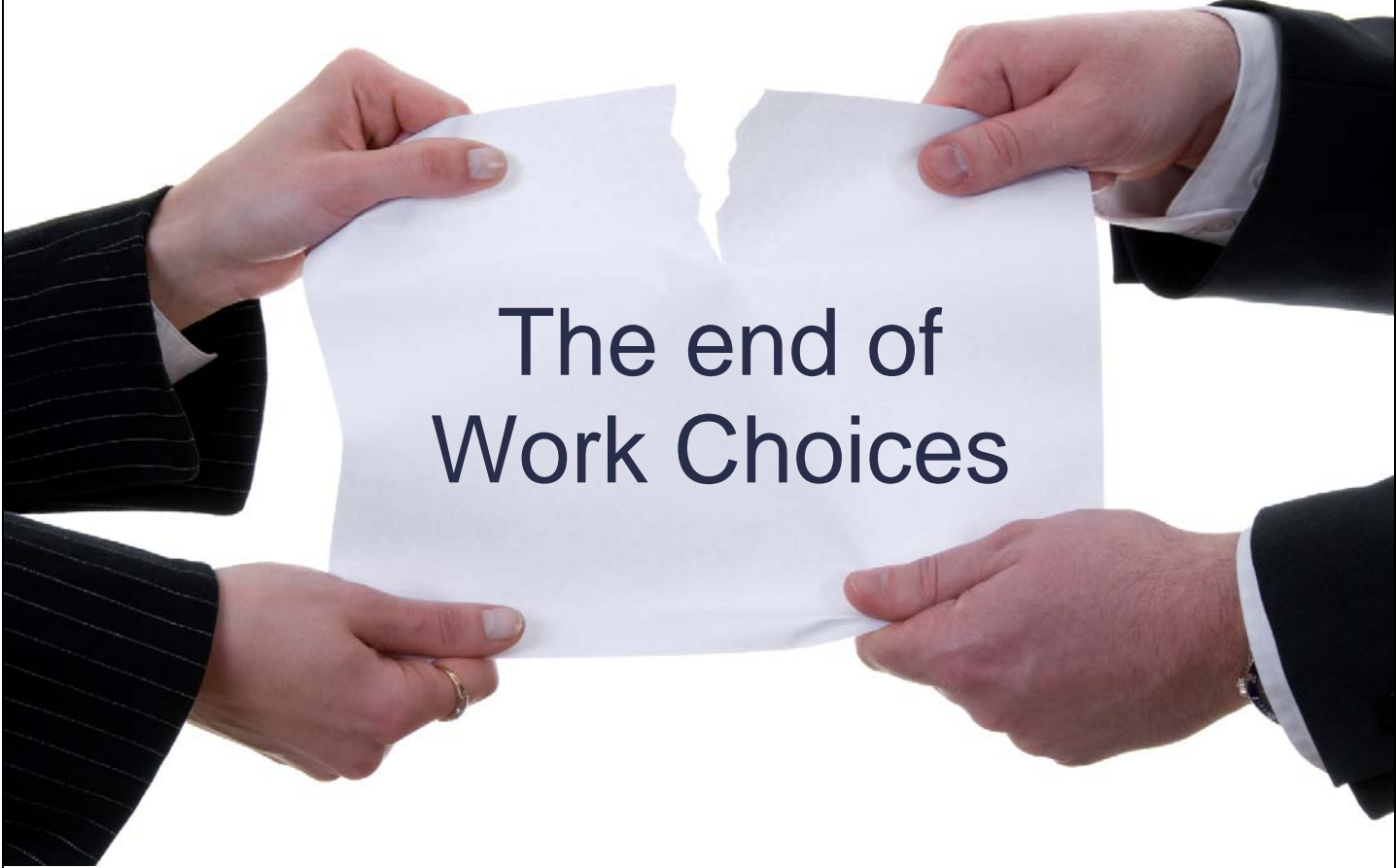


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## The end of Work Choices

The Labor Party's emphatic election victory signals the end of Work Choices.

One of Labor's plans in the area of industrial relations is the two stage "Forward with Fairness" reforms. In the first phase, a transition Bill will be put before Parliament to take effect as early as possible in 2008.

The main thrust will be to halt the making of Australian Workplace Agreements (**AWAs**). Employers who have been using them will still be able to make Individual Transitional Employment Agreements (**ITEAs**), but only until the end of 2009. These will have a limited lifespan and be subject to a no-disadvantage test. In phase 2, the Labor government will start consultation over its full

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reform package, to be introduced with effect from 2010. Only then will we see the introduction of Fair Work Australia, the strengthening of the statutory safety net of minimum conditions, the partial restoration of unfair dismissal rights and the requirement to bargain in good faith.

The Labor government has given itself plenty of time to tackle the huge task of rewriting the Workplace Relations Act which many consider to be bloated and incomprehensible.

What Prime Minister Rudd will attempt to do is iron out the most draconian and unpalatable aspects of Work Choices whilst still preserving its underlying assumptions: that industrial relations policy should be used to create a flexible, productive and strike-free workforce.

The Forward with Fairness program enshrines 10 statutory minimum conditions, with a further 10 conditions that may be included in awards. It also charges Fair Work Australia with conducting a process of award simplification over the next couple of years. While the Rudd government's "family friendly" initiatives such as the creation of the Office of Work and Family and the promises of \$12 million in grants to encourage small business to adopt practices promoting work/life

balance, many of the remaining principles of workplace relations are likely to remain the same.

Given that industrial relations was at the very heart of national debate during the recent elections, it is fair to assume that the Rudd government will carefully and thoroughly review the industrial relations landscape. It is likely to take a year or two for any new legislation to be drafted and enacted.

We will keep you informed of any further changes on this front.



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## Confidential information

The NSW Court of Appeal recently considered the doctrine of confidential information in *Del Casale v Artedomus (Aust) Pty Limited* [2007] NSWCA 172. Messrs Del Casale and Savine (**the appellants**) were former directors of Artedomus (Aust) Pty Limited (**the respondent**). The company had found a supply of special stone in Sicily which was much prized by Sydney architects. Messrs Del Casale and Savine were told during the 1990s that the particular stone was rare and indeed Artedomus were the sole importers of the stone into Australia.

The respondent went to some lengths to conceal the origin of the stone from the stonemasonry market. Only the directors of the company, the warehouse manager and those responsible for payments to suppliers were given this information.

The managing director repeatedly emphasised to each of the other directors, the warehouse manager and those responsible for payments to suppliers that the source of products was not to be disclosed to anyone.

A number of years later the employment of the appellants came to an end for different reasons.

After they left the company, the appellants went to Italy, visited Sicily, inspected stone and imported some of the special stone from the same Sicilian suppliers who supplied the respondent.



The respondent commenced proceedings in the Equity Division of the Supreme Court seeking to prevent the appellants from continuing with this conduct and sought an order that an account of profits for past trading be undertaken. The trial judge found the claim for breach of confidence made out and made orders restraining the appellants from using the confidential information and providing for an account of profits. The appellants sought leave to appeal to the NSW Court of Appeal.

The Court of Appeal held that it was clear that an employee copying customer lists or even deliberately memorising them during employment for personal use after the employment had ceased, was a breach of the equitable duty not to misuse confidential information. However, there were particular considerations which limited how far that restriction applied. Often an employee will necessarily, through employment, come to have knowledge that the employer would prefer not to have generally known, but often that knowledge will become part of the employee's know-how which the

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employee is entitled to use for his or her own benefit after the employment ceases. It is very often a difficult task to distinguish between an employee's general know-how and confidential information which the employer is entitled to protect.

A distinction must be drawn between an ex-employee using such information as part of his or her know-how and an ex-employee disclosing that information to other persons. In some cases, an injunction will be justified but in other cases not.

The Court of Appeal held, on the facts of this case, that the information available to the appellants as to the

source of the stone was general know-how they acquired whilst working in the respondent's business rather than being protected confidential information.

However, the respondent was saved by a provision in Mr Del Casale's contract of employment to "keep confidential" commercially sensitive information. The Court of Appeal confirmed the primary judge's decision that Mr Del Casale did act in breach of this contract by taking advantage of the information he had been provided with during the course of his employment.

The case is a salient reminder of the importance of confidentiality provisions in contracts of employment.

## Climate change litigation

As the new Prime Minister commences his early days in the top job, ratifying the Kyoto Protocol remains at the top of his 'to do' list.

While the Protocol itself runs out in 2012, the Bali conference in December will consider climate change policy beyond the end of the agreement. Whatever the outcome, as government cranks up their regulatory response to climate change, it is clear that climate change litigation will be on the rise. Such litigation may involve exceeding greenhouse gas emission limits, failing to report and even potential allegations of contributing unreasonably to climate change or failing to take reasonable steps to reduce emissions.



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Climate change litigation has already been seen in Australia, however it has centred largely around planning approvals such as in *Gray v Minister for Planning* [2006] NSWLEC 720 (the *Anvill Hill case*). In that case, it was argued that the proponents of an open cut coal mine did not include 'indirect emissions' in their Environmental Impact Assessment that would have covered potential greenhouse gas emissions from the burning of coal by third parties outside the control of the proponent. The court held that although it would be difficult to quantify the impact the mine would have on climate change with precision, it should still be done.

Although it is unclear exactly what model of emission trading will be used in Australia under the Kyoto Protocol, the national framework legislation, the *National Greenhouse and Energy Reporting Act 2007*, is already in force. The Act imposes an obligation on corporate groups and companies to report their greenhouse gas emissions, energy production and energy consumption levels if they exceed certain thresholds. A failure to report can result in a fine of up to \$220,000.00 and can extend to personal liability for Directors. The threshold levels are reduced every year, meaning that more and more companies will be caught by the Act. Companies that exceed the threshold must also be registered with the National Greenhouse and Energy Register (although voluntary registration is also available).

Under the Kyoto Protocol or any subsequent policy, these thresholds, reporting and registration requirements may become even more rigorous. So what does this mean for companies?

Under the current legislation, companies will need to be in a position to assess whether they are required to report for the financial year ending 30 June 2009 and where registration is required under the Act, it must occur before 31 August 2009. At present, the reporting obligations relate to greenhouse gas emissions that are under a corporation's control only and therefore do not appear to relate to indirect emissions such as those considered in the *Anvill Hill case*. As global climate change becomes increasingly regulated however, companies would be wise to keep abreast of the legislative requirements related to their activities.



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## Duty of care owed by landlord to tenant

The recent decision in the NSW Court of Appeal of *Virgona v De Lautour* [2007] NSWCA 282 illustrates some of the difficulties faced by courts in considering the duty of care owed by a landlord to a tenant.

On 28 December 1997, the respondent was injured when she fell through a ceiling on the second floor of a house in which she, together with others, was a tenant.

She brought proceedings for damages for negligence against the appellant as landlord of the premises. There was no written lease between the parties and the arrangements whereby the respondent became a tenant were informal.

The respondent had gone into an area of the roof space in the leased premises to store a metal pipe about 1 metre in length. When she entered the roof area she observed a wooden beam or rafter, capable of supporting her weight, running straight ahead of her across the floor. There was insufficient space for her to stand so she squatted, balanced her right leg on the beam and put her left foot on what she thought was another beam coming across at right angles. This, however, was not a beam but a batten, the purpose of which was merely to join and fill the space between two separate sheets of asbestos cement ceiling material constituting the floor of the roof area and the ceiling of a bedroom below. The batten was not weight bearing.

The respondent's foot went through the batten and she fell through the ceiling to the bedroom below sustaining serious personal injuries.

The respondent claimed that her landlord owed her a duty to fully inspect the premises and ensure that they were totally safe for use, including the roof area. She alleged that there was invited or lured into the roof space because there was a latch on the door giving entry to it. She therefore thought it was permissible, safe and appropriate to enter the roof area and to there store the metal pipe.

The Court of Appeal found in favour of the appellant landlord. The Court held that in the absence of any contractual term (eg a provision in a lease), the duty of a landlord in relation to the safety of premises does not in general require a landlord to commission experts to inspect premises to look for latent defects, nor is it a duty to make premises as safe as reasonable care can make them.

Rather, in general terms, the duty of a landlord is to be determined by reference to foreseeable risk of harm and what a reasonable person would do in response to that risk.

In respect of residential premises, the content of the landlord's duty to the tenant will require that the

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premises be reasonably fit for the purpose for which they are let, namely habitation as a domestic residence. There was nothing unusual about the roof area that made the premises as a whole unfit for the purposes they were let, namely habitation as a domestic residence. The Court held that the risk of traversing a roof area having a floor comprised of ceiling material is well known and part of ordinary domestic life. The

Court reiterated that there is no such thing as absolute safety. All residential premises contain some hazards to their occupants and visitors.

The case is a timely reminder of some basic principles of the law of negligence in the area of landlord and tenant – namely that the landlord's duty is only to take reasonable care and does not require the landlord to ensure the premises are free from any hazards.

## Consumer Trader & Tenancy Tribunal Proceedings (for strata titles properties)

An Owners Corporation, for which the firm acts, was involved in proceedings commenced in the Consumer, Trader and Tenancy Tribunal (**CTTT**).

A building, situated at Botany, had had a long history as a tannery. In 1998 it was converted into a number of residential units. The builder (being a company) effected the mandatory home owners warranty (**HOW**) insurance with HIH Ltd. A strata plan was registered and the new owners moved in, only to be confronted with a large number of building defects.

The Owners Corporation prudently lodged a HOW insurance claim in respect of these defects. Two events then rapidly followed, first, the builder went into liquidation and, second, HIH collapsed. As part of the Federal/State Governments' response, the *Home Building Act 1989* (NSW) was amended whereby HIH's HOW insurance policies were underwritten by the NSW Government's HOW insurance scheme. In these circumstances, the claim proceeded to be dealt with and remedial building works proceeded.

As those works were effected, further defects emerged, on a significant basis. In fact, the quantum of the claim quadrupled. The Government insurer's approach then took a decisive change. The insurer purported to dispute the basis of the claim, alleging that the Owners Corporation had not initiated the claim utilising the proper form, had not provided all relevant evidence (most particularly the original building contract between the developer and the builder) and was outside the



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statutory time limit to make the claim (the argument here being that increases to the claim, brought about by the submission of variations to the remedial building contract) upon discovery of additional defects, were, in substance, new claims and thus outside the six year period.

The Owners Corporation, now confronted by rectification costs rapidly approaching \$2 million, initiated proceedings in the Home Building Division of the CTTT (being one of its 8 divisions) for relief.

The selection of the CTTT was made having regard to the CTTT's stated legislative purpose of being to resolve disputes in an accessible, informal, efficient and inexpensive manner. Section 28 of the *Consumer and Tenancy Tribunal Act 2001 (the Act)* provides that the Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness "*and that it is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms*".

The Insurer also raised the issue that the claim exceeded the jurisdictional limit of the CTTT, namely, \$500,000.00.

The Owners Corporation argued that as the Insurer had not objected to the form of the original application at the

time it was lodged, and had made significant payments to the Owners Corporation in satisfaction of the remedial builder's claims, it was estopped from denying the validity of the claim. Further, in response to the argument concerning the non-production of the original contract (which was a vital element the insurance claim, by virtue of the policy itself), evidence was produced that payments had been made pursuant to the contract, giving rise to the argument that the contract was, therefore, in existence. Other evidence was adduced to substantiate the timing of the original building works and the affection of the HOW insurance policy.

Upon hearing the evidence and arguments, the CTTT ruled in favour of the Owners Corporation. Particular regard was had to section 28 of the Act. The Insurer was, therefore, obliged to pay out on the balance of the claim, with the result that the building works were successfully completed, without significant expense to the owners. The other matter, in the resolution of the dispute, had been the relevant speed in which the CTTT dealt with the proceedings. This was of great importance to the owners in the continued enjoyment of their properties.

The case is illustrative of the importance of chasing the most advantageous manner in achieving a client's desire to have a matter resolved as quickly and as inexpensively as possible.

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## Assistance

If we are able to assist you in any of these areas, or other litigation or industrial matters, please contact one of our Litigation Practice Group Team:

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