

Workplace

February, 08

Industrial News

Work Choices Phaseout Commences

Following Labor's win at the Federal election in November last year, the process of phasing out the Work Choices reforms has commenced.

The new Federal Government has proposed a two year policy implementation plan, called *Forward with Fairness*.

In 2008, legislation is likely to be passed which will:

- prevent the making of new Australian Workplace Agreements
- create a new form of individual workplace agreement – called Interim Transitional Employment Agreements (***ITEAs***) – to be available only for limited use during a 2 year transitional period. ITEAs must not disadvantage employees when compared with an applicable collective agreement or award and the Australian Fair Pay and Conditions Standard
- put in place a new no-disadvantage test which will ensure that collective agreements do not disadvantage employees when compared with the Australian Fair Pay and Conditions Standard
- remove the current requirement to provide a Workplace Relations Fact Sheet to employees
- enable the Australian Industrial Relations Commission to undertake the process of modernising industrial awards.

A Transitional Bill effecting these changes will be presented to Parliament in the first week of sittings beginning on 12 February 2008. While the Federal Government hopes the Bill will be passed in 2008, it will not have control in the Senate and as such, the changes may be delayed until the second half of the year.

The current Work Choices laws will continue to be valid until the new laws are passed.

Finlaysons will continue to provide clients with Alerts when any new legislation, regulations or policy is implemented.

This Alert is intended as an alert only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

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Compensation News

Legal Professional Privilege Lost if Documents Not Confidential

Recently the NSW Court of Appeal delivered its decision in *State of New South Wales v Jackson* [2007] NSWCA 279. The Court ruled that witness statements are not protected by legal professional privilege if they are not sufficiently confidential.

The case involved a schoolyard injury to a 14-year-old student. The teacher supervising the activity was instructed to complete an "Accident to School Student Form", write a statement himself, and to obtain two witness statements.

The Court found that even though the two witness statements were obtained for the dominant purpose of anticipated litigation, they were not prepared in circumstances where the witnesses had an express or implied obligation of confidentiality. As a result, the witness statements were not protected by legal professional privilege and had to be disclosed to the opposing party.

While this case was decided under New South Wales law, it is likely that a similar result would occur in South Australia. This means that documents and communications will not automatically be protected by legal professional privilege simply because a person intends to use them to obtain legal advice or because litigation is contemplated. Rather, the document and communication will also need to be confidential in order for the privilege to apply.

Finlaysons recommends that employers review their incident reporting and management systems to ensure that where appropriate, legal professional privilege is maintained. Depending on the seriousness of the incident, this could involve instructing solicitors to interview witnesses and take statements rather than doing it in-house, and ensuring that all interviewees are advised that they should not discuss the matter with outside parties. Documents should also be marked "confidential". Together, these steps will ensure that employers can conduct full and frank investigations into workplace incidents without the fear that sensitive material may fall into the wrong hands.

If you require assistance in relation to your incident reporting system please contact any member of our Workplace Team.

Disclosure of Video Surveillance

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In the recent decision of *Bennet v Advertiser Newspapers Ltd [2007] SAWCT 1.9*, the Workers Compensation Tribunal held that video surveillance footage which was viewed by a doctor for the purpose of writing a report did not have to be disclosed in the interests of justice because there were no “special reasons” that required disclosure.

The case concerned an exempt employer who sought a medical opinion from a doctor about video surveillance footage of a worker. The doctor considered that the video surveillance footage changed his original opinion regarding the worker’s level of disability and took the view that the worker’s actions in the surveillance footage were at odds with his presentation on earlier dates. When the worker became aware of the surveillance footage, he sought an order that the exempt employer produce copies for him to review. The exempt employer opposed the worker’s application.

While exempt employers must disclose surveillance material to a Conciliation Officer, they are generally permitted to conceal it from workers until trial in order to protect the forensic advantage of the material. However, the Tribunal does have an overriding power to order disclosure and production of surveillance footage where:

- (i) a party consents
- (ii) the surveillance material was previously shown to the worker’s treating medical expert or current rehabilitation provider
- (iii) the disputed determination relies on a medical opinion which is wholly or predominately based upon the surveillance footage
- (iv) the Tribunal is convinced that in the interests of justice there are special reasons that require the video surveillance footage be disclosed.

In this case the Tribunal was only required to consider whether the footage should be disclosed in the interests of justice. However, it held there were no special reasons outside the range of circumstances that were usually to be expected in litigation of this type. The Tribunal added that if necessary, the interests of justice could be met through an adjournment or by obtaining a supplementary report from the doctor prior to calling the worker’s experts to give evidence.

Despite the outcome in this case, surveillance evidence still needs to be managed carefully to ensure its value is not lost through disclosure to an

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opposing party too early. This means that careful consideration needs to be given to what material should be obtained in the first place, and whether it should be shown to the employer's independent medical experts or the worker's own doctors pursuant to a Section 110 Authority.

Each of these decisions will need to be made on a case by case basis depending on the history and progress of a claim.

If you would like to discuss the use and management of surveillance evidence, please contact Grant Archer.

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