferring employee in relation to a particular industrial instrument if it applied to his or her employment with the old employer immediately before transmission and the nature of his or her employment with the new employer is such that the instrument is capable of applying to employment of that nature.

However, the employee would cease to be considered to be a transferring employee in relation to that particular instrument if:

- (a) he or she ceased to be employed by the new employer after the transmission; or
- (b) the nature of the employment with the new employer changed so that the instrument is no longer capable of applying; or
- (c) the transmission period ends—that is, 12 months after transmission (Note that this does not apply if the instrument is an ACPS—see below).

Transmission of Australian Workplace Agreements

Division 3 provides that if an employee and his or her old employer were bound by an AWA immediately before transmission, and he or she is a transferring employee in relation to the AWA, then the new employer is bound by the AWA.

The new employer is bound by the AWA until it is terminated or replaced by another AWA, or the transferring employee ceases to be a transferring employee in relation to the AWA, or the transmission period ends.

The result of the above is that the new employer will remain bound by the AWA for no more than 12 months after transmission.

A transmitted AWA may not be unilaterally terminated during the transmission period, even where it has reached its nominal expiry date.

Transmission of collective agreements

Division 4 creates arrangements for collective agreements which are similar to those that apply to transmission of AWAs. In the case of collective agreements, the new employer will be bound with respect to any employee who fits the definition of “transferring employee in relation to the collective agreement”. The new employer remains bound by the collective agreement in relation to particular transferring employees until the collective agreement is terminated, replaced by another collective agreement, replaced by an AWA, or there ceases to be any “transferring employees in relation to the collective agreement”, or the transmission period ends—once again, with the transmission period defined as limited to 12 months, this marks the longest duration for which the employer can be bound by a transmitted collective agreement.

A transmitted collective agreement may not be unilaterally terminated during the transmission period, even where it has reached its nominal expiry date.

Where a transmitted collective agreement is replaced by an AWA or collective agreement, the transmitted collective agreement will cease to operate altogether,

even if its expiry date has not passed, it will not merely be suspended, as would normally be the case when replacing an existing collective agreement with a new one. This concept of completely ceasing to operate, not just being suspended, applies also to transmitted awards which are replaced by a new AWA or a new collective agreement.

It is important to note that the new employer is bound by the old employer’s collective agreement only in relation to the employment of transferring employees in the business being transferred. The new employer will not be bound in relation to new employees; nor will the instrument “infect” parts of the enterprise other than the specific part that has been transferred. A transferring employee to whom a transmitted collective agreement applies will not be covered by a collective agreement that bound the new employer prior to the point of transmission, until at least the end of the transmission period of 12 months. In other words, if no new collective agreement or AWA has already been made, at the end of 12 months from the time after the transmission of business took place, the transferred employees will no longer be covered by the collective agreement that was transmitted with them, and instead may be covered by the collective agreement that the new employer was party to immediately before the transmission.

The *Workplace Relations Act* post-Work Choices provides for the Commission to be able to make orders about the extent to which transmitted collective agreements will bind new employers. These orders can alter the position which would otherwise be the outcome of the legislative provisions which deal with transmitted collective agreements, in the case of particular employers and employees. This provision provides a similar flexibility as previously existed in section 170MBA, which, as discussed earlier, empowered the Commission to make an order that the new employer would not be bound by the transmitted certified agreement, or bound only to a specified extent or for a specified period.

The new provision, unlike the old one, is not restricted in the sense that the Commission is not required to address any particular factors before making the order, although the Commission is required to give specified relevant parties an opportunity to make submissions before making an order.

Transmission of awards

Division 5 deals with transmission of awards from the old employer to the new employer, largely in a manner similar to collective agreements.

In essence, new employers will be bound by awards which regulated the employment of employees of the old employer if there is at least one transferring employee

in relation to the award.

As with collective agreements, the new employer is only bound in relation to transferring employees who were covered by the award immediately prior to transmission. The application of the award does not become extended to apply to new employees or employees in other areas of the employer's business.

It is important to note that the award may have bound the employer regardless of the transmission, for example the new employer might have been already involved in that industry and be a respondent to the award. If this is the case, the award continues to apply and the limitations in Division 5 on the time for which the new employer is bound by the award do not apply.

If the only reason the award is applicable to the new employer is because the award has transmitted with the business, then the new employer only remains bound by the award in relation to particular transferring employees until it is revoked, or it is replaced by an AWA or a collective agreement, or there ceases to be any transferring employees in relation to the award, or the new employer ceases to be bound by the award in relation to the transferring employees, or the transmission period (of 12 months) ends; whichever happens first.

Here again we see the one-year maximum; further, Work Choices specifically prevents the Commission from making an order that would extend the transmission period.

Once a transmitted award is replaced by an AWA or a certified agreement, it ceases to operate altogether, it is not merely suspended during the life of the AWA or certified agreement, as would normally be the case.

Transmission of APCS

Division 6 deals with the transmission of an Australian Pay and Classification Scale (APCS). The Work Choices amendments provided for the creation of Australian Pay and Classification Scales. Where, immediately before the time of transmission, an employee's employment with the old employer is covered by an APCS, the applicable APCS will be transmitted with the transferring employee. In contrast to AWAs, collective agreements and awards, a transmitted APCS does not cease to have effect at the end of the 12 month transmission period.

Transmission of Preserved Redundancy Provisions

On 5 December 2006 Parliament passed amendments to the *Workplace Relations Act*. The amendments included provisions that preserve redundancy provisions contained in a Workplace Agreement that is terminated unilaterally for a maximum period of 12 months. A party bound by

such an agreement immediately before it ceased operating continues to be bound by any redundancy provision contained in the terminated workplace agreement up to a period of 12 months, or if an employee ceases to be employed or another workplace agreement comes into operation before that time (s.399A).

The amendments also introduced Division 6A which transmit preserved redundancy provisions applicable to a transferring employee to the New Employer. The new employer will remain bound to the (terminated) preserved redundancy provision in relation to a transferring Employee until the end of the period of 12 months from the date the s.399A agreement ceased operating, or where a transferring employee ceases to be employed, or another workplace agreement comes into operation in relation to that transferring Employee before that time.

Transmission of Entitlements

Division 7 of the Work Choices amendments deals with the transfer of entitlements which have arisen under the Australian Fair Pay and Conditions Standards. The Australian Fair Pay and Conditions Standards are the five guaranteed minimum employee entitlements which the Work Choices amendments provide for and deal with pay rates and casual loadings, hours of work, annual leave, personal leave and parental leave. The transmission of business provisions of the Work Choices amendments provide for some automatic transfer of parental leave entitlements from the old employer to the new employer, and for agreement to be reached about the transfer of other entitlements.

A new employer takes over the liability for any parental leave entitlements for which the old employer had been liable immediately prior to transmission and which are imposed by the Australian Fair Pay and Conditions Standard. Service with the old employer that counted for purposes of calculating a parental leave entitlement will be counted as service with the new employer. The old employer must notify the new employer of any transferring employee who is on parental leave at the time of transmission or who has applied for such leave on the basis of an entitlement under the Australian Fair Pay and Conditions Standard.

Other than parental leave, liability for accrued entitlements arising from the Australian Fair Pay and Conditions Standards will not transfer from an old employer to a new employer in the absence of an agreement.

A new employer may agree in writing to assume liability for a transferring employee's entitlements generally or in relation to a particular matter, or to recognise a transferring employee's continuity of service generally or in relation to a particular entitlement.

Notice Requirements

New employers who have inherited an AWA, collective agreement or an award in relation to a transferring employee must give the transferring employee a written notice about the AWA, collective agreement or award. The written notice must specify a number of matters including:

- details about the AWA, collective agreement or award;
- the date on which the transmission period ends;
- that the employer will remain bound by the transmitted instrument until the end of the transmission period, unless the transmitted instrument is terminated, or otherwise ceases to be in operation, before the end of that period;
- what can replace or exclude the transmitted instrument;
- any provisions of the Australian Fair Pay and Conditions Standard or another instrument which will be a source of terms and conditions when the transmitted instrument ceases to apply;
- any collective agreement or award which is applicable to employees other than transferring employees which would bind the transferring employees but for the transmission provision (together with a copy of that collective agreement or award).

A copy of the written notice described above must be lodged with the Employment Advocate.

Monetary penalties are imposed for failure to comply with notice requirements.

The recent amendments concerning preserved redundancy provisions also impose a requirement to give a written notice specifying a number of matters similar to those outlined above. The major difference is that the new employer must specify the date that the preserved redundancy provision(s) will cease operating, as opposed to the date on which the transmission period ends.

Transitional Provisions

AWAs and certified agreements made before the Work Choices amendments to the *Workplace Relations Act* are treated as transmitted with the business in relation to transferred employees, with scope to be replaced by a new AWA, or certified agreement. The transmitted AWA or certified agreement will continue to bind the new employer for no longer than the 12 month transmission period, in most circumstances.

The position of State awards and agreements

The Work Choices amendments deal with the transmission of a "State transitional

instrument", which is defined as a notional agreement preserving State awards or a preserved State agreement. Such awards and agreements will have applied to that large group of employees previously covered by State industrial relations jurisdictions, but now moved across to the greatly expanded Federal coverage that is a prominent feature of Work Choices.

The new employer is deemed to be bound by a State transitional instrument in relation to transferring employees in a similar manner as discussed previously for collective agreements and awards which travel with transferring employees. The new employer will cease to be bound by a State transitional instrument when that instrument ceases to operate, or when it is replaced by a certified agreement or AWA or, in the case of a preserved State award, replaced by a Federal award, or at the end of 12 months, whichever happens earlier. The new employer will have already ceased to be bound before the 12 months is up if there are no longer any transferring employees to whom the State transitional instrument applies. Notional agreements preserving State awards will automatically cease to operate at the end of the period of 3 years beginning on the reform commencement, in any event.

As with the transmission of Federal agreements, the transitional provisions also give the Commission power to order that a new employer is not bound, or only partially bound, by a State transitional instrument. The transitional provisions also impose similar requirements on new employers to notify transferring employees about the industrial instruments and surrounding issues which will apply to them.

The place of the case law that came before Work Choices

In spite of the modifications just discussed, there is still some continuity with the old order—particularly in relation to judicial exploration of what constitutes "a business" and what it means to be a "successor, transferee or assignee" of a business when looking at a particular factual scenario.

For example, to detour briefly into the case law, in 2000 in its judgment in *PP Consultants Pty Ltd v Finance Sector Union* the High Court formulated an analytical framework for determining whether a succession, assignment or transmission of a business or part of a business had occurred. This case involved a pharmacy which took over part of the operations of the local St George Bank. The test for deciding whether a succession, assignment or transmission has occurred essentially involved a comparison of the character of the business of the first employer with the character of the business of the second employer. Further light was shed

on the conceptual boundaries in 2005 by the Amcor decision, and also by the less well-known judgment in *Minister for Employment and Workplace Relations v Gribbles*. As with *PP Consultants*, *Gribbles* concerned section 149(1)(d) of the *Workplace Relations Act 1996*, the pre-reform provision discussed earlier in relation to transmission of awards. The *Gribbles* case involved a radiology clinic which replaced another radiology clinic at a Melbourne medical centre. The High Court concluded that the second employer in that case was not a successor to the business of the first employer, even though it pursued the same kind of activity with the same employees in the same location as the first employer, because it did so, among other things, without enjoying the assets of the first employer.

Since the Work Choices amendments do not define some of the key concepts, opportunity for the Federal and High Courts to wrestle further with ambiguous situations is left open—with the consequence that employers will need to be aware of what is happening outside the pages of the legislation itself.

Aspects left to State legislation

Another area of continuity involves those matters that remain within the sphere of State powers. It is possible to summarise the main areas for which State control remains intact.

Firstly, that minority of persons who are not employed by "constitutional corporations" or other employer covered by the amended Act will continue to have their employment covered by the State industrial relations jurisdictions, with their own structures of awards and agreements. State legislation has tended to mimic the Federal approach of binding new employers to the industrial agreements that bound the prior owners of businesses.

In New South Wales, Part 8 of Chapter 2 of the *Industrial Relations Act 1996* preserves an employee's continuity of service for purposes of service-based entitlements under an industrial instrument or legislation where there is a "transfer of business" (defined as a transfer, transmission, conveyance, assignment or succession of the whole or any part of a business) and he/she takes up employment with the transferee of the business.

Also in New South Wales, but in common with State laws across Australia, section 4(11) of the *Long Service Leave Act 1955* preserves continuity of service. For the purposes of calculating accruals of long service leave, the period of service with an old employer is counted as service with the new employer. Work Choices specifically exempts State laws dealing with long service leave from its attempt to otherwise cover the field in terms of

industrial and employment laws, although for employers under the Federal system it is possible to enter into an agreement covering long service leave under that system which will over-ride the State law to the extent of any inconsistency.

Conclusion: the prospects for employers

Companies taking over businesses now have some aspects of the industrial relations obligations they will inherit spelt out in greater detail. The duration of obligations imposed by any agreements, awards and AWAs that are transmitted with the acquired business now have a limited life span. Employers have gained the benefit of more freedom and flexibility in replacing those obligations with arrangements that more closely match their particular needs.

However, purchasers of a business should be aware that they have also gained some obligations, such as the enhanced notification requirements, with detailed notices to be issued to employees and also to the Employment Advocate.

Incoming employers will be assisted by some improved notification requirements applying to outgoing employers (for example, regarding how much parental leave is about to be taken), but, just as under the pre-Work Choices regime, employers should still satisfy themselves about precisely what sort of industrial instruments they will be dealing with in the immediate term. Quite apart from being bound by these instruments for up to one year after the acquisition, inevitably the workforce will have expectations of retaining those terms and conditions into the future and these attitudes will form the background of any negotiations about replacement agreements. This is one reason why full information should be obtained before taking over the operations. Such information should be obtained before the purchase is concluded so that the agreed price is one that accurately picks up the industrial relations cost that the new employer will be facing.

The recent decision of the High Court dismissing the States and Union challenges to Work Choices has removed the uncertainty which attached to these provisions. However, as indicated, a number of issues will not be resolved until addressed by the Courts. Purchasers of businesses with a significant number of employees should be particularly observant and careful, and keep abreast of relevant developments in the case law, as well as any fine tuning of the Act by the Government. Also, a significant number of workers will remain within the State industrial relations systems, and State laws, such as those regarding long service leave, will continue to be in place, meaning that the situation under State laws should also be kept firmly in mind.

New record-keeping requirements under Work Choices

Stephen Boatswain and Jenny King

Extended grace period introduced

Employers who are subject to the "Work Choices" amendments to the *Workplace Relations Act 1996* in effect have been given a 12 month grace period to comply with the record-keeping requirements of that legislation, following the introduction of the *Workplace Relations Amendment Regulations 2006* (No. 3) on 21 September 2006.

Employers now have until 26 March 2007 to adjust to the requirements of the new record-keeping provisions, the amendments operating to postpone by a further 6 months the date from when employers will be required to comply with the record-keeping requirements under Work Choices. This means that employers cannot be prosecuted for failure to comply with those record-keeping requirements until after 26 March 2007.

While employers cannot be prosecuted for non-compliance with record-keeping until that date, it is important that employers take the opportunity provided to evaluate and update their record-keeping systems so that they are compliant with the legislation by 26 March 2007.

Employers should be aware, however, that the grace period for the issuing of infringement notices has not been extended, and employers may be issued with an infringement notice for contravention of the record-keeping requirements on and from 27 September 2006. However, in practice it is unlikely that such an infringement notice would be issued, given that prosecutions cannot be initiated until 27 March 2007, and given that it is arguable that no actual penalty would arise from such an infringement notice.

Record keeping amendment

On 13 November 2006 the Minister announced a number of amendments that were to be introduced to the *Workplace Relations Act*. This included amendments to the record-keeping regulations that would 'streamline' the record-keeping requirements in terms of hours worked by only requiring employers to record those hours for which an employee is entitled to overtime or other penalty rates, rather than all hours worked. The other record-keeping requirements would be maintained. At this time the record-keeping amendments have not occurred, and we have no further detail other than what is contained in the announcement. What follows is an outline of the record-keeping requirements currently established by Work Choices.

What records need to be kept by employers?

All employers covered by Work Choices must keep the following records in relation to all employees, where applicable:

- **General details:**
employee name, date of birth, employment commencement date, name of applicable industrial instruments, classification of employee, employee status (that is, full-time or part-time, and whether permanent, temporary or casual), and if full-time or part-time a specification of number of hours to be worked per week.
- **Reasonable additional hours:**
a copy of any written agreement whereby an employer and employee agree that the employee will work an average of 38 hours per week over a minimum period of 12 months.
- **Pay details:**
gross rate of pay as an hourly rate, the basis on which the employee's rate of pay is determined, details of any incentive-based payment, bonus, loading, monetary allowance, penalty rate or other entitlement, the period to which the payment relates, total gross/net remuneration received, dates when employee was paid, the deductions (if any) made from remuneration.
- **Annual leave and personal leave details:**
nominal hours worked, rate of accrual of the leave, date on which the leave was credited to the employee, the balance of the employee's leave entitlement, amount of leave taken, and the amount paid to the employee while on leave.
- **Annual leave cashing out details:**
a copy of the employee's written election to forgo annual leave, the rate of payment for the annual leave forgone and the date payment was made.
- **Other leave details:**
the amount and type of other leave taken, details of the accrual of that leave, the date when the employee was credited with the leave, the balance of the employee's entitlement to the leave, and the amount paid while the employee was on the leave.
- **Superannuation details:**
the amount of superannuation contributions made, the period over which they were made, dates when contributions were made, name of the

superannuation fund, and the basis on which the employer became liable to make the contribution.

- **Termination details:**
whether termination of employment was by consent, by notice, by summary dismissal, or another method, and the name of the person who acted to terminate the employment.

If an employer employs a person whose base annual salary is less than \$55,000 (to be indexed each year), then the employer must keep records of the total number of hours worked each day by that employee.

If an employer employs a person who is entitled to an overtime loading, then the employer must also keep records of that employee's daily starting and finishing times.

Enforcement of record-keeping obligations

An employer must keep employee records for 7 years, and must keep the records in a legible form in the English language.

An employer must make a copy of a record available on request by a workplace inspector. The records must be readily accessible to a workplace inspector, and must be in a condition that allows a workplace inspector to determine the employee's entitlements and whether the employee is receiving those entitlements.

Auditing your business

To ensure that your business is ready to comply with the record-keeping requirements in Work Choices before 26 March 2007 employers should:

- update your record-keeping systems to ensure compliance;
- identify employees who earn below \$55,000 base salary per annum, and put in place daily hours record-keeping systems for those employees; and
- identify employees who are entitled to overtime loadings, and put in place daily start and finish time record-keeping systems for those employees.



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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 is one of Australia's largest workplace relations law firms with offices in Sydney, Melbourne and Brisbane and over 30 lawyers. Harmers experience and expertise was recognised this year in being awarded "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.

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