

Australia's Wide Brown Land - Welcome to 2011

*"I love a sunburnt country,
A land of sweeping plains,
Of ragged mountain ranges,
Of droughts and flooding rains.
I love her far horizons,
I love her jewel-sea,
Her beauty and her terror -
The wide brown land for me!"*

Dorothea Mackellar

Many Australians are experiencing difficult times due to extreme weather conditions. Widespread flooding in many states, particularly Queensland and Victoria has resulted in significant natural disasters affecting many people. In January I was asked what obligations employers' were under to grant leave or otherwise accommodate the circumstances of staff that were affected by the disasters.

The Fair Work Ombudsman (FWO) has provided some guidance on the question of employee entitlements during floods or other natural disasters. In summary, the FWO is advising employers and employees that the National Employment Standard of Personal/Carer's Leave allows an employee to be absent from work where they provide care or support to a member of the person's immediate family or household who require care or support because of an unexpected emergency affecting that member.

In addition, State occupational health and safety laws provide for a general duty of care toward employees that may need to be considered.

[\[More\]](#)

Definition of small business changes – 1 January 2011

Commencing on 1 January 2011, the definition of a *small business* for the purposes of unfair dismissal changed.

Under the national Fair Work system, if a small business employer terminates someone and they follow the Small Business Fair Dismissal Code, this cannot be regarded as an unfair dismissal.

A small business employer is defined as someone who employs fewer than 15 employees. Until 31

December 2010 the phrase "*fewer than 15 employees*" was defined as full-time equivalent i.e. 570 hours of staff hours per week.

After 1 January 2011, this method of calculation changed and is based on a simple headcount of the number of employees in the business, irrespective of how many hours they work. The headcount includes casuals employed on a regular and systematic basis and employees of associated entities.

[\[More\]](#)

Australia's unemployment rate unchanged at 5 per cent

The Australian unemployment rate stood unchanged at 5.0 per cent seasonally adjusted in February, as announced by the Australian Bureau of Statistics (ABS). The ABS reported the number of people employed decreased by 10,100 to 11.413 million in February. The decrease in employment was driven by a decrease in part-time employment, down 57,700 people to 3.344 million that was partially offset by an increase in full-time employment, up 47,600 people to 8.068 million. The number of people unemployed decreased by 500 people to 604,800 in February.

[\[More\]](#)

One in ten employees earn \$1,856 or more per week

In May 2010, a quarter of all employees earned less than \$528 per week, with another quarter earning more than \$1,304, according to results from the Survey of Employee Earnings and Hours, released by the Australian Bureau of Statistics (ABS). The survey also showed that ten percent of employees earned \$1,856 or more per week.

Full-time employees, who make up the majority of employees, received average weekly total cash earnings of \$1,313.30, compared to \$1,010.30 for all employees. Earnings were higher for full-time males (\$1,404.40) than for full-time females (\$1,167.70). However, part-time females earned slightly more than part-time males (\$503.80 compared to \$454.50).

The occupation groups receiving the highest average weekly earnings for all employees were Managers (\$1,848.90) followed by Professionals (\$1,348.80). The lowest earnings were recorded by

Sales workers (\$578.60), Community and personal service workers (\$648.70), and Labourers (\$650.90).

[\[More\]](#)

Easter Monday and ANZAC public holiday confusion

ANZAC Day 25th April falls on Easter Monday this year. The question therefore arises as to how the two public holidays are treated.

The answer depends upon the State in which the employee works and whether a modern award or an enterprise agreement applies to your business.

The National Employment Standards allow other days declared by State or territory law to be observed generally within the State or territory, or a region, as a public holiday by people who work in that State, territory or region. All States and territories except for Tasmania have either substituted the Easter Monday holiday or provided an additional public holiday on Tuesday the 26th April.

Employees covered by modern awards for example, except Tasmania, are entitled to the Tuesday as well as the Monday off work without deduction of pay. If an enterprise agreement applies then you will apply the terms of the enterprise agreement. If the agreement is silent on the matter, you may exercise discretion as to whether you grant Tuesday 26th April as a paid holiday.

[Contact us](#) if you are unsure of how the holidays apply to your business.

Equal Remuneration Case

The Equal Remuneration Case at Fair Work Australia (FWA) continues to roll on and absorb an enormous level of resources of those parties participating.

The Australian Government has provided updated information to FWA about the breadth and variety of Commonwealth funding programs likely to be affected by the application and to advise the Government's intended approach to working through the potential implications of the case with the key affected stakeholders.

Other submissions from State governments are also listed and may be of interest to employers working in the community services industry.

[\[More\]](#)

TIP OF THE MONTH: Employer's right to monitor internet use confirmed by Federal Court

Landers and Rogers Solicitors have informed clients and employers of a recent Federal Court decision confirming an employer's right to monitor an employee's internet use on an employer-owned computer, even if the employee is logged on at home, after work hours, and using his or her own internet connection. The case as summarised by Landers and Rogers is as follows.

Background

John Griffiths, a senior public sector employee who had worked in the public service for 25 years, was dismissed from his role at a government department (Department) for viewing pornography on his work laptop.

Although Mr Griffiths viewed the material at home and after work hours, using his personal internet connection, the Department's desktop logging software was monitoring his computer usage, recording screen shots every 30 seconds and downloading them to the internal server where the activity was detected.

The Department undertook an investigation into Mr Griffiths' conduct and found that accessing pornographic material on a work laptop constituted a breach of the Australian Public Service Code of Conduct. Mr Griffiths' actions also breached the Department's IT policy and his obligation to "use Commonwealth resources in a proper manner".

Mr Griffiths' conduct was the subject of an internal investigation, in which he initially denied that he had engaged in improper conduct. The investigation recommended that Mr Griffiths' employment should be terminated. This decision was internally reviewed and overturned.

However, a second investigation took place which concluded that by creating an "elaborate, but ultimately unbelievable explanation" he had accessed the material first "accidentally" and then for the purpose of "research and inquiry", Mr Griffiths had dishonestly attempted to excuse his misconduct. This dishonesty was viewed unfavourably both by the Department, and ultimately by the court.

Federal Court Application

Mr Griffiths applied to the Federal Court to have the investigator's findings quashed.

One of the arguments he relied upon was that the investigation concerning the accessing of pornography outside of work hours in his own home constituted a breach of privacy.

Mr Griffiths argued that his right to privacy had been breached at common law, under the Privacy Act 1988 (Cth), and the International Covenant on Civil and Political Rights (which prevents arbitrary or unlawful interference with privacy). He also argued that his privacy had been breached on the basis that the Department's IT policy was unreasonable to the extent that it applied to computer usage at home using a personal internet connection.

Decision

The Court found that the Department had not breached the Privacy Act by directing employees not to view pornography and by implementing measures to monitor compliance with that lawful direction. Justice Perram said:

"it is not unfair to warn a person that their computer use will be monitored in order to detect any accessing of pornography and then to do so".

Justice Perram also found that Mr Griffiths' common law right to privacy had not been breached because he had been warned by the Department, in its IT policy, that his computer usage would be monitored. Additionally, the clear warning in the IT policy about the seriousness with which inappropriate computer usage would be viewed meant that no breach of the International Covenant on Civil and Political Rights had occurred.

Justice Perram stated that monitoring employee's computer usage in order to enforce its IT policy was a lawful purpose and that the Department had a legitimate interest in ensuring its computers were free from pornography.

Conclusions

It is encouraging that in this instance the court did not shy away from upholding decisions made under policies which seek to eradicate misconduct in circumstances where the employee has been warned about the consequences of non-compliance with the policy. Nevertheless this decision raises a point of intersection between privacy laws and workplace policies.

It is worth noting that the Office of the Privacy Commissioner claims that it receives many enquiries regarding the privacy of workplace e-mail and web-browsing activities. The Privacy Commissioner suggests this indicates there is a general expectation, by staff, that law exists which protects their privacy in the workplace.

However, there is no general constitutional or common law right to privacy in Australia. In addition, the Privacy Act exempts employee records from the definition of "*personal information*" that is covered by the privacy principles in the law.

Nevertheless, the Commonwealth Privacy Act applies to staff e-mails that contain personal information *other than employee records* in certain circumstances and also applies to logs of staff web browsing activities.

Recommendations

The Privacy Commissioner has provided [guidelines](#) that should enable employers to comply with the privacy principles in formulating and applying workplace policies on the acceptable use and monitoring of e-mail and internet.

In summary the policy should:

1. be promulgated to staff and management should ensure that it is known and understood by staff.
2. be explicit as to what activities are permitted and forbidden
3. clearly set out what information is logged and who in the organisation has rights to access the logs and content of staff e-mail and browsing activities
4. refer to the organisation's computer security policy and that improper use of e-mail may pose a threat to system security, the privacy of staff and others and the legal liability of the organisation
5. outline how the organisation intends to monitor or audit staff compliance with its rules relating to acceptable usage of e-mail and web browsing
6. be reviewed on a regular basis in order to keep up with the accelerating development of the Internet and Information Technology.
7. be re-issued whenever significant change is made

For specific advice on the development of a suitable policy for your workplace [contact us](#).

Around the States

South Australia

First Aid Code of Practice

The South Australian *Approved Code of Practice for First Aid in the Workplace* (First Aid Code) came into effect on 10 December 2010. The First Aid Code adopts a best practice approach to first aid and brings South Australia's requirements more in line with other states and territories.

The First Aid Code outlines a duty-holder's obligations in respect of first aid, including the requirement for first aid kits, trained personnel, and policies and procedures. For example, under the First Aid Code, low risk workplaces with less than 10 people are not required to have a trained first aider in their workplace.

The former *Approved Code of Practice for Occupational Health and First Aid 1991* was revoked as an approved code of practice on 10 December 2010.

Western Australia

Review of the Western Australian Industrial Relations System

The Western Australian Government has released the Review of the Western Australian Industrial Relations System conducted by Mr Steven Amendola. The Amendola Review was commissioned by Government to fundamentally review the statutory framework underpinning the Western Australian industrial relations system in light of the federal Fair Work Act 2009. A key theme of the review was the potential for harmonisation, if any, of the federal and state industrial laws. The comprehensive report was delivered to Government by Mr Amendola on 30 October 2009 and contains 193 recommendations.

[More](#)

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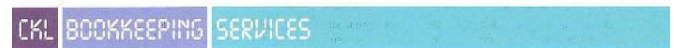
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