

EMPLOYMENT BRIEFLY

PROVIDING INTERNET FACILITIES TO EMPLOYEES – THE RISKS

The provision of internet and email facilities to employees puts employers at risk of both vicarious and direct liability for civil and criminal offences.

The Broadcasting Services Amendment (On-Line Services) Act 1999

The creation of Internet Industry Codes of Practice (“Codes”) (commencing operation on 1 January 2000) have increased operational risks for employers.

The *Broadcasting Services Amendment (On-Line Services) Act 1999* (“Act”) makes internet host providers liable for internet content they carry which is illegal or offensive. Although the word “host” is not defined in the Act, most employers who provide email and internet access to employees will constitute a host under the new provisions.

The new provisions only relate to “internet content” and not ordinary electronic mail. However, as quite a lot of material transmitted by email has internet content or internet content can be attached, it is likely that most employers will be affected.

The “on-line provider rules” in the Act require compliance with the Codes. For example, hosts must take reasonable steps to inform users about:

- the right to make complaints to the Australian Broadcasting Authority (“ABA”) about prohibited content and potential prohibited content; and
- complaints procedures.

The above requirements can be satisfied if the host has included a statement, policy, notice or link to the internet approved by the Internet Industry Association for that purpose. Reasonable procedures would include having internet sites available that enable users to make/deal with complaints about information that is likely to cause offence to a reasonable adult.

Following a complaint, the ABA can issue a “take-down” notice to a host where internet content is assessed to be prohibited content or potentially prohibited content. The host must remove the offensive material within 24 hours and must not host such content again.

If the notice is not complied with, a company shall receive **a fine of \$27,500 for every 24-hour period of non-compliance**, whether or not the business is carried on during that time.

Two weeks after the ABA began its task of internet censorship, it had issued an unspecified number (which had reached “double digits”) of take-down notices on an interim basis, pending assessment by the National Classification Board.

Use Of Filtering Devices

Employers can install filtering software or access a filter at the Internet Service Provider (“ISP”) level through a dial-up service. ISPs are entitled to charge for filter software and the host must decide whether to implement the solution.

Employers will, therefore, incur further operational costs. However, as this will decrease potential liability, it is recommended practice. For employers to defend most civil claims brought by employees, mere reasonable precautions must have been taken to prevent the offending conduct.

In respect of criminal offences, an employer can be liable due to their vicarious liability for the actions of employees.

The *Crimes Act 1914* (Cwth) already makes it illegal to use a telecommunications service in an offensive manner. This would encompass the downloading of offensive material from the internet, such as child pornography. However, the *Broadcasting Services Amendment (On-Line Services) Act* goes further than this.

Overall, the Act and Codes enable employers to manage employees’ access to on-line content.

Strategy

Employers should therefore:

- develop and inform employees of the employers’ policies regarding use of email and the internet;
- consider filtering software so that employees cannot access offensive material;
- be prepared to deal with any ABA notices with great speed.

The constitutional validity of the Act is being challenged in the High Court by the Eros Foundation. We shall let you know as to the outcome of the legal proceedings.

If you have queries regarding the Act and the practical application of its requirements, please contact:

- Jill Francis
– tel 8210 1294 or email jfrancis@normans.com.au
- Ian Colgrave
– tel 8210 1203 or email icolgrave@normans.com.au
- Celine McInerney
– tel 8210 1206 or email cmcinerney@normans.com.au

AFFIRMATIVE ACTION - NOT ANY MORE

The former *Affirmative Action (Equal Employment Opportunity for Women) Act 1996* has been significantly amended by the Federal Parliament.

It has been renamed the *Equal Opportunity for Women in the Workplace Act 1999* - it had been said that the term “affirmative action” was often misconstrued to mean that positive discrimination for women based upon preferential treatment and quotas should be exercised. Accordingly, the term has been removed from the legislation altogether.

Although employers of 100 or more are still required to create and implement workplace programs which comply with the Act, consistent with the above, they are no longer called “Affirmative Action Programs”. A new process has been introduced for the creation of these programs, which requires a workplace profile to be prepared with respect to that employer, following consultation with employees. This is designed to allow employers to tailor workplace programs to their individual organisation.

Most employers will not be glad to hear that the requirement to provide an annual report to the Equal Opportunity for Women in the Workplace Agency has been retained - but the good news is that the first reports do not need to be lodged until 31 May 2001 - relating to a reporting period of 1 April 2000 to 31 March 2001.

If any employer requires assistance with the requirements of the legislation, please contact:

- Ian Colgrave
– tel 8210 1203 or email icolgrave@normans.com.au
- Julie McIntyre
– tel 8210 1290 or email jmcintyre@normans.com.au
- Jill Francis
– tel 8210 1294 or email jfrancis@normans.com.au

VOLUNTARY REDUNDANCIES & COMMONWEALTH COMPENSATION

The decision in *Comcare & Chenhall* requires careful consideration of the circumstances in which an employee leaves his or her employment. The

definition of “suitable employment” varies depending upon whether an employee left their employment voluntarily. This, of course, has implications for assessing weekly payments of compensation given the necessity to ascertain the amount an employee is able to earn in suitable employment. Most redundancies in the Commonwealth arena have been termed “voluntary”. Some decisions of the Administrative Appeals Tribunal (“AAT”) indicate that this cannot be accepted at face value. Even redundancies that are termed “voluntary redundancies” must be carefully examined to ensure that they are truly voluntary.

In *O’Shea & Comcare* (1993) the AAT examined the circumstances of Mr O’Shea’s departure from the Civil Aviation Authority (“CAA”) and found that, although theoretically he had the option to seek redeployment within CAA, there was in reality no position available to him, even if he had requested redeployment.

In a recent AAT decision in *Jones v Telstra Corporation Limited* (1999) the employee argued that his redundancy was not truly voluntary and that he had been “railroaded” into accepting it. The AAT considered that it was “required to look at the actual circumstances of the retirement notwithstanding its formal labelling as ‘voluntary’”.

It is clear, from both *Jones* and *O’Shea*, that the AAT is prepared to go behind the documentation surrounding a redundancy to see if it is truly voluntary. Accordingly, decision makers assessing claims for weekly payments following the termination of employment must also undertake some investigation into the circumstances of the redundancy even if the paperwork suggests that it was voluntary.

For further information about issues covered in this article, please contact Julie McIntyre on 8210 1290 or email jmcintyre@normans.com.au.

WHEN IS IT SAFE TO BLEED? WHEN IS IT LAWFUL TO DISCRIMINATE?

In a decision delivered on 2 December 1999 (*X v The Commonwealth*) the High Court of Australia considered the provisions of the *Disability Discrimination Act 1992* and, specifically, the meaning of the term “inherent requirements of the particular employment”. This decision assists to resolve the difficulty many employers have had in reconciling their obligations not to unlawfully discriminate against employees and applicants for employment on the ground of disability and their obligations to safeguard other employees, members of the public and the employer’s property.



X enlisted in the Australian Army. He commenced recruit training. He underwent a medical examination that included a blood test. He tested positive to HIV. He was discharged from the Army. He then lodged a complaint with the Human Rights and Equal Opportunity Commission ("HREOC") alleging that his discharge from the Army on the ground of his positive test was unlawful discrimination.

It was common ground that the basis of his discharge was the positive test and that, despite this, he was currently in excellent health and able to physically undertake all of the tasks required of him in the Army. The Army, however, argued that X could not carry out the inherent requirements of his employment as a soldier because one of those requirements was that he be able to "bleed safely" and not infect other soldiers.

HREOC found in favour of X on the grounds that he was physically able to perform the tasks and skills of his employment and that "safe bleeding" was not an inherent requirement of the employment but "an externally imposed requirement of the employer, based on policy considerations". It was noted that the risk of exchange of bodily fluids was not restricted to Defence service, but could apply equally in an industrial setting, for example, between process workers.

The Army appealed successfully to the Federal Court and X appealed to the High Court. A majority of the High Court also found in favour of the Army. The High Court considered that HREOC had defined the inherent requirements of employment too restrictively in limiting its consideration to X's physical ability to perform the tasks of his employment. The High Court stated that it is always permissible to look at the context, social, legal and economic, in which the work takes place. ***Carrying out employment without endangering the safety of other employees was found by the majority to be an inherent requirement of any employment.***

McHugh J set out a 2-part test which encompasses whether the disability poses "a real risk to the safety or health of other persons or the preservation of the property of the employer". Accordingly, to determine whether there is a real risk you should first assess:

- the degree of risk;
- the consequences of the risk being realised;
- your legal obligation to co-employees and others;
- the function that the employee performs;
- the organisation of your business.

If there is a real risk then the next consideration is whether it can be avoided with the provision of services or facilities that you could provide without unjustifiable hardship.

This decision represents a very useful exposition of what is meant by the "inherent requirements" of a position and when it is possible to lawfully discriminate against someone on the ground of disability.

For further information about issues covered in this article, please contact Julie McIntyre on 8210 1290 or email jmcintyre@normans.com.au.

TAX ALERT FOR CHARITABLE BODIES

The current system of self-assessment or confirmation by the Australian Taxation Office ("ATO") of charities' gift deductibility and income tax exempt status ceases on 30 June 2000. Charities must apply to the ATO to seek an endorsement as a deductible gift recipient and/or an income tax exempt charity to receive these concessions after 1 July 2000.

Charities that are not freshly endorsed by 1 July 2000 will lose their deductible gift recipient and/or income tax exempt charity status.

For further information about issues covered in this article, please contact Kim Evans on 8210 1287 or email kevans@normans.com.au.

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Norman Waterhouse Lawyers

Level 15
45 Pirie Street Adelaide
GPO Box 639 Adelaide
South Australia 5001
Telephone +618 8 8210 1200
Facsimile + 618 8 8210 1234
www.normans.com.au
DX 397 Adelaide
ISO 9002 Quality Certified

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