

WORKCHOICES Are You Ready?

KYLIE TORLACH



The Federal Government's WorkChoices legislation was passed by Parliament on 14 December 2005.

Some of the provisions, such as those concerning the new Australian Fair Pay Commission, are already in

operation — and the remainder of the provisions took effect from **Monday 27 March 2006**.

The States have challenged the legislation in the High Court of Australia. Subject to any changes arising out of the decision of the High Court, the legislation will significantly change the Industrial Relations landscape in Australia.

Of critical importance to most businesses is the fact that if they are "trading corporations" which are currently in the State IR system, they will transfer into the Federal IR system.

It is likely that most corporations in Australia will be "trading corporations". This phrase has been generously interpreted by the courts and commissions in the past. For example, a corporation can be "trading" even if trading is not its primary, predominant or characteristic activity, a corporation



need not make a profit to be "trading", and "trading" includes the buying and selling of both goods and services.

It is also important to understand that the word "corporation" includes incorporated associations.

The legislation introduces new Australian Fair Pay Scales, and Minimum Conditions e.g. personal/carer's leave, compassionate leave and maximum ordinary hours of work.

The legislation contains complex and lengthy transitional provisions — which apply not only to those employers currently in the Federal IR system, but also to those employers who will be transferring into the Federal IR system from the State IR system.

The overall effect of those transitional provisions is that all employers will, at some stage over the next few years, have to consider what the ongoing terms and conditions of their employees will be, and whether they wish to take up the new workplace agreement opportunities in the legislation.

There have also been important changes to the unfair dismissal provisions. Particularly, it is intended that employers with less than 100 employees will be exempted from the unfair dismissal (but not unlawful dismissal) provisions; and, if an employee is dismissed for genuine operational reasons e.g. redundancy, then the employee will not have a right to bring an unfair dismissal claim.

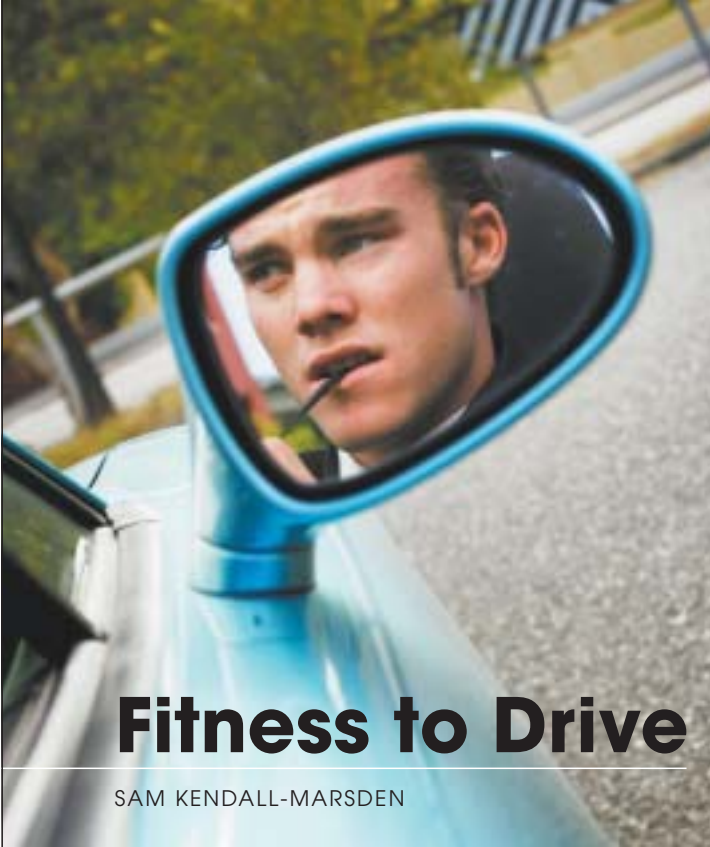
There have been numerous other significant changes to the existing legislation, including changes to: Transmission of Business, Right of Entry to workplaces and Freedom of Association.

Kylie Torlach and Andrew Perry, Associates at Mullins Lawyers who practice in the area of workplace relations, recently presented a client seminar reviewing the provisions of the legislation. We intend to run further sessions in the immediate future. If you are interested in attending such a session, would you please contact Amy Garner on (07) 3224 0222 or at agarner@mullinslaw.com.au to express your interest.

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Fitness to Drive

SAM KENDALL-MARSDEN



Driver's should be aware that from 1 March 2006 changes were made to Queensland laws relating to reporting permanent or long term medical conditions that adversely affect the ability to drive.

From 1 March 2006 drivers who do not report such a condition to Queensland Transport as soon as it develops or adversely changes risk a \$4,500.00 penalty or disqualification from driving. Drivers are

required to report the condition or adverse change as soon as they become aware of it, which may be before they have obtained a medical certificate.

Queensland Transport gives the following, non-exhaustive examples of medical conditions that may affect driving:

- Diabetes (early and late onset)
- Epilepsy
- Heart disease
- Strokes
- Arthritis and other joint problems
- Eye problems (for example cataracts)
- Hearing disorders
- Sleep disorders
- Parkinson's disease and other neurological disorders
- Dementia and Alzheimer's disease
- Depression and other mental health problems
- Lung disease
- Injuries and disabilities

After notifying Queensland Transport, a concerned driver should arrange for their fitness to drive to be assessed by a doctor, occupational therapist, optometrist or physiotherapist who will report to Queensland Transport.

Queensland Transport will then consider the information received and can suspend, cancel or amend the driver's licence to include a condition, for example, daylight driving only. Any medical certificate must be carried by the driver. If the driver disagrees with Queensland Transport's determination they will be required to "show cause".

Irrespective of doctor/patient confidentiality, a Health Professional can report a patient who is unfit to drive where they are concerned the patient will drive against their advice. If this happens, Queensland Transport will require the affected driver to "show cause".

Drivers who are concerned about their fitness to drive should notify Queensland Transport and seek medical advice immediately or risk a fine or disqualification from driving.

Identify Theft

When bad things happen to good names

STEPHANIE SMITH



Unfortunately the Australian Institute of Criminology has revealed that fraudsters are increasingly accessing peoples personal and financial details from everyday transactions and committing crimes more commonly known as identity theft. Identity theft is a serious issue and now constitutes

approximately one third of all criminal activity in Australia.

The increase in fraud and identity theft is linked closely to technological advances, however fraudsters also value your mail and rubbish as a means to obtain your personal and financial information.

Identity fraud generally involves the gaining of money, goods, services or other benefits through the use of a false identity. Examples of identity theft crimes include:

- Counterfeiting or "skimming" your credit cards,
- Using stolen credit cards and card numbers,
- Fraudulently obtaining loans and finance, obtaining benefits and pensions; and
- Evading the paying of taxes, levies or other debts.

Victims of identity fraud often need to spend large amounts of time and money convincing banks and financial institutions that they are not responsible for the fraudulent activity that has occurred in their name. Also victims have difficulty restoring their credit rating to what it was prior to the identity theft.



There are difficulties in achieving successful prosecutions of identity related fraud. Difficulties arise in obtaining evidence as fraudsters go to considerable lengths to make identification of them difficult and financial trails of evidence are often obscure.

In Queensland there is no specific legislation that covers "identity theft", however fraudsters have been convicted of offences under the *Criminal Code*, such as stealing, fraud, misappropriation, false pretences, falsifying records and producing false records.

If you consider that you have been a victim of identify theft or are suspicious of some activity taking place, you are best to contact the police, the Office of Fair Trading and of course the banking, financial institution or agency that may be the other target in the fraud.

People should be careful to whom they disclose their personal details. Extra care should be taken when conducting personal affairs on-line or over the telephone. Guard your mail and dispose of your records appropriately. This will help to ensure you don't become a victim of Identity Theft.

POWER SHIFT IN RETAIL LANDLORD AND TENANT RELATIONSHIP

ANNE-MARIE LOESKOW



The *Retail Shop Leases Amendment Act 2006* ("the Act") will have significant implications on retail shop leases entered into as

from 3 April 2006. The Act achieves a raft of amendments to the *Retail Shop Leases Act 1994*, the majority of them imposing obligations on the Landlord.

Where a Lease contains an option to renew, the Landlord must give the Tenant written notice of the last date for exercise of the option. If the Lease does not contain an option to renew, the Landlord must give the

entitling the Landlord to re-locate the Tenant:

- 1 The Landlord must, at least 3 months prior to the re-location, give the Tenant written notice including details of the proposed re-development, information about the alternative premises and the re-location date;
- 2 The Tenant may terminate the Lease within one month after receiving that re-location notice;
- 3 Unless the parties agree otherwise, the Lease for the re-located premises must be on the same terms and conditions as the existing Lease but with rent adjusted to reflect the different location or value of the new premises; and

If a Lease entered into after the Act's proclamation date contains a right for the Landlord to terminate the Lease so it may demolish the building, the Landlord must give the Tenant a notice at least six months before the termination date. The notice is to contain sufficient detail of the proposed demolition to indicate a genuine demolition proposal to be carried out within a reasonably practicable time after the Lease is terminated.

The Tenant will have the right to terminate the Lease earlier than the termination date. The Landlord must pay reasonable compensation for the Tenant's fit-out. The Landlord is not liable to pay compensation to the Tenant for early termination of the lease unless the demolition proposal was not genuine, or the demolition is not carried out within a reasonably practicable time after the termination date.

On the Tenant side, the amendments make it mandatory for a non-major Tenant (a Tenant with less than 5 retail stores in Australia) to provide the Landlord with financial and legal reports before they enter into the Lease or take an assignment.

The definition of "Lessee" has been amended to include Sub-Tenants, Franchisees and Tenants holding over under expired Leases which will enable these groups to access compensation provisions of the *Retail Shop Leases Act 1994*.

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Tenant notice advising of its intentions regarding renewal, failing which the Lease will be extended at the Tenant's request.

Where a Tenant assigns its interest, it will be released from all future liability under the Lease as from the assignment date provided it has given the incoming Tenant the necessary disclosure forms. This will make it doubly important for the Landlord to thoroughly investigate the incoming Tenant to ensure they have the necessary business experience and financial resources. The Landlord should also obtain from the incoming Tenant any necessary security such as personal or bank guarantees. The Landlord may claim compensation for loss suffered from false or misleading statements contained within Lessee/Assignee Disclosure Statements.

Where a Lease contains an option to renew with a market rent review due at the commencement of that option term, the Tenant may request a market determination prior to the date for exercising its option. If the review is to be undertaken by a valuer, the parties will be incurring costs without certainty that the Tenant will exercise the option to renew at the end of that valuation process.

If a Lease entered into after the Act's proclamation date contains a provision

- 4 The Landlord must pay the Tenant's reasonable re-location costs including the costs of dismantling and reinstalling fixtures and fittings, re-establishing the Lessee's business in the new premises and legal costs.

UPDATE ON NEW SMOKING LAWS

From 1 July 2006, patrons will not be allowed to smoke in licensed venues unless they are in a Designated Outdoor Smoking Area

As most people would be aware, there have been many changes to Queensland's smoking laws over the past few years, particularly in respect to licensed venues. The final stage of these laws takes effect on 1 July 2006 when smoking will be completely banned in licensed premises, unless you are in a Designated Outdoor Smoking Area (DOSA).

Hotellers can create a DOSA in the outside area of their venue where patrons will still be permitted to smoke. The DOSA must be less than half of the total outdoor area and needs to be clearly distinguished from the rest of the venue with appropriate buffer zones.

No food may be consumed in the DOSA and patrons cannot be served with drinks, although they may take drinks into the DOSA that they have already purchased from the bar. Additionally, no entertainment is to be provided for patrons in the DOSA.

There are heavy penalties for venues that do not comply with the new laws, with licensees facing fines of up to \$10,500 if patrons are smoking in their venues (other than in a DOSA) and individuals that are caught smoking will receive an on-the-spot \$150 fine.

COURT TO MAKE YOUR WILL

MICHAEL KLATT



Amendments to the Succession Act 1981 were recently passed and are expected to commence on 1 April 2006.

One of the most significant amendments to the Act enables the Supreme Court to make an Order authorising a Will to be made, altered or revoked on behalf of the person without testamentary capacity. The Act declares that an Order under the Act does not of itself make, alter or revoke a Will but gives authority to the Registrar of the Court to make the document. The Act requires that any Application for leave for such an Order include a draft of the proposed Will, alteration or revocation.

These Amendments give the Court significant powers in relation to the making of a Will which has always been seen as such a personal act. It is difficult to comprehend how a Court will exercise its discretion to make an Order under these new provisions.

Families have become more complicated, given the significant increase in the breakdown of relationships and the formation of new relationships, leading to blended families. The Court would, in most circumstances, be reluctant to exercise its discretion, but this remains to be seen.

It will also be interesting to see how the Court deals with disputes between children of the Willmaker regarding provisions or changes that should be made in a Will for a person without testamentary capacity.

The other significant amendment to this legislation affects the provisions relating to the execution of a Will. Until now it has been essential that the Willmaker sign the Will, or a person at the direction of the Willmaker sign the Will, in the presence of two witnesses who also sign their signatures in the presence of the Willmaker and each other. The Court has had power to confirm the validity of the Will where there has been substantial compliance with the provisions relating to the execution. There have only been rare instances where the Court has allowed a departure from execution procedures.

The new amendments now give the Court wider powers to dispense with execution requirements. The new provisions also provide that the Willmaker or person on behalf of the Willmaker must sign or acknowledge their signature on the Will in the presence of two or more witnesses present at the same time. At least two of the witnesses must attest and sign the Will in the presence of the Willmaker but not necessarily in the presence of each other. The signatures need not be at the foot of the Will, as was previously required, however the signature of the Willmaker must still be made with the intention of executing the Will.

The new amendments allow the Court to make an Order authorising a minor to make or alter a Will. Until now minors have only been able to make, alter or revoke a Will if they were married.

Beneficiaries or persons who thought that they would be beneficiaries of a deceased person's Will have, in some cases where there has been a family dispute, found it difficult to obtain a copy of the deceased's Will from the executors. Under the amendments the following persons will be entitled to a copy of a deceased person's Will:

- Any person mentioned in the Will, whether as beneficiary or not;
- Persons mentioned in earlier Wills whether as beneficiaries or not;
- Spouses, parents and children of a deceased person;
- Any person who would have been entitled to a share of the Estate if the person died without having made a will (intestate);
- A parent or guardian of a minor mentioned in the Will or parent or guardian of a minor who would have been entitled to a share of the Estate if the Willmaker had died intestate;
- A creditor or other person who has a claim against the Estate;
- A person entitled to make a Family Provision Application.

This seems to be a sensible amendment to the legislation and should save significant time in obtaining copies of Wills to properly advise clients as to their rights under a Will, or rights to apply to the Court for family provision or other relief.



JOHN MULLINS
EDITORIAL

The Government's WorkChoices legislation has now taken effect. We are reading in the newspapers of some businesses that have seized the opportunity to make staff changes that they have been unable to make for many years. The States' High Court challenge to this legislation is yet to be heard. If the High Court upholds some of the States' objections it will cause substantial upheaval in the employment sector. The Government's popularity has suffered as a direct result of the initial WorkChoices implementation and it will be interesting to see what happens to the Government's popularity as this legislation takes hold.

Another significant piece of legislation for commercial property owners and tenants is the change to the *Retail Shop Leases Act*. The *Retail Shop Leases Act* has now been in effect since 1984 and there has been major amendments made to this now on a number of occasions. Each time the amendments seek to bring greater balance to the Landlord/Tenant relationship.

Elsewhere in this publication you will see reference to legislation affecting driving and smoking. There is very little we do in our lives these days that is not regulated (and potentially taxed) in some way by Government. A recent study in the *Financial Review* suggests that the Government through direct and indirect taxation, that as high as \$200,000 out of a new \$570,000 house goes to the Government. At the same time we are seeking Government enquiry into comparative tax rates in other countries. To be fair to the local authorities in South East Queensland they were not amongst the highest taxing local authorities.

Michael Klatt's article on wills should be compulsory reading. The only thing in life we can guarantee is death. We often do not like to think about this unfortunate event but making a will is necessary and will assist your family greatly at the time of your death. If you have not made a will, or have not made a will lately - do it now.

At the time of writing this *Innisfail* is starting the long process of recovery after the destructive cyclone. The Mullins family has a long association with the *Innisfail* and *Tully* area and we send our sympathy and best wishes to the people of North Queensland for the loss they have suffered.