

# WORK InSights

Spring edition 2008

## Editorial

This edition of *Work InSights* comes at a time when there are some concerns at the state of the Australian economy, a time when risks to business assume a greater importance than at other times. For that reason, this edition looks at three different, but very practical areas of concern for employers.

Firstly, discrimination claims have been “big news” items for some time now, and are clearly having an impact on those businesses affected. We look at what can be learned from some of those high profile cases, and how employers can make sure their business is “EEO ready”: able to avoid discrimination claims by appropriate behaviour but also able to respond quickly if a complaint is made.

Attracting and retaining staff in times of economic uncertainty can be difficult, and our second article has a very useful, detailed checklist of steps that can be taken to attract and retain good staff, whilst protecting the business from risks, for example, posed by loss of confidential information, or poaching of clients or staff by former employees.

At a time when cost-cutting is important, it is sometimes tempting to reduce costs of storage by culling employer records. Our third article looks at what records an employer is required to keep, and for how long. Some practical issues that may confront a business that does not retain records are also addressed in the article.

So, three topics, bound together by a common theme: practical steps to protect your business, in good times or bad.

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## Learning from the Christina Rich and PwC Dispute: minimising the risks and costs exposures of EEO complaints

**Emma Pritchard and Bernard Ng**

Cases involving unlawful discrimination and harassment—such as the now-settled litigation between Christina Rich and the PricewaterhouseCoopers partnership; the recent Victorian decision in *Tan v Xenos*, or the dispute between former newsreader Christine Spiteri and Channel Nine—have recently received a high level of media coverage. The subject matter of these claims (for brevity, here called “EEO complaints”), the high profile of the parties involved, and the quantum of compensation sought, all combine to result in public scrutiny of the internal practices and procedures of the defendant businesses.

Most businesses would now have some awareness of obligations under equal opportunity legislation (the Commonwealth *Sex Discrimination Act*, for example, dates from 1984)—but as these cases show, mere awareness is not enough. Our experience in this field, acting for both complainants (such as Ms Rich) and defendants (often large corporations with relatively sophisticated human resources sections), highlights that there is significant risk for businesses in this area. There are, however, some steps that businesses can take to minimise the incidence of EEO claims, and some insights about what to do when an EEO complaint lands on the desk.

### The cost of EEO complaints is increasing:

When the equal opportunity jurisdiction was at its infancy, compensation awarded to successful complainants was relatively modest. However, that is no longer necessarily the case. Recent litigation has shown an upward trend in the compensation sought by and awarded to applicants. Factors include:

#### *Increased amounts of compensation awarded*

Even where a complainant is not necessarily on a high income courts now appear to be more willing to consider significant compensation for acts of unlawful discrimination and harassment. One notable recent example is the \$100,000 awarded to Ms Tan in the matter of *Tan v Xenos*. In that case, Ms Tan was found to have been subjected to sexual harassment during her employment as a registrar in her third year of training to become a doctor.

### *Increased scope for compensation*

It is increasingly common for the applicant in EEO-related litigation to also seek other components of loss, thereby increasing the scope for compensation. For example, complainants could claim for loss of future earnings, on the basis that the discriminatory conduct damaged their career prospects. For executive-level complainants with an expectation of ongoing engagement, significant remuneration and long-term benefits such as pensions and incentive schemes, the amounts can be significant. Although ultimately settled without the Court having to determine any of the issues, this was the position in the claim by Christina Rich, where loss of future earnings formed a significant component of her claim.

Even conduct by the employer after the alleged discrimination can sometimes be relied on to increase damages. Under EEO legislation, for example, it is unlawful for an employer to victimise a complainant, including subjecting the person to a detriment, because that person brought an EEO complaint. This victimisation may independently sound in compensation regardless of whether the substantive complaint has merit. Again, in the Rich matter, another untested basis for damages was victimisation. One claim for victimisation concerned the partnership's decision to place Ms Rich on restrictions, preventing her from attending work or contacting clients, because she stated that she would file a complaint with the Human Rights and Equal Opportunity Commission.

### *Other Costs to the Business*

Even if there was no monetary compensation payable, EEO complaints entail other less tangible, but nonetheless significant, costs to business. These include:

#### *Damage to the reputation of the business*

Even if an EEO complaint has no merit, a business is likely to suffer some damage to its reputation merely by being associated with that complaint. This is especially the case where the complaint proceeds to litigation and the claims made by the employee become part of the public record.

#### *Staff retention issues*

EEO complaints are often a symptom of general work-related tension between the complainant and other employees. This can lead to higher turnover of staff



as dissatisfied employees, seeking a better working environment, find work elsewhere.

#### *It makes it harder for the business to attract quality candidates*

Employers subject to an EEO complaint may also find it more difficult to attract quality candidates. With low unemployment rates and employers having to make an extra effort to attract candidates from a relatively small pool, the existence of an EEO complaint—whether meritorious or not—may discourage good applicants.

#### *It decreases productivity and profitability for the business*

EEO complaints have an effect on productivity. Firstly, such complaints may point to a poor working environment, which in turn reduces workplace morale, productivity, and ultimately, the profitability of the business. Those directly affected also suffer significant morale and productivity issues.

Secondly, properly investigating and dealing with an EEO complaint necessarily requires significant investment of resources by the business and considerable management downtime. This, in turn, also forms an unwelcome distraction away from the profit-making activities of the business.

For these reasons, it makes good business sense for all employers, large and small, to have a coordinated strategy to minimise the incidence of an EEO complaint.

### **Minimising EEO claims— Making business “EEO-ready”**

The mere “awareness” of EEO obligations is not enough to prevent a business from being exposed to and liable for an EEO complaint. The entire workforce, from senior executives to junior employees, must be active in ensuring EEO guidelines are met. There are a number of steps that a business should take to make its workforce “EEO-ready”. These include:

#### *Step 1 — Assess Awareness at all Levels, including Management and Senior Executive Level*

The first step in making a workforce “EEO-ready” is for the business to assess staff awareness of its EEO obligations, exposures and risks. Our experience, from conducting major litigation in this area for both complainants and defendants, is that training and policies are often directed only at more junior staff, resulting in a surprising disparity of awareness across a business, with

management and senior executive levels often the most exposed.

If insufficient awareness is identified, take immediate remedial action (for example, by way of a seminar or briefing). Even if not identified as the “least aware” employees, there are three reasons we recommend a focus on management and senior executives:

- Firstly, management and senior executives are the leaders and drivers of the business. Their participation and support is critical, as it will send a strong message to the general workforce that the business as a whole is committed to take EEO issues seriously.
- Secondly, it is often the case that senior staff are likely to be some of the longest serving staff members. This means (a) they may not have had the benefit of EEO training for some time and are in need of a “refresher” course, or (b) their very seniority can lead to perceptions that they do not need to participate in EEO training and development.
- Finally, it is important that senior staff are “EEO-ready” given that on most occasions it is staff at this level who will be the most appropriate to drive or conduct an investigation into an EEO complaint.

### Step 2 — Conduct an Audit

The next step is to conduct an audit to determine whether the EEO system currently in place within the business is optimal, or whether there is room for improvement.

Some of the issues that should be considered in conducting such an audit are:

#### *Is there an effective EEO Policy?*

It is important that a comprehensive and current EEO policy be in place, and perhaps more importantly, that the EEO policy is well disseminated and understood by all employees, from senior management to front line staff. As cases show, there is little utility in having a comprehensive, well-drafted EEO policy if it does not leave the human resources manager’s office drawer. Some issues to consider include:

- Are the EEO policies and procedures comprehensive (covering, for example, all grounds of discrimination including newly-



introduced grounds such as breastfeeding), legally compliant and tailored as far as possible to the business?

- What does the business do to bring those policies and procedures regularly to the attention of the workforce at all levels and to make clear what kind of behaviour is appropriate?
- Are the policies and procedures regularly reviewed to ensure they are up-to-date and reflective of current EEO obligations?

#### *Training*

In addition to paying close attention to the currency of the EEO Policy and ensuring it is widely understood, the audit should check whether appropriate training is provided to employees at all levels. In our experience, an ideal training scenario would involve two different training modules, one being a general workplace behaviour module attended by all employees, regardless of seniority, and the other a specific module designed for managers and senior executives that deals with responding to EEO complaints and handling investigations. These would be conducted on a regular basis, ideally with small groups of no more

than 10 people per session to aid learning.

#### *Workplace Culture*

The most overt examples of unlawful discriminatory and harassing behaviour are usually well understood, but it is also important for the audit to detect “indirect discrimination”, that is, whether other practices or conditions of employment—including the workplace culture—have a discriminatory effect. Some issues to consider include:

- How would employees describe the workplace culture?
- Could the culture prevalent at the workplace have the effect of disadvantaging women or other subgroups?
- Are there procedures in place for minimising the risk of sexually harassing conduct or other discrimination occurring at work-related events which occur after hours or off premises?
- Do women working in male dominated areas face unnecessary obstacles or unpleasant behaviour imposed upon them by their male colleagues?
- Do remuneration policies, methods and opportunities for advancement

within the workplace operate to the detriment of some women or other subgroups within the workplace?

### *Complaint Handling*

The best policies will not necessarily prevent a complaint being made, and it is important that a system be in place to deal with complaints appropriately. This is discussed in more detail below.

### *Step 3 — Develop an Implementation Plan, and implement according to priorities*

Once the audit is complete, key areas for improvement should be identified and prioritised. An implementation plan, with predefined timeframes and measurable benchmarks, should be devised. Above all, the plan should be implemented, not allowed to remain only as a “paper” policy.

### *Step 4 — Keep it regular*

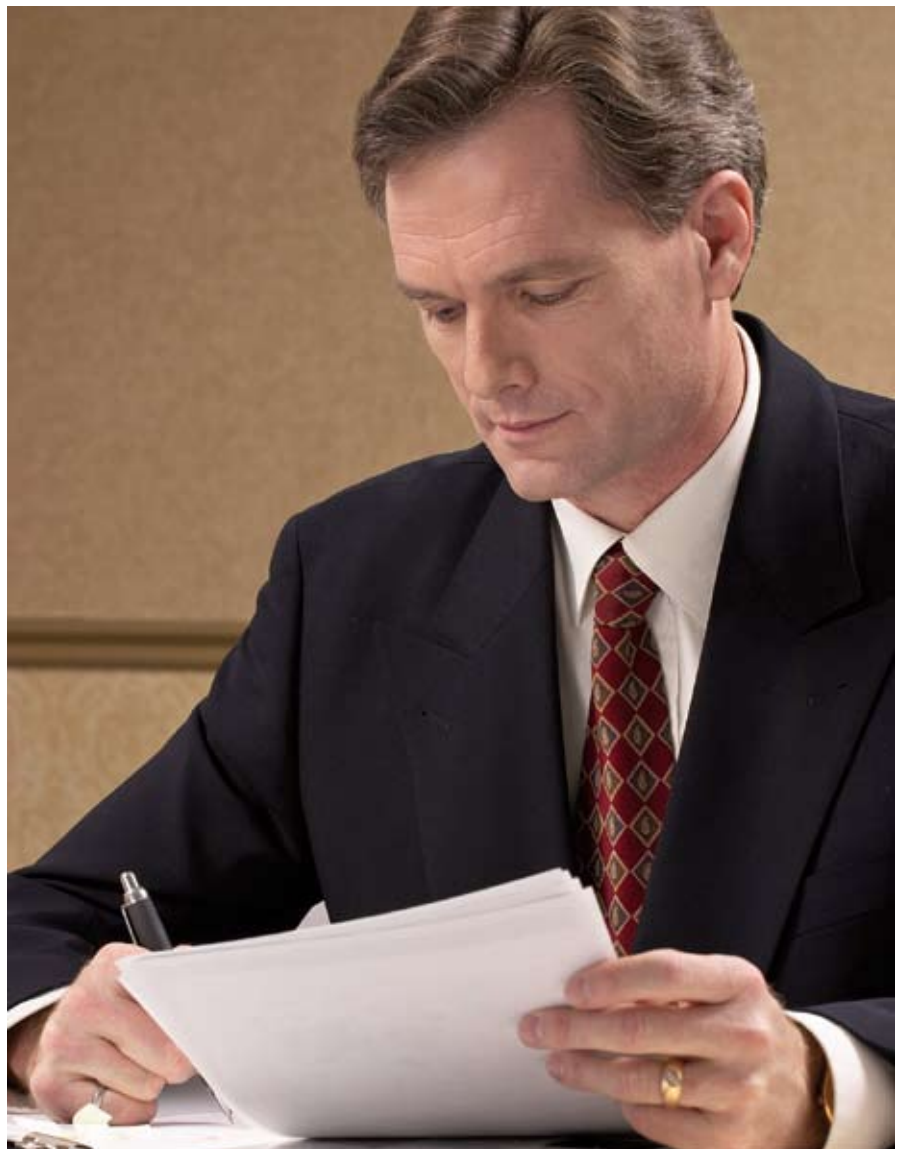
Maintaining an EEO-ready workforce is an ongoing process. Regular audits and regular training are needed.

## **Recommended Complaint Handling Procedures**

No matter how conscientious a business, there is always the potential for an EEO complaint. All businesses need to be prepared for such an event—how an EEO complaint is initially handled may make the difference between a complaint sensitively and expeditiously resolved and one that rapidly proceeds to litigation with all the associated costs described above. This is not to suggest a “one size fits all” approach. Each EEO complaint is different, involving different personalities and allegations of varying degrees of seriousness, and the procedure needs to be suitable for each business. Nevertheless, there are questions that will guide the formulation of a suitable process.

*Are managers within the organisation trained on how to respond to complaints when they arise to ensure that they are investigated by appropriate personnel?*

The choice of an investigator (or investigation team) is important as it has a significant impact on the complainant’s perception of the fairness of the investigation process. The investigator should not be perceived as having any bias or preconceptions about the complaint, and should not be closely connected with the complaint or any of the participants.



*Are there mechanisms in place for considering whether complaints should be handled internally or by an external body or person?*

There are sometimes significant benefits in engaging external advisors to assist with an investigation, including perceptions of greater transparency and impartiality, and reduced management downtime. For organisations with in-house legal teams, issues such as conflict of interest and waiver of legal privilege may also suggest using external people to conduct the investigation. The Federal Court in an interlocutory judgment in the Christina Rich matter found that in-house counsel (who had dealt with Ms Rich’s complaint) lacked the necessary independence to sustain a claim to legal professional privilege over a range of documentation.

*Is the business bound by an industrial instrument that expressly requires a certain complaint handling*

*procedure to be followed?*

If so, such procedures should take priority over any policy to avoid potential exposure to a penalty for breach of an industrial instrument.

*Are there communication strategies in place for responding internally and externally to enquiries about discrimination complaints?*

It may be worthwhile, especially in high-profile matters, to put in place a well-considered communication strategy early on in the process. This ensures the business’s position is communicated to its own employees, the general media and if necessary the customers, in a consistent and effective manner.

These steps are recommendations of a general nature: businesses should consider their individual circumstances and obtain guidance from their legal advisors and tailor their practices and procedures accordingly.

## Attract, Retain, Protect

### Tips for managing employees and protecting your business in a time of economic downturn

Shana Schreier-Joffe and Danielle Ireland-Piper

#### *Strange bedfellows—rising unemployment in the midst of a nation-wide skill shortage*

In April 2008, Mark Davis, Political Correspondent for the *Sydney Morning Herald*, observed that “the job market has remained strong in recent months despite international economic uncertainty and rising interest rates”, but went on to note that we are likely to see “the unemployment rate rising from its current 4 per cent to 4.3 to 4.5 per cent by late 2009”. This, according to Davis, represents an extra 50,000 to 75,000 people joining the ranks of the unemployed.

However, the prospect of job loss has a strange bedfellow in Australia—a nation-wide skill shortage. Economists have noted that “...while Australia is enjoying its longest employment growth period in recent history, the nation is also undergoing a skills shortage crisis stretching from skilled labourers to highly trained accountants...”. A report by Mercer (*Workplace 2012, What does it mean for employers?*) noted:

The reality is that in four to eight years almost every employer in Australia will be faced with an increasing number of employees moving towards retirement. This will put further pressure on the remaining skilled workers within the labour force and may leave business with inadequate resources to deliver ongoing business operations—let alone grow.

The federal government has estimated that Australia will face a “debilitating” shortage of more than 200,000 skilled workers over the next five years and a deficit of 240,000 workers by 2016.

For employers, this raises the question as to how to attract and retain skilled staff, while still protecting the interests of the business in times of economic downturn.

A well drafted and well thought out contract of employment will do much to assist in answering this question. Employers, in finalising contracts of employment, should develop a checklist to help ensure that those contracts will assist in attracting and retaining employees, while still offering adequate protection to the business.

#### *A checklist—what should an employment contract look like?*

Issues that employers and human resource professionals might wish to consider include:

##### ✓ *How should my employees be remunerated?*

Naturally, there are many non-financial incentives that can assist in attracting and retaining employees. Ultimately, however, financial reward will always play a big part in employee loyalty to an employer. As is sometimes said in business circles, “when money talks, nobody walks”.

However, the way an employee is remunerated does not have to be a black and white issue of paying higher salaries. There is much scope for employers to be creative in shaping remuneration schemes that can be of benefit to both the employee and the employer. As Garry Adams, Head of Executive Remuneration at Mercer Human Resource Consulting, has commented:

Reliance on the “plain vanilla” remuneration designs that have characterised the Australian corporate environment will no longer work. If companies are to develop executive remuneration strategies that fulfil the multiple objectives of the various stakeholders, they will need to be innovative and sophisticated in their approach. And for those companies seeking to win the war for talent, this will be an imperative, not an option.

##### *Packages*

There is an emerging trend in Australian workplaces to adopt an integrated reward model, involving a “total employee reward” or “total target reward” approach to remuneration. This kind of model includes total fixed remuneration and also identifies target levels of variable rewards, plus non-financial rewards. It will be typically made up of the following:

- **total employment** cost made up of a base salary, superannuation, insurance, value of company

vehicle, value of other fringe benefits, fringe benefits tax (FBT) payable, non-FBT benefits, allowances and packaging options;

- **short or long term incentives** such as performance based bonuses; and/or
- **non-financial rewards** such as recognition programs and career development opportunities.

In considering the form a remuneration package should take, an employer should consider the types of benefits that might be attractive to their employees. This will obviously be dependent upon the nature of the workforce concerned and the needs of the individual staff member. Examples of potential benefits that might be included in a remuneration package include:

- study expenses;
- child-care costs and school fees;
- private health insurance or medical and dental expenses; and
- insurance to cover death, total and permanent disablement and salary continuance.

In setting out the remuneration package of an employee in a contract of employment, employers need to clearly set out the value of each of the components and specify which are to be included, and which are to be excluded, from termination payments.

##### *Superannuation*

Depending on their age and tax arrangements, an offer to increase the superannuation component of a remuneration package in exchange for a reduction in base salary might be attractive to some employees. Employers should be mindful that employees are now able to nominate a superannuation fund of their choice and this should be communicated to an employee. When promoting a particular employment package, it is also useful to distinguish the superannuation component from the base salary component. Since 1 July 2008, employers were required to use statutory “Ordinary Time Earnings” as a base for calculating employees’ superannuation payments. The ATO has excluded payments in lieu of notice from its definition of “Ordinary Time Earnings”. Nonetheless, employers may consider expressly excluding superannuation from any termination payment. This will assist in protecting an employer from claims of underpayment of salary and from claims that an employer made misrepresentation

to the employee as to the terms of their employment.

#### *Bonuses and Commission*

Bonuses and Commission can be excellent incentives for staff to stay loyal to their employer. However, employers should be careful to ensure that the payment of any bonus is discretionary and that this is expressly stated in the employee's contract of employment. This will help to avoid expensive legal tussles over the non-payment of any bonus, should the performance or continued employment of the employee become an issue. Employers may also wish to consider specifically excluding discretionary bonuses or commission from any termination payments due under the contract. However, it should be noted that under the Rudd government's National Employment Standards, which are due to take effect on 1 January 2010, employers will be required to include incentive-based payments and bonuses in termination payments made in lieu of notice.

#### *Shares and Options*

Depending on the nature of the business, employers may also wish to consider offering their employee shares, share rights or options in the employer's business. A share right, or option, is a contractual right to acquire shares in the future, at a set price. The shares are issued when the employee exercises this right to the shares in what are known as employee share schemes. This can be an effective way of aligning an employee's goals with the financial success of a business and fostering a sense of loyalty to an employer. The schemes, while worthwhile, can be complicated, so legal advice should be obtained if a business chooses to set up an employee share scheme.

#### *Golden handcuffs*

"Golden handcuffs" is the term given to remuneration made to an employee on the condition that the employee will stay with company. A commonly used formula for golden handcuffs will give an employee an initial payment, with subsequent payments conditional on performance (and thus remaining with the employer). However, when planning financial incentives for directors or former directors of a company, employers need to be aware that the federal *Corporations Act 2001* places limits on such payments in some circumstances.

- ✓ *Is there a guarantee that my employee is fit for the job?*

Including a clause in an employment



contract that requires an employee to warrant that they are fit for the job (and, for example, that the representations made to the employer are true) can be an effective way of protecting your business. This means that if an employer discovers that in fact the employee is not fit to perform the duties contrary to the employee's representation (or has, for example, misrepresented their experience or qualifications) then an employer has rights under the contract to address the situation.

- ✓ *Should the contract include reference to company policies?*

Many employers have company policies that they would like their employees to follow. However, as the 2007 decision of the Full Court of the Federal Court of Australia in *Goldman Sachs JB Were Services Pty Limited v Nikolich* shows, very careful consideration needs to be given to the content of these policies.

In *Nikolich*, the employee, prior to accepting an offer of employment, was given a copy of his future employer's 100 page "Working With Us" document, which included a range of company policies and procedures. The Court found that the obligation set out in the document to "take every practicable step to provide and maintain a safe and healthy work environment" had

become an express term of the contract of employment. The Court then found that the Company breached the health and safety policy, and therefore had committed a breach of contract.

The Court set out a range of factors that will be influential in determining whether or not policies become contractual entitlements. For example, a Court will consider whether a company policy is merely descriptive or whether it is promissory in the way it is worded. If an employer says that they "will take every practicable step to provide and maintain a safe and healthy workplace", as was the case in *Nikolich*, this is likely to be found to be promissory language and therefore, a contractual entitlement.

A Court may also consider whether an employee was required to "sign off" on company policies to acknowledge they have read and understood the policies. If this is the case, the content of the policies is more likely to be considered to be enforceable.

The message employers should take from this decision is that careful thought needs to be given to the content and wording of company policies. Careful drafting of a contract of employment can also do much to assist in this regard. For example, a well drafted contract might stipulate which, if any, company

policies are binding on employees, or state that certain policies are not intended to create positive and binding obligations on the employer.

✓ *Can I ask my employee to perform their work at a different location?*

If there is a chance that an employee will at some stage be required to perform their work at a different location, then this should be expressly provided for in that employee's contract of employment. The Courts have recognised an implied term enabling an employer to direct an employee to perform work at a different location, and to alter aspects of the employment. This right arises from the employer's ability to give lawful and reasonable directions to staff. However, such alternatives must be reasonable and consistent with the particular contract and not amount to a unilateral reduction in the value or status of the work performed. If there is an express location clause, or there is a possibility of a change in location or duties, an express clause granting this right will protect an employer from a claim by an employee that their contract of employment has been breached. Such a clause will provide certainty. It will remove the necessity for the employer to rely on implied duties to justify any alterations that may be introduced. It may also assist an employer in resisting a claim for redundancy or for constructive dismissal based on an alteration in location or duties.

✓ *Have I ensured my employees will continue to be bound by the contract if their duties change?*

Where there is a possibility that an employee's position or duties may change over time, employers should be careful to ensure that the contract provides for this contingency by giving the employer the right to the services of an employee in any capacity while employed or by setting terms and conditions that will apply generally while the employee remains employed. Without such a provision in the contract, a Court may find that if the change in duties was profound it has the effect of creating a new contract rather than just varying the original contract. If no (new) written agreement is entered, the new contract will be an unwritten contract subject to implied terms and duties. One significant effect of this may be to replace the period of notice expressed in the original contract with a period of "reasonable notice" in the new. Reasonable notice can be much



longer than commonly found in written contracts (in the case which is often cited as highlighting this issue, *Quinn v Jack Chia (Australia) Ltd*, a decision of the Victorian Supreme Court in 1991, reasonable notice was found to be twelve months when the original contract provided for only one month) and an employer found not to have given reasonable notice may be liable for damages for breach of the contract. There are various forms of "anti-Jack Chia" clauses which can be utilised by an employer, depending on the circumstances which the employer may anticipate.

✓ *Have I distinguished between my employee's probationary and qualifying period?*

There are generally two reasons for including a probationary period in a contract of employment. The first, and traditional, reason is that it allows the employer and employee to see whether the position is suitable, without being bound by the long periods of notice sometimes required for permanent employees. On that basis, longer probationary periods, and the ability to extend probationary periods, makes sense in a contract of employment. The second reason for having a probationary period is that it can, under

relevant State or Federal legislation, give some protection against claims for reinstatement or claims for compensation for unfair dismissal. This protection can be lost if the period is too long, so most probationary periods are kept to no more than three months.

There is also some relief from unfair dismissal claims where an employee is dismissed during what the Commonwealth *Workplace Relations Act 1996* describes as the "qualifying period". The qualifying period is generally six months. To give an employer maximum flexibility, a contract of employment should expressly provide that any probationary period is not intended to reduce or displace the qualifying period.

✓ *Can I conduct surveillance in the workplace?*

It may be that an employer wishes to conduct surveillance in the workplace—the most common types being electronic surveillance (involving the surveillance of an employee's email or internet use), and camera surveillance (involving the visual surveillance of employees by video camera or some other means). In a number of States, such surveillance is governed by legislation, such as the New South Wales *Workplace Surveillance Act 2005* and the *Listening Devices Act*

1984, the Victorian *Surveillance Devices Act 2005* or the Queensland *Invasion of Privacy Act 1971*. While careful regard should be had to the terms of the legislation in each particular case, the fact of surveillance being conducted should also be set out in an employee's contract of employment, to avoid any argument that employees had no notice that surveillance was taking place.

✓ *Is my confidential information protected?*

Generally speaking, the law will imply into a contract of employment a duty on an employee to act in good faith towards their employer. This duty of good faith carries with it an obligation not to divulge confidential information or use it in any way that could be detrimental to an employer. While this offers an employer some level of protection, it will only protect confidential information that is so sensitive as to be considered a trade secret. Employers should therefore give careful thought to identifying the types of information that it considers confidential and the types of conduct it would view as a misuse of confidential information in the contract of employment. In so doing, an employer can help to broaden the scope of **protected** information beyond what would otherwise exist under the general law. Furthermore, confidential information clauses have been recognised as a basis for warranting the imposition of restraint provisions.

✓ *Can I restrain my employee from working for, or becoming, a competitor?*

In a market characterised by a nationwide skills shortage, "head hunting" of employees is likely. A restraint clause in a contract of employment can be an effective way to protect your business from employees who may wish to resign in order to set up a competing business, or to work for a competitor. This is particularly so in relation to employees who may have a special skill, or who have close contact with clients or sensitive information and therefore carry much of an employer's "goodwill", or are the public face of a company. In recent times, the Courts appear to be more willing to enforce restraints than they have been in the past.

However, in order to be enforceable, a restraint clause needs to be reasonable and certain in its scope and meaning. This means that the length, duration and geographical scope of the clause

should be reasonable and clearly defined. It also means that the extent of the restraint should be no more than necessary for an employer to protect their business interest in the particular industry in which the employee works. It is important to ensure the drafting of all aspects of a restraint clause is appropriate, otherwise the whole clause may be found to be unenforceable.

✓ *Have I made it clear that my employee's wages are inclusive of award entitlements?*

If your employees are covered by an Award which allows annualised wage rates, it may be helpful to expressly state that the wages or salary set out in any contract of employment are inclusive of Award entitlements. As long as the employee receives more than she or he would under the Award, such clauses, if properly drafted, may assist in protecting an employer from claims by an employee for overtime and other allowances or penalties provided for under an applicable Award. In times of economic downturn, claims for underpayment of wages or award breach would be even more of an unwelcome expense for an employer.

✓ *Do I have access to my employee's intellectual property?*

Employees who have a particular skill or artistic ability are likely to have what are called "moral rights" in the work that they create. This makes it important for employers to be able to require employees to do all they lawfully can to allow an employer to use their work. Where appropriate, employers should consider including a clause such as this in an employee's contract of employment.

An employer should also give thought to including in a contract of employment a clause relating to intellectual property. If properly drafted, such a clause can give an employer greater rights over the creations, inventions and processes which might be created by an employee in the course of their employment. These creations, inventions and processes can be a valuable asset and one the employer considers theirs, and it is important for both the employer and the employee to have clarity in relation to the ownership of such rights.

✓ *Do I have a right to suspend my employee?*

Where an allegation is made in relation to an employee, and an investigation is

required, it may not be desirable for that employee to be present in the workplace during that time. Employers should consider including a right to suspend an employee in defined circumstances in any contract of employment.

✓ *Have I got an effective termination clause?*

If there are certain forms of conduct an employer believes should result in the termination of employment, then it is vital that these be spelt out in a well-drafted termination clause in the contract of employment. It may not be enough for an employer to assert that it was intended that a form of conduct would warrant dismissal after the conduct has occurred, if this was not specifically provided for in the employment contract or in any relevant legislation. Employers do need to ensure, however, that any termination clause does not contain grounds for dismissal that are unlawful.

✓ *If my employee resigns, can I place that employee on gardening leave?*

There may be circumstances where an employee gives notice of resignation, but because of the nature of the confidential information that employee possesses or because of their ability to influence client choices about future work, an employer may not want that employee to work out their notice period in the office. In order to cater for these circumstances, employers should consider setting out their right to put an employee on "gardening leave" in the contract of employment. This can be of great assistance if there is a need to protect client information and company goodwill. Further, in a tight labour market, a period of gardening leave (rather than no longer being employed by anyone), coupled with effective notice periods, can also be of assistance to an employee looking for new employment or making a transition to a new employer.

*Employers should resist the temptation of a standardised contract*

In summary, employers should resist the temptation to opt for a standardised form of contract for all employees. It makes better sense in both the short and long term to ensure that contracts of employment are appropriately tailored to a particular position and with a view to securing particular outcomes.

## Retention of employee records

**Bronwyn Maynard and James Robertson**

How long must an employer keep employees' records? This is an important question for employers, as failure to retain such records appropriately may leave an employer subject to fines or other penalties or put the employer at a significant disadvantage in litigation. This article looks at the statutory obligations to retain employee records, as well as the obligations to retain records where there is anticipated or actual litigation.

### Statutory obligations to retain employee records

A number of statutes require employers to keep business records, including employee records.

For employers in the federal system (the majority of employers), the primary source of the obligation for employers to keep and retain employee records is the *Workplace Relations Regulations 2006* made under the *Workplace Relations Act 1996*. Those Regulations require employers to keep records of certain details relating to their employees, including the following: the employee's name, commencement date, and employment status (for example, full-time or part-time; permanent, temporary or casual); any overtime (if worked); any agreement for the employee to work reasonable additional hours; and details relating to pay, leave, superannuation contributions, and the termination of the employee's employment.

The *Workplace Relations Regulations* specify that these records are to be kept for a period of seven years after the date on which an entry is made. If the records relate to the employee's name, status or the date on which the employment commenced, or if the records relate to any choice of superannuation scheme, they must be kept for a continuous period of seven years after the date on which the entry was last changed, or on which the employee's employment with that employer was terminated, whichever happens first. The records must be kept during that time in a legible form in the English language, and in a form and condition accessible to a workplace inspector. Failure to comply with these requirements may attract civil penalties of up to \$550 for individuals or \$2750 for corporations.

For employers still under State systems, there are similar provisions in State legislation (though the details differ).

For example, in Queensland, there are requirements about the keeping of records in sections 366 to 370 of that State's *Industrial Relations Act 1999*. In New South Wales, section 129 of the *Industrial Relations Act 1996* and Part 4 of the *Industrial Relations (General) Regulation 2001* govern the keeping of employee records for those covered by that State's system of industrial relations.

Other statutes which require the keeping of records can also encompass certain information about employees. The Commonwealth *Income Tax Assessment Act 1936* requires that records that "relate to any financial transaction in the business" be retained for five years from the date upon which the record was prepared or obtained, or from the time when the relevant transaction was completed. This would include certain details relating to employees, such as the payment records of employees. Under that Act, the Tax Commissioner has the power to extend a taxpayer's assessment for up to four years in certain circumstances, including fraud or tax evasion. Thus, to be safe, an employer would be well advised to keep employee records for at least the full nine-year period (five plus the potential four).

The *Commonwealth Corporations Act 2001* requires that financial records relating to certain entities covered by the Act be kept for seven years. The definition of "financial records" does not specifically refer to documents such as employee personnel records. However, if the records contain documents or other material relating to the financial transactions, position and performance of a business, they would likely fall within the definition of "financial records" and so would need to be retained for the required period. Again, failing to comply with these obligations is an offence.

While statutes impose obligations to keep records, they also contain provisions that may assist an employer with proving that the company took or did not take certain action, should it ever be necessary to do so. Thus, under the *Uniform Evidence Acts*, "business records" can be admitted into evidence if those records form part of the records belonging to the employer, made in the course of or for the purposes of the business, and contains statements made by a person who had personal knowledge of the facts asserted in the document. This can assist as the documents can be admitted without the need to call a person to verify them. Of course it makes the systematic keeping of records by an employer even more important—records should be carefully and logically kept, as a file and not simply

as a collection of loose documents. The *Corporations Act*, similarly, provides in section 1305(1) that a "book" kept by a body corporate under a requirement of that Act is admissible in evidence in any proceeding and is "prima facie evidence of any matter stated or recorded in the book". The term "book" is broad in meaning, being defined by section 9 to include any "record of information" and "financial reports or financial records, however compiled, recorded or stored". To the extent that the *Corporations Act* covers employee records, then an employer can rely on those records as prima facie evidence of the truth of those records.

### Ongoing or anticipated litigation

Quite apart from statutory obligations to keep records, employers need to consider the need to maintain records about their employees where litigation has either been commenced, or is even just a possibility ("contemplated").

Deliberate destruction of documents in the face of litigation (even if not yet commenced) can have extremely serious consequences. It can, for example, amount to contempt of court, or be part of a conspiracy to pervert the course of justice, both of which can result in imprisonment or fines. Under Commonwealth law, deliberately destroying or altering a document with the intention of preventing it being used in court can result in five years imprisonment. In New South Wales, destruction or suppression of material known to be required for proceedings can result in 10 years imprisonment. In the Victorian case of *McCabe v British American Tobacco Services Limited*, Justice Eames in the Supreme Court of Victoria struck out British American Tobacco's defence to a claim for damages, on the ground that BAT had acted deliberately, by destroying documents under its document retention policy, to put documents out of reach of a discovery process, thereby denying the plaintiff, a cancer sufferer, a fair trial. Although Justice Eames' decision was overturned on appeal, the Victorian Government introduced two pieces of legislation (the *Crimes (Document Destruction) Act 2006* and the *Evidence (Document Unavailability) Act 2006*) to ensure that documents used for litigation purposes in Victoria are retained, making it an offence to destroy or conceal documents reasonably likely to be required in evidence in an ongoing or potential legal proceeding, **and** allowing a court to draw an adverse inference against a party whose conduct has the consequence that

relevant documents are unavailable to be produced in legal proceedings.

Even if there is no intention to destroy documents to avoid litigation, employers should carefully consider whether they are better served by maintaining proper records than by destroying them. The inability to produce documents may well result either in adverse inferences being drawn against the company, or the company simply unable to defend itself. There are many and varied legal claims which could be lodged against an employer, and the limitation periods (that is, timeframe within which the litigation may be commenced) under both Federal and State legislation differ greatly. Most of these last for three or six years, but can extend to twelve years, for example, in the case of latent work injuries or misleading and deceptive conduct causing injury or death under Commonwealth Trade Practices legislation. Employers who work

in areas of inherent risk should maintain detailed records for a considerable period of time, as limitation periods can often be extended and may not commence running until the injury manifests itself, which can be many years after the employment ceases.

### Some practical steps for employers

There are a number of practical steps employers can take. At the very least, employers can carry out an audit of their compliance with the legislation, to ensure that they are complying with the requirements to keep employee records.

More significantly, employers should consider introducing clear document retention policies and guidelines. Ideally, given that prevention is better than cure, the policies and guidelines should commence with positive obligations on employees to

keep proper documentation in all areas (not only the legislative requirements). This would include taking care in creating documents (for example, accuracy, keeping criticism to a minimum, and the like) as well as the need to properly retain them. It would take into account that an employer may be better protected to defend (or initiate) any litigation claim if it has retained documents that later may become evidence in those proceedings. Such policies will need to cover all forms of "documents" (for example, retention of emails is a significant issue) and ensure that where it was necessary (for example, for reasons of storage capacity) to cull documents that any destruction of documents was done strictly in compliance with the law and carefully monitored to ensure that there could be no suggestion that documents were destroyed for an improper purpose, and that no documents were destroyed that potentially could be useful to the company.

## STOP PRESS:

### More details released on Australia's new Workplace Relations System

In a speech to the National Press Club on 17 September 2008, "introducing Australia's New Workplace Relations System", the Hon Julia Gillard MP gave further indications of how the Government's Forward with Fairness policy will translate into law. She also revealed that some of the changes would now come into operation earlier than had previously been proposed—changes to the bargaining rules and unfair dismissal laws will take effect from 1 July 2009, the remaining reforms taking effect, as announced, on 1 January 2010.

Ms Gillard also provided details on other key features of the reforms, including the small business unfair dismissal code, institutional arrangements for setting minimum wages, limits on industrial action, and multi-employer bargaining for low-paid and disadvantaged employees. While much of the detail announced is in accordance with the Forward with Fairness policy we set out below a summary of the key announcements.

#### 1. An independent umpire—Fair Work Australia

Labor policy made it clear that the new system would be overseen by a new,

independent, "one-stop shop", umpire, Fair Work Australia. The shape of Fair Work Australia is becoming clearer—there will be a specialist Minimum Wages Panel which will determine national minimum wages (see below), and a new Inspectorate to investigate and enforce breaches, including where necessary through the courts. For matters that arise under the new laws requiring the exercise of judicial power, there will be new specialist "Fair Work" divisions in the Federal Court and the Federal Magistrates Court (not quite "one-stop" any longer).

#### 2. The safety net

A key element of Labor's IR system was a new set of ten, non-removable, minimum National Employment Standards, the final draft of which was published in June this year after extensive consultation.

For those earning under \$100,000 a year, the Standards will be complemented by Modern Awards, tailored to the needs of particular industries or occupations. These Modern Awards will include up to ten additional entitlements, including: minimum wage rates, overtime and penalty rates, provisions about when work is to be performed and procedures for consultation, representation and dispute resolution. The Modern Awards will be finalised, and the Standards in operation, from 1 January 2010.

#### Minimum Wages Panel

Minimum wages and casual leave loadings will be reviewed every year by the specialist Minimum Wages Panel within

Fair Work Australia. The Panel, headed by the President of Fair Work Australia, will comprise up to seven members.

#### Review of awards

Fair Work Australia will review Modern Awards every four years. The first review will take place in 2014.

### 3. A New Bargaining System

The new system will emphasise enterprise-level collective bargaining. Employers and employees will be required to bargain in good faith for a mutually acceptable outcome.

Fair Work Australia will be able to make good faith bargaining orders that can direct parties to meet; disclose relevant information; consider proposals and respond to them; and refrain from unfair or capricious conduct.

However, compulsory arbitration will not be a feature of good faith bargaining. Such bargaining will not require parties to make concessions, or to sign up to an agreement when they do not agree. Arbitration will be limited to exceptional circumstances only, for example, where industrial action is causing a threat to safety or health, a threat to the economy, or significant harm to the parties.

#### Agreement content

The new legislation will remove the concept of "prohibited content" restrictions on the content of workplace agreements, in essence returning to the "matters pertaining" test that previously

applied. Under that test all matters that properly relate to the work performed and the entitlements of employees in the workplace, as well as their effective representation, will be able to be the subject of bargaining. Agreements will be able to include matters like salary sacrifice arrangements, health insurance, childcare and payroll deductions of union dues for union members. Terms dealing with the operation of the agreement will also be allowed.

Matters that are the prerogative of management—like decisions about closing an unprofitable plant or using a preferred supplier—will not be included in enterprise agreements.

#### 4. Industrial action

The new laws will continue to distinguish between protected industrial action during bargaining and unprotected industrial action taken outside of bargaining. Protected industrial action will be allowed in the course of bargaining, in accordance with strict rules, including a secret ballot of employees and three days' notice of intention to take the action. Unprotected industrial action will not be tolerated. Employees who engage in "wild-cat" snap strikes or bans instead of following proper dispute resolution processes will face significant consequences.

It will still be unlawful to claim or pay strike pay—if an employee stops work, their pay must be deducted, but only for the actual period of time the employee stopped work (unlike the current mandatory minimum period).

In the case of partial work bans, employers will be able to exercise discretion. They can tolerate the bans; stand down or lock out employees; or issue a "partial work notice" and make deductions proportional to any work not performed. Fair Work Australia will be able to review whether the amount deducted is proportional.

As the ultimate response to industrial action, employers will be able to lock out employees. However offensive, pre-emptive lockouts—taken by the employer when employees haven't taken any industrial action—will no longer be permitted.

#### 5. Multi-employer bargaining for the low paid

Pattern bargaining continues to be prohibited, but "low-paid workers" like those working in child care and cleaning can be empowered to bargain on a multi-employer basis.

To do so, a union or bargaining representative will need to apply to Fair Work Australia for approval to enter into a new "low-paid stream" to bargain with a specified list of employers, and potentially with head contractors, if those head contractors determine pricing for services. Employees will not be able to undertake protected industrial action, but they will be able to utilise Fair Work Australia's good faith bargaining rules and powers of mediation and conciliation. Fair Work Australia will only be able to make a binding determination if the parties agree.

#### 6. Freedom of association protections

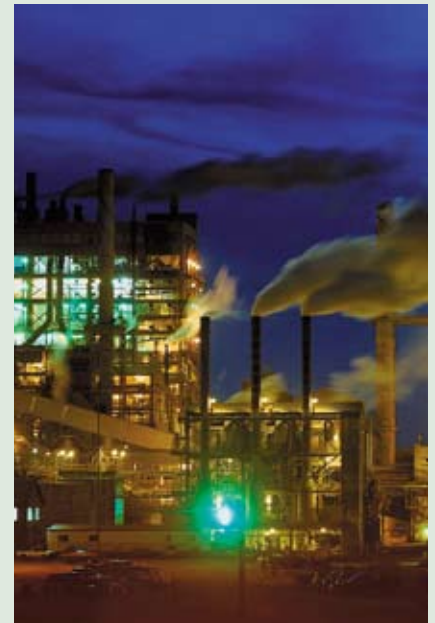
While there are currently a number of rights and protections, it will be unlawful for a person to take adverse action because a person has, or exercises, a workplace right. Adverse action will include dismissal, discrimination, refusing to employ a person or prejudicially altering the position of the person. These protections will cover industrial action, sham contracting arrangements, discrimination on a number of grounds and absence from work because of illness or injury. The protection will be more comprehensive than is currently the case.

#### 7. Unfair dismissal

The new laws will have special provisions for small businesses, those with less than 15 employees. Small business employees with less than 12 months service, those summarily dismissed for serious misconduct or those terminated because of a business downturn or because a position is no longer needed will not be able to seek a remedy for unfair dismissal.

Compliance with a simple and short six-paragraph *Fair Dismissal Code for Small Business* will ensure a small business will be held to have acted fairly in making a decision to dismiss someone with 12 months' service or more. This Code requires the employer to give the employee a warning, based on a reason that validly relates to the employee's conduct or capacity to do the job; and to provide a reasonable opportunity for the employee to improve his or her performance. Multiple warnings are not required. There is no requirement for "three strikes and you're out". While desirable, it is not necessary for a warning to be in writing.

According to Ms Gillard, "as long as [small business] employers comply with this Code, the dismissal will be held to be fair. But if an employer doesn't comply, and



sacks a tried and tested employee harshly or unfairly, compensation will follow".

Disputes will be overseen by Fair Work Australia using fast and informal processes and legal representation will be allowed only in exceptional circumstances.

#### 8. Next steps

The Committee on Industrial Legislation and State and Territory government officials will examine the draft substantive legislation from 7 to 17 October 2008 and provide feedback to the Government. That legislation will be introduced in the Parliament by the end of 2008 and will then be considered by a full Senate Committee inquiry.

Separate legislation will be introduced in the first half of 2009 to provide for transitional and consequential changes and "explain how existing employers and employees move to the new Forward with Fairness arrangements". The Government intends to have the legislation through Parliament in time to ensure the bargaining framework and unfair dismissal changes can take effect from 1 July 2009 next year.

#### 9. Still to come

Details on the Industrial Relations changes which Ms Gillard did not provide include: the new right of entry laws; whether the Australian Industrial Relations Commission's existing members will be offered positions on Fair Work Australia; and how the National Standards will apply to agreements within their current terms. Once these details are known, we will provide a further update.

## About Us

Harmers Workplace Lawyers focuses 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 has consolidated its reputation as Australia's leading workplace law firm by being awarded the "Employment Specialist Law Firm of the Year" at the ALB Australasian Law Awards for 2006, 2007 and 2008. With offices in Sydney, Melbourne and Brisbane and approximately 30 lawyers, Harmers is one of Australia's largest workplace relations firms.

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

### Lesley Maclou

Partner & Team Leader  
lesley.maclou@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

### Sandra Marks

General Counsel  
sandra.marks@harmers.com.au

### Greg Robertson

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

### Nichola Constant

Senior Associate & Team Leader  
nichola.constant@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 10  
224 Queen 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](http://www.harmers.com.au)

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