WORK SIGHT

WorkSight Focus International

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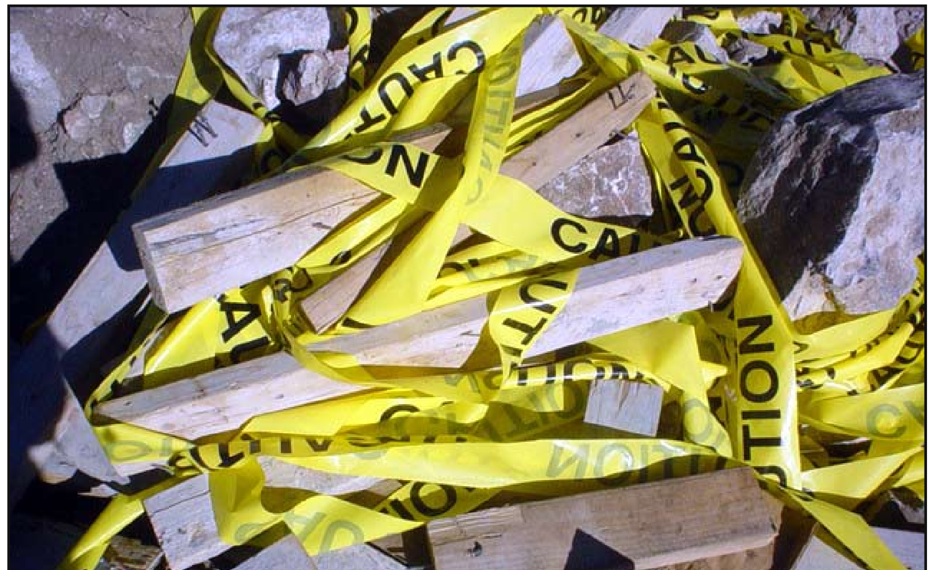
News, opinions, events and more from the WorkSight team

New Industrial Relations System in Australia

The new industrial relations system will bring approximately 75 – 85% of all Australian workers into the federal industrial relations system. The state industrial relations systems will be left to deal with employees of non-constitutional employers (e.g. partnerships or sole traders) and state public service employees.

Those incorporated businesses (e.g. those with Pty Ltd or Inc. after their names) that have been operating in the state systems will transfer into the national system. They will be able to maintain their state awards and agreements for a 3-year transitional period only. At the end of the transitional period if they have not already made an agreement with their employees under the federal system, they may be transferred to an appropriate federal award or just rely on the minimum employment conditions set out in the Fair Pay and Conditions Standard.

Those unincorporated businesses that are already in the federal system will be given 5 years to decide whether they want to stay in the federal system (in which case they will have to become incorporated) or leave it to come under the relevant state industrial relations system. During the 5-year transition period they will not be able to make any new agreement with their workers.



All businesses in Victoria will be covered by the federal system.

Agreement making

When making an agreement or an AWA (individual contract), businesses currently have to compare the agreement with the relevant award to show that they are not disadvantaging their employees by entering into the agreement. However, under the new system, an agreement must only meet the Fair Pay and Conditions Standard. The employment

Fair Pay and Conditions Standard

The Fair Pay and Conditions Standard will establish the minimum employment conditions that all employees must be given. These conditions will be:

- 38 hours a week (can be averaged over a year)
- 4 weeks annual leave (2 weeks can be cashed out each year)
- 10 days paid Personal/carer's leave
- 2 further days of unpaid carer's leave – for unexpected emergencies when paid leave used or if casual
- 2 days of paid compassionate leave (not just bereavement leave)
- 52 weeks of unpaid parental leave
- 20% casual loading

conditions in the box below make up this standard. As long as an agreement contains at least these employment conditions it will be acceptable. If an award applies to a business and contains better employment conditions than the agreement, those conditions can continue to apply. However, if the agreement specifically states that the award will no longer apply, the agreement will override the award employment conditions.
In another significant change, an agreement (or AWA) will become enforceable as soon as it is lodged with the Office of the Employment Advocate. There will be no hearing or other assessment done either by the Office of the Employment Advocate or the Australian Industrial Relations Commission.
Those businesses with over 100 employees will be able to dismiss an employee within a 6-month probationary period without risking a claim of unfair dismissal (it is currently 3 months). Employees who have been made redundant will also not be able to claim unfair dismissal.

National Wage Cases

The Australian Industrial Relations Commission will no longer hold annual, national wage cases. Instead the Fair Pay Commission will decide on the minimum wage levels as and when it sees fit. It will consult with relevant parties to decide on the appropriate level instead of hearing claims. The Government has said the Fair Pay Commission will adjust wages for the first time in spring 2006.

Awards

The number of awards and what they can cover will be reduced significantly so they will only be used by those businesses that have not made, or do not want to make, an agreement with their employees.

Unfair Dismissals

Those businesses with up to 100 employees will no longer be covered by the unfair dismissal provisions and so will be free to dismiss employees without the risk of being taken to the Australian Industrial Relations Commission.

However, the unlawful dismissal provisions that prevent employees being dismissed for discriminatory reasons will still cover all businesses.

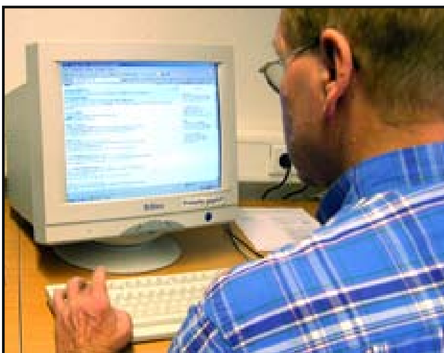
Timeline

The WorkChoices Bill has passed through the House of Representatives and the Senate. Two parts of the legislation - provisions setting up the Fair Pay Commission and scrapping the obligation for small businesses to pay severance - will take effect following Royal Assent, while the remainder will take effect by proclamation, but are expected to apply from March.

Survey shows age policies not part of the culture

Employers are beginning to establish policies relating to older workers but these efforts have not yet translated into cultural change in the workplace. This conclusion was reached by the 2005 Australian Diversity Equality Survey which was released at the 17th Women, Management and Employment Relations Conference.

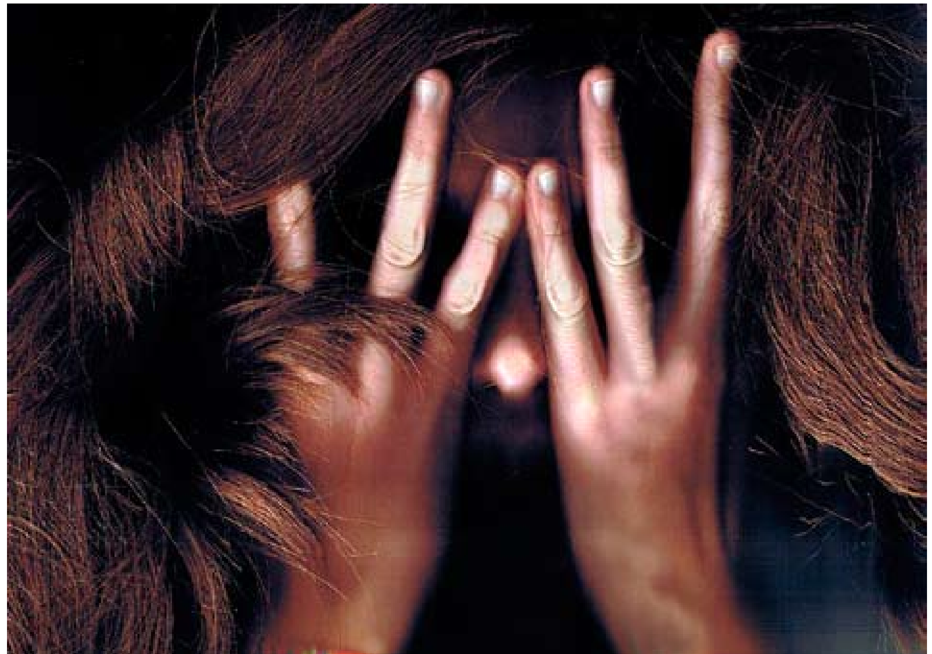
Juliet Bourke of Aequus Partners said that age diversity was “the new black”, that is, it is currently a fashionable concept, but employers still had only a limited grasp of the scope of age discrimination. In 2003, in the previous survey, only 25% of organisations had programs to address age diversity. The 2005 survey found this percentage had increased to 44%.



Most organisations (60%) had a stated commitment to addressing age diversity and had established a steering committee, and 75% of organisations surveyed had a person designated as a diversity manager. However, said Bourke, the scope of diversity programs was narrow. Most programs focused on retention of older workers (94%) and maximising performance (95%). A broader agenda would include changing recruitment strategies to appeal to older workers. Currently, most recruitment advertising still targets young workers.

Accountability is another aspect that is not addressed well by most diversity programs. Until managers’ commitment to diversity is reflected in performance management and promotional decisions there is unlikely to be significant improvement in workplace behaviour.

The Australian Diversity Equality Survey was conducted by the Equal Employment Opportunity Network of Australia (EEONA) and is available at http://www.eeon.com.au/



Termination for out of work sexual harassment unfair

The Australian Industrial Relations Commission (AIRC) found that sexual harassment of a female work colleague at a non-employer sanctioned social gathering could not be relied on to justify termination of employment.

A senior prison officer (the employee) was dismissed from his employment following a series of incidents during a work related field trip. The incidents involved the employee touching a female colleague’s chest, bottom and grabbing the back of her underwear.

The AIRC found that at least two of the employee’s actions towards the female colleague did amount to sexual harassment as that term was defined in the respondent’s policy documentation. However, the key issue was whether there was sufficient nexus between that sexual harassment and his employment so that his conduct could constitute a valid reason for termination.

Whilst the employees were away for work purposes, they were out of uniform and were not present at the employer-provided accommodation. The gathering was a private one between work colleagues – it was not required or sanctioned by management. The employees were not placed in proximity of each other by their

employer but by their own choice.

The sexual harassment was therefore of a private nature and, although grossly inappropriate, did not constitute a valid reason for the termination of the employee's employment.

The AIRC found that the employee's conduct towards his fellow male employees and his inability to attend work the next day constituted valid reasons for termination. However, it was not satisfied that the employee was told that the reasons for his termination included the threats he made to his male colleagues.

After considering the employee's previously unblemished employment record, the AIRC concluded that the employee's termination of employment was harsh and was excessive to his conduct. Termination was also unreasonable as it was imposed for conduct that was essentially private. Accordingly, the employee was to be reappointed to the position he held prior to termination with continuity of employment and paid for lost earnings between his termination and reappointment.

Tichy v Department of Justice — Corrections Victoria AIRC (Simmonds C) (PR955783)

Refusal to discuss new agreement nbreaches existing agreement

An employer was found to have breached a term of its certified agreement by refusing to hold discussions for a replacement agreement. The relevant term of the certified agreement stated that the parties agreed that discussions for a new agreement would occur no later than three months prior to the expiry date of the existing certified agreement.

The Queensland Industrial Relations Commission (QIRC) held that such a term required the parties to make bona fide, reasonable and meaningful attempts to finalise a replacement agreement - it did not permit one party to unilaterally decide that it did not wish to make a certified agreement with the other party.

The Commission expressed the view that the conduct of the employer constituted a clear breach of the certified agreement and its obligations under that agreement. Whether the QIRC had the power to force the employer to negotiate a certified agreement was irrelevant as the obligations to discuss a new agreement were imposed by the terms of the existing certified agreement, which the QIRC has the power to interpret and enforce.

QNU v Friendly Society Private Hospital, Bundaberg [2005] QIRComm 76

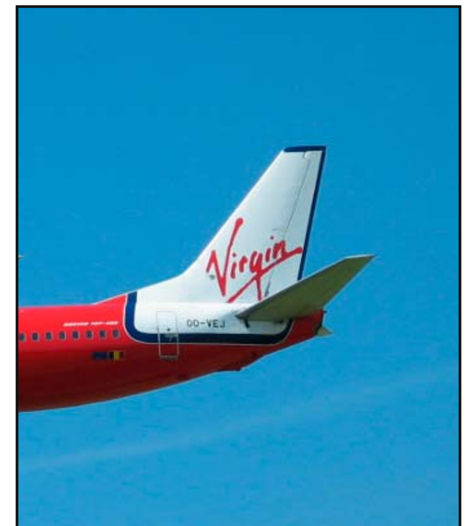
Virgin Recruitment Practices discriminated against older applicants

Virgin Blue discriminated against older applicants for flight attendant positions when it was accelerating its recruitment during a rapid growth phase in 2001-02, Queensland's Anti-Discrimination Tribunal ruled recently. The Tribunal accepted, on the basis of statistical analysis of the age profile of successful applicants, that the recruitment practices used by Virgin at the time were discriminatory on the basis of age.

Under the recruitment system used by Virgin, a third party was used to screen resumes via an online assessment process. The form had a mandatory field for the applicant's age.

The Tribunal found the competency-based process used by Virgin was designed to be "age neutral". However, it failed to generate age-neutral results, because the statistics showed that only one applicant had been chosen from more than 750 over-35s who applied for flight attendant positions with Virgin between September 2001 and September 2002.

The airline conceded that up to the end of 2002, it didn't appoint a single flight attendant over 36, despite 10% of applicants falling into that age category.



The Tribunal also found that the statistical evidence and the inadequacies in the recruitment process were compelling evidence that Virgin had discriminated on the basis of age against each of the women.

Costs were ordered against Virgin and proceedings were adjourned until a future date to hear the parties on the issue of compensation for the jobseekers

Hopper & Others v. Virgin Blue Airlines Pty Ltd (10 September 2005)

International Focus looks at

The Fine Print

Risk assessments must take account of everything

A recent case highlights that an employer's duty to ensure the health and safety of people at work goes beyond the identification and control of risks associated with work, and includes any risk in the workplace.

The case Inspector Gill v Qantas Airways Ltd [2005] NSWIRComm 326 involved a labour hire employee engaged by Qantas at its freight terminal in Sydney. The employee entered a semi-restricted area in the terminal and squatted next to, or sat on the edge of, a roller deck in order to adjust a radio. The roller deck subsequently moved and the employee was injured.

The NSW Industrial Relations Commission in Court Session (the court) rejected the claim by the employer that the employee was not required to enter the restricted area to perform their work. The court found that a risk assessment should search out and remove all risks in the workplace, not just those associated with the performance of work.

Inspector Gill v Qantas Airways Ltd [2005] NSWIRComm 326

Workplace Relations Specialists

Practical and personal employee relations advice

If you need information or advice about any employee relations issues affecting you or your employees contact Siân Owen, Janet Nicolson or Rae-Anne Medforth at WorkSight.

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This newsletter is intended to provide a general outline and is not intended to be and is not a complete or definitive statement of the law on the subject matter. Further advice should be sought before any action is taken in relation to the matters described in this newsletter.