

## EMPLOYMENT BRIEFLY

### The New Privacy Provisions

As you would no doubt be aware, new privacy provisions have been inserted into the *Privacy Act 1988 (Cth)* which affect private sector organisations. They came into effect on 21 December 2001 and mean that private sector organisations covered by the legislation must now comply with either a binding privacy code (which must be approved by the Federal Privacy Commissioner) or, alternatively, the National Privacy Principles (NPPs) in the legislation.

The NPPs govern the way in which organisations collect, use and disclose personal information. They apply to businesses with an annual turnover of more than \$3 million, although some businesses with an annual turnover less than that are also affected.

The new provisions will obviously have an effect upon a wide range of employment related issues. We will look at two issues in particular – the effect upon arrangements with contractors, and the effect upon conducting video surveillance of employees.

#### Impact Upon Engaging Contractors

As many readers would be aware, businesses and individuals have tended to use independent contracting arrangements instead of employment agreements with greater frequency in recent years. The new State Government has indicated that it will be targeting this area. Contractors, and the organisations engaging them, need to consider their “privacy” obligations when personal information may be accessed, used or disclosed as a result of their arrangements.

There is no doubt that contracts for services should be drafted with confidentiality in mind. Traditionally, confidentiality has protected the disclosure of information of a confidential nature regarding an organisation’s business interests, intellectual property, marketing procedures, client lists and financial information. With the changes to the privacy legislation, both contractors and the organisations engaging them may now have obligations in relation to the personal information about individuals that comes into their possession.

Whether such obligations exist, and how they should be dealt with, will largely depend upon whether the contractor and the organisation are bound by the Privacy Act, and there may be situations where the obligations of the organisation and contractor are different. For example, if the organisation is a Local Government authority and the contractor is not, the organisation will not be bound by the Privacy legislation but the contractor may be. The first step is to work out who is bound.

An organisation may sometimes disclose personal information it holds about individuals to a contractor, or give the contractor access to it, to enable the contractor to perform the contracted services. Alternatively, a contractor may have the opportunity to access information held by the organisation while providing services – cleaners and computer repairers are examples of contractors who may be able to access information if they wanted to. In these circumstances, the organisation may have obligations to inform individuals about how their information may be accessed and used, obligations to ensure that information is kept secure, and obligations to take reasonable steps to ensure that contractors do not misuse information.

Organisations which are bound by the Privacy Act, or which are not bound but nevertheless wish to act consistently with the Act, should review their contractual arrangements with contractors and, where desirable and possible, vary those arrangements to ensure that they deal appropriately with privacy issues. For example, each contract should provide that the contractor will only use any information supplied to it for the purposes of supplying the contracted services, and should impose obligations upon the contractor to return or destroy information if instructed to do so.

Norman Waterhouse is assisting many organisations to review their arrangements with contractors and to vary those arrangements where necessary.

*If you wish to discuss the changes to the Privacy Act and its implementation in a contract for services arrangement please contact Sonia Albertini on 8210 1266.*

## Effect Upon Video Surveillance of Employees

At times an employer may, for some reason, feel the need to conduct video surveillance of a particular employee or group of employees. There may be suspicions of theft or misconduct which the employer wishes to investigate. Employers involved in workers compensation proceedings, in particular self-insured employers managing their own claims, may wish to conduct video surveillance if they have reason to doubt the genuineness of a particular claim.

The question, then, is whether the new provisions of the Privacy Act 1988 affect employers' rights and obligations in relation to conducting video surveillance.

The Privacy Act provides that an organisation must take reasonable steps to make individuals aware of:

- The fact that it is collecting personal information about them;
- The purposes for which it is collecting the information; and
- Who it might pass the information on to.

"Personal information" is defined in the Act to include "a record or document, database or photograph or other pictorial representation of a person". The definition, therefore, is sufficiently broad to encompass records in electronic form, and includes films and videotapes

Many of the potential benefits of conducting video surveillance would be lost if an employer was, for example, required to inform a particular employee that he or she was to be filmed and to describe how the film would be used.

However, the obtaining and use of video surveillance film by employers may not necessarily be subject to the same minimum standards brought about by the new national privacy scheme. We'll explain why.

### *First Possibility – Employee Records*

The Privacy Act exempts from its coverage acts or practices in relation to "employee records" of an individual if the act or practice directly relates to a current or former employment relationship between the employer and the individual. An "employee record" means a record of personal information relating to the employment of the employee.

It is therefore arguable that the obtaining of video surveillance film of an employee by an employer is an act or practice which directly relates to an

employment relationship, and therefore falls outside the scope of the Act.

### *Second Possibility – Unlawful Activity and Seriously Improper Conduct*

One of the most common uses of video surveillance in the workplace is where an employer wishes to investigate instances of suspected theft or other misconduct by an employee.

The National Privacy Principles specifically allow an organisation to use or disclose personal information about a person, without the person's consent, when it has reason to suspect that unlawful activity has been, is being, or may be engaged in and the information is used or disclosed as a necessary part of the investigation. "Unlawful activity" refers to acts or omissions that are expressly prohibited by Commonwealth or State law.

They also allow personal information to be used or disclosed if the use or disclosure is reasonably necessary for the prevention, detection, investigation or remedying of seriously improper conduct by an enforcement body. "Serious improper conduct" refers to serious breaches of standards of conduct associated with a person's duties, powers, authority and responsibilities.

Furthermore, they allow an organisation to deny a person access to personal information the organisation is holding about the person when possible unlawful activity is being investigated and providing access would be likely to prejudice the investigation.

Therefore, conducting video surveillance to investigate incidents of theft (clearly an unlawful activity), or to investigate an employee who is suspected of workers compensation fraud, is not prohibited by the new provisions.

*For further information about issues covered in this article, please contact Cecilia White on +61 8210 1286 or 0402 787 232, or e-mail [cwhite@nomans.com.au](mailto:cwhite@nomans.com.au).*

## **WORKPLACE BULLYING – SOMEONE ELSE'S PROBLEM?**

The issue of "bullying" in the workplace, whilst not treated terribly seriously by some employers, is one that will become more and more prominent in the next few years. The SA Employee Ombudsman has clearly signalled that it is an area of particular focus for him, and an international conference on the issue was recently held in Adelaide.



In Victoria, the Government is viewing the issue seriously, and Worksafe has published an "Issues Paper".

In short, the issue will not simply "go away" if employers ignore it. We would recommend that all employers, whether large or small, look to implementing some form of policy, procedure or practice to deal with allegations of workplace bullying as soon as possible.

In many cases, this exercise may simply involve amendments to existing policies to incorporate definitions of bullying as one of the types of grievance or disputes that can be dealt with under existing mechanisms. However, some may desire a more detailed approach.

We would welcome any inquiry with respect to the adoption or creation of a bullying policy or procedure for your enterprise.

*For further information about issues covered in this article, please contact Ian Colgrave on +61 8210 1203 or 0419 823 729 or e-mail [icolgrave@nomans.com.au](mailto:icolgrave@nomans.com.au).*

## PROTECTED INDUSTRIAL ACTION

A recent decision of Justice Kenny in the Federal Court (*Emwest Products Pty Ltd v AMWU - 6 February 2002*) has thrown something of a spanner into the industrial relations system in this country.

Traditional wisdom had been that apart from action that was "protected" by virtue of Section 170ML of the Workplace Relations Act – action taken during a notified "bargaining period", there was a "prohibition" on any other form of industrial action by virtue of Section 170MN of that Act. Section 170MN reads so that employees or unions subject to or bound by an enterprise agreement are prohibited from taking industrial action "for the purpose of supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement".

It was thought that this provision meant that, as an employer, if you have an agreement, you have negotiated industrial "peace" for the period of that agreement – and action could only be taken to advance claims for the next agreement, once the current one had expired.

The AMWU disagreed with this proposition – and Justice Kenny found in their favour. Essentially the reasoning was that the prohibition in Section 170MN only applied to industrial action relating to employment terms and conditions **contained in the agreement itself**. If the action related to matters that were not contained in the agreement, then there is no basis for an injunction to be granted pursuant to Section 170MN. In the

Emwest case, the action had been taken to advance redundancy claims – and this subject was not dealt with by the relevant agreement.

No great mention was made by the judge of the "No Extra Claims" clause of the Emwest agreement – and this aspect of the judgment alone may lead to criticism.

As stated above, this decision has thrown traditional understandings into disarray, and it is being appealed to the Full Court. For the meantime, however, employers may be subject to industrial action that they had not expected, if the basis of such action relates to terms and conditions not covered by your enterprise agreement.

*For further information about issues covered in this article, please contact Ian Colgrave on +61 8210 1203 or 0419 823 729 or e-mail [icolgrave@nomans.com.au](mailto:icolgrave@nomans.com.au).*

## OUR TEAM – WHO WE ARE & WHAT WE DO

Here is a brief snapshot of our team and our areas of interest, should you need to contact us at any stage.

### Ian Colgrave, Partner

Ian heads the Employment & Industrial Relations team at Norman Waterhouse. He was admitted to practice in 1985, joining Norman Waterhouse in 1989. He provides advice on employment and industrial related issues including unfair dismissals, workplace agreements, award negotiation and interpretation, equal opportunity (including discrimination and sexual harassment), negotiation and drafting of employment contracts and a range of human resource management strategies.

Please contact Ian Colgrave on +61 8 8210 1203 or 0419 823 729 or e-mail [icolgrave@nomans.com.au](mailto:icolgrave@nomans.com.au)

### Sonia Albertini, Senior Associate

Sonia joined Norman Waterhouse in 2001, having practiced in the area of industrial and employment law for over 5 years. She is particularly interested in human resource management practices, including policy management, dispute resolution, termination of employment issues, discrimination and occupational health and safety matters.

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### Josh Abbott, Associate

Josh was admitted to practice in 2000, after commencing employment as a Law Clerk at Norman Waterhouse in January 1999 in the Employment and Industrial Relations Team. Josh has continued to work in the Employment and Industrial Relations Team and has developed a specific interest in unfair dismissal, occupational



health and safety law and equal opportunity matters, such as sexual harassment.

Please contact Josh Abbott on +81 8 8210 1232 or 0409 977 752 or e-mail [jabbott@normans.com.au](mailto:jabbott@normans.com.au).

**Cecilia White, Associate**

Cecilia joined Norman Waterhouse as a Law Clerk in 1999, working in the area of Employment and Industrial Relations Llaw. She was admitted to practice in 2001, and has continued working with the Employment and Industrial Relations Team. Cecilia has a keen interest in all areas of employment and industrial relations law, including workers compensation.

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**COMING EVENTS.....**

**October Employment Law Seminar**

We will be holding an all-day seminar in mid-October, at which we will deal with current issues in Employment Law. We will be presenting a number of discussion papers to provide an insight into the practical impact of current issues upon employers.

Watch this space for further details.....

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