

## MEDIA RELEASE

### **General protections provisions are being widely applied with claims on the increase**

#### ***Employer responses to commonplace employee requests can bring provisions into play***

21 July 2010 – General protections provisions are being widely accessed by employees, with recent court decisions demonstrating the breadth of the provisions and the coercive powers available to protect employees who have exercised an employee right, according to Harmers Workplace Lawyers.

The general protections provisions of the Fair Work Act state that an employer must not take any 'adverse action' against an employee because the employee has exercised or proposes to exercise a 'workplace right'.

Shana Schreier-Joffe, Partner at Harmers Workplace Lawyers, said claims made under these provisions by employees and unions were increasing.

"A 'workplace right' has a very broad meaning that encompasses everything from union activity right through to an employee's right to make fairly commonplace enquiries or complaints with respect to their employment.

"These could include salary enquiries, flexible work requests as well as requests for further information regarding planned disciplinary action, so it's easy to imagine how widely these provisions can be applied," she said.

According to Ms Schreier-Joffe, recent decisions by Fair Work Australia show employer actions such as informing an employee their role may be made redundant, instituting a disciplinary enquiry, investigating complaints against the employee or issuing a 'show cause' letter, may constitute adverse actions under the Act.

A recent case, *Jones v Queensland Tertiary Admissions Centre (29 April 2010)*, illustrates how employees may be able to effectively prevent or delay an employer's legitimate disciplinary action, despite there being merely an allegation that the employer has acted in breach of the general protection provisions.

"Prior to a hearing by Fair Work Australia, the employee applied directly to the Federal Court for an interlocutory injunction, asserting a breach of the general protection provisions. As a result the court granted an interim injunction to prevent any further action against Ms Jones' prior to a final hearing of the matter, though later all claims made by the employee were rejected by the court," said Ms Schreier-Joffe.

Another recent case, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus (15 June 2010)*, demonstrates the power of the court not only to stop but also to reverse a termination of employment prior to a

full hearing, where it appears a breach of the general protections provision has occurred.

Ms Schreier-Joffe said, “In this case the court determined the evidence strongly supported a finding that the employer had terminated the worker’s employment because of union activities, and that its statement that there was not enough work for the employee was made to mask its real intent.

“Our advice to businesses is not to underestimate the wide-ranging reach of these provisions or the powers of the court or Fair Work Australia to act where they feel adverse action has occurred.

“If an employee can demonstrate they have exercised an employment right as well as show some kind of adverse action taken by their employer as a result, then the onus rests with the employer to prove otherwise. Employers need to be able to document and prove that the adverse action was justified and unrelated to the employee exercising their workplace right,” she said.

#### **Practical advice for business:**

Ms Schreier-Joffe said employers should take the following steps:

- Be trained in relation to what the general protections provisions entail
- Make sure the reason for dismissal, or other adverse action is not prohibited under the Act’s general protections
- Managers should undergo comprehensive performance management training
- Ensure that the lawful reason for dismissal is clearly communicated to the employee
- Be trained to make records of all employee concerns, requests and responses and ensure that the supporting documentation is kept on file
- Establish a system to flag high risk issues, so that grievances can be dealt with internally rather than employees making claims to external tribunals and courts where possible
- Have appropriate processes to capture ‘corporate memory’ because general protection claims can occur up to sixty days after the event.

Ends

#### **Note to editors:**

##### ***About Harmers Workplace Lawyers***

*Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia’s leading employment and industrial law firms, with offices in Sydney and Brisbane. The firm has been awarded Australasian Legal Business’s ‘employment specialist firm of the year’ for the past five years running.*

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For further information, please contact:

Lauren White / Dylan Malloch

Tel. (02) 8920 0700

Email: [lwhite@sefiani.com.au](mailto:lwhite@sefiani.com.au) / [dmalloch@sefiani.com.au](mailto:dmalloch@sefiani.com.au)