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From the President

Colours run wild in ADB competition

Creative use of colour was a feature of the winning entries in the Anti-Discrimination Board’s ‘We are Happy Together’ colouring competition, held as part of this year’s Law Week events.

Issues of race have been in the spotlight this year in Sydney, so we wanted to highlight the benefits of diversity and tolerance as part of our Law Week contribution.

I presented the prizes and certificates to the winners, at NSW Parliament House on 5 June. The children’s band, the Hooley Dooleys, delighted the children and their families with a wonderful and energetic performance, and all finalist entries were displayed and admired by those who attended.

The colouring template featured a number of animals from different countries, each eating food from another country. There is a koala eating stir-fry, a zebra eating pasta, and a panda bear eating fish and chips.

We received over 2000 entries from all over NSW. It was interesting to see how the entries reflect the diversity of cultures in our State, and that cultural richness is shown in the variety and creativity of the techniques used.

We were very impressed with the overall quality of the entries, and it was very difficult to select the shortlists in each category, let alone the winners. All the entries on the shortlists show great ability, but the winning entries stood out for their high level of creativity, use of colour and technique.

The winner in the 0-5 age group was four-year-old Hoyori Maruo from Kogarah. Hoyori’s entry, which covered all the animals in multicoloured

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Winning entries in the colouring competition. 
Top: Georgia Hoad’s entry in in 11+ category 
Middle: Amy Sutherland’s entry in the 6–10 category
Bottom: Hoyori Maruo’s entry in the 0–5 category
stripes, is noticeable for its remarkable precision and use of colour by such a young child.

In the 6-10 age group, winner Amy Sutherland of Sans Souci produced a highly embellished entry with additions such as a picnic blanket, party hats, and clothes and jewellery on the animals, as well as detailed shading.

The 11+ category winner was Georgia Hoad from Bellingen. Georgia used textas to create very brightly coloured entry with lots of decoration and detail.

The winners received a $50 book voucher and a $100 book voucher for their school or group. Ten shortlisted entrants in each category were also presented with certificates.

Stepan Kerkyasharian AM

Aboriginal & Torres Strait Islander Outreach

Ten year service medals

The Board’s Aboriginal and Torres Strait Islander Team recently acknowledged the diligence, and efforts of two of the members of the Aboriginal & Torres Strait Islander Advisory Committee.

Christine Mumbulla and John Walford have been with this committee since its inception in 1996. On behalf of the Board President, Elizabeth Wing, ADB Manager Enquiries and Conciliation, presented them with medals celebrating their ten years of service at the Committee meeting in June.

They are both very active within their communities and have been involved in advising the Board on many issues including:

- what role they see the Anti-Discrimination Board taking to confront discrimination towards Aboriginal & Torres Strait Islander people;
- how can we improve people’s knowledge about anti-discrimination; and
- what problems people might have in making complaints.

Christine Mumbulla, Elizabeth Wing and John Walford
The owner of a small business is legally liable for any unlawful discrimination or harassment in connection with work, or the services or goods they provide, unless they can show that they did everything reasonable prevent discrimination, harassment and bullying.

‘Reasonable steps’ do, however, vary with the circumstances. The reasonable expectations of large corporations are bound to be different to ‘reasonable steps’ required of a small business.

**Good business sense**

The requirement to take reasonable steps to prevent discrimination and harassment is not unreasonable in any business setting. You are getting the best person for the job if you are employing people on the basis of genuine job requirements, as opposed to stereotypical views about men or women, or people of different ages, races, etc. For example, sometimes an employer assumes that a good manager needs to be of a certain age and have a certain amount of ‘life experience’ to effectively manage staff. However, this is just a stereotype and is not necessarily correct. Many younger people have superior people management skills demonstrating that the length of experience is not necessarily relevant to a person’s ability. What is relevant is the quality of that experience and their current ability. An employer may miss out on the best person for their company because it has made an assumption about a person based on age.

You’ll also be getting the best out of your staff if you are making decisions about workplace issues such as training, promotion, or other benefits, on the basis of relevant individual qualities and characteristics. What is more, your staff is more likely to be loyal, committed and hard working.

Happy employees are more likely to provide good quality services to customers and clients.

There may be serious consequences if bullying and harassment is allowed, or unfair decisions are frequently made, such as high turnover, absenteeism, low productivity and morale, time-consuming conflict, recruitment costs, bad publicity, increased insurance premiums, industrial action, even sabotage. You may end up in court fighting costly discrimination and harassment claims.

**Harassment and bullying**

Claims of sexual harassment and the mishandling of these complaints can devastate small or close knit organisations. An example was a 2004 case involving a not-for-profit welfare organisation, which a member of the NSW Industrial Relations Commission described as ‘very sad and depressing’. In this case, the organisation sacked a community worker following allegations he had ‘threatened or intimidated’ a female co-worker to drop her harassment claim against a male colleague. The Commission was highly critical of the organisation for the inadequacy of its investigations into the claims of intimidation and to the worker’s own claim that he had been harassed, which it failed to investigate at all. It appeared that the organisation had such a level of internal disharmony that it was not functioning properly. ‘The evidence was riddled with claims and counter claims of sexual harassment, threats, vendettas, corruption, blackmail, theft, lying and defamation,’ the Commission said.

In some cases involving small businesses, workplace practices may not have changed in years and neither staff nor management are aware of current legal requirements. ‘Initiation’ rituals can be an example. One such case drew...
extensive adverse publicity, which will affect the perceptions of prospective clients and employees.

The case involved a 16-year-old labourer who was wrapped in glad wrap and had sawdust and glue stuffed into his mouth. As he was asthmatic, this ‘prank’ could have proved fatal. The incident lasted half an hour until an independent contractor on the site cut him free.

None of the workers involved was disciplined and the directors of the company did nothing to stop the initiation. Indeed there was a culture of initiation within the workplace. Action in this case was taken under occupational safety and health laws, which place obligations on employees as well as employers to ensure a safe and healthy workplace. It was found that the company failed to ensure a safe environment without risks to health and was fined $55,000.

The directors were fined $12,000 each.

**Expectations of small businesses**

In one small company with only six employees, a manager sexually harassed and discriminated against his Personal Assistant. He made a number of unwelcome sexual advances.

When the woman complained, the employer engaged an independent person to investigate her allegations. Furthermore, it took action to ensure that this kind of behaviour was not repeated.

A policy was developed and explained to the employees.

The NSW Administrative

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Decisions Tribunal commended the company’s actions and commented that ‘Reasonable steps’ will vary with employer size. It said that engaging a competent and experienced person to investigate and possibly mediate could be a reasonable step. So could giving a policy to new starters and providing on-going competent training. It also recommended ‘further steps’, such as brochures and notices on notice boards. However, it said that the employer, must still take active steps to prevent harassment before a complaint arises.

The tribunal found, the employer had not taken any reasonable steps prior to the current complaint and the woman settled for $5,000.

In cases where the harassment is so bad that the employee feels that they have no option but to resign, this can be considered a ‘constructive’ dismissal at law. An example involved an employee of a seafood restaurant who was sexually harassed by her boss. His behaviour included sexual advances, physical contact, coming to her house at night. She continued to reject him and he became aggressive. Eventually, she was forced to leave her job. The harassment continued, with daily calls and messages, and eventually threats, so she took legal action. It was held by the tribunal that she was constructively dismissed:

‘His actions constituted relentless and continuing unwelcome sexual conduct that interfered with the applicant’s work performance and created a hostile work environment’

She was awarded $7,500 (6 months wages) for lost income and $12,000 in general damages (this would have been more had she sought counselling).

**Some advice**

In addition to the measures considered ‘reasonable steps’ by Tribunals or Courts, NSW Administrative Decisions Tribunal member, Stevie Clayton, told a meeting of the EEO Practitioners Association that:

‘Employers who want to avoid or minimise discrimination complaints should ensure they give employees ‘regular and honest feedback’.

Clayton said that many complaints were due to the employee having received no feedback about deficiencies in their performance. Then, when they do not get a promotion, or are penalised by their employer, they don’t believe it can be about performance problems and look for an external reason, such as discrimination.

Employers should make sure they have the appropriate policies and procedures in place and ensure they provide a fast and fair avenue for resolution of grievances. Clayton said employers should

- take pre-emptive action, including examining the corporate culture;
- want to resolve issues rather than want to make them go away;
- document what is acceptable conduct;
- carry out awareness training for managers;
- and support managers so they can do their jobs properly.

That sums it up!
Developing emotionally healthy organisations

There is an emerging trend within progressive organisations of acknowledging and developing emotional intelligence (EI). This is a timely and positive phenomenon, however, EI’s focus on improving personal and interpersonal skills and awareness does not go far enough in ensuring emotional health in organisations. No matter how emotionally aware individuals are, if the emotional culture of the organisation is based on dysfunctional dynamics, we will get an organisation where what is preached and what is practised is not aligned. This article touches on the characteristics that define an emotionally healthy system where harassment and bullying are minimised.

Workplaces are in a double bind

Our emotional make-up, coping mechanisms and psychological issues cannot help but make themselves felt at work. This affects the quality of workplace relationships and therefore organisational effectiveness.

One of the biggest taboos in the workplace is the inclusion of any feelings that are potentially disruptive and/or threatening. Most organisational cultures prohibit the level of emotional honesty needed to bring these issues up and resolve them in a constructive manner. Additionally many individuals lack the skills to deal constructively with them – hence the confusion that defines most workplaces’ emotional dynamics.

As our emotional reality already permeates and shapes every aspect of our working life, this taboo, far from preventing the feelings from making themselves felt in the workplace is destructive as it prevents us from resolving issues.

So how do we create an organisational system that is emotionally healthy?

The five characteristics of emotionally healthy organisations

Characteristics 1: Validation of emotions

The ‘entry level’ requirement is the right to validation of emotions. All humans feel the same emotions – anxiety, vulnerability, fear, hatred, love, affection, joy, jealousy etc. It is what we do with them, how we handle them and express them that is constructive or destructive.

If feelings are taboo in a group, they will still find expression on some level (e.g.: through behaviour such as backstabbing, gossiping, undermining and sabotaging, loss of morale, absenteeism, formation of covert cliques etc.). They accumulate and are likely to emerge in an inappropriate and destructive manner or alternatively deaden group dynamics, repressing creativity, passion, energy and joy along with the ‘undesirable’ emotions. This may also lead to harassment and bullying in the workplace. On the other hand, a culture that validates emotions is in for a challenging, confronting but also fulfilling and ultimately productive ride of growth and development.

An example of the impact of inappropriate emotional repression:

Let us consider a manager who is uncomfortable with conflict. If they avoid dealing openly with issues that may give rise to conflict, they are effectively avoiding carrying out a large part of their duties as those parts of organisational life that are contentious or could lead to clashes of views are likely to be minimised, invalidated, denied or ignored. This has the effect of allowing issues to go unaddressed and organisational creativity, which is largely a function of diversity of views and perspectives, will dwindle.

Characteristic 2: Appropriate emotional authenticity.

A natural and necessary extension of validating emotions is the freedom to appropriately (i.e. skilfully, with due respect for the needs and rights of all involved) express these emotions.

In the workplace many of us are uncomfortable with the expression of others’ feelings especially if they are confronting in character. This can result in an explicit or implicit ban on expressing how one feels which in turn causes a major
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problem – for it is our feelings that tell us when we feel wronged or in need of support, thus allowing us to address the issue behind the feelings. In many workplace cultures it may be unacceptable, for example, to acknowledge feelings of vulnerability so as not to appear less than ‘together’. This may be so especially in some environments where traditional attitudes such as: ‘a man should be able to take this without complaining!’ or ‘typical woman – there she goes crying to the boss…’ prevail.

It is therefore important that our workplaces provide a forum that is supportive of expressing and resolving relevant emotional issues such as conflict, personal boundaries, anxiety and other emotional dynamics in a healthy way; i.e. openly, but in an appropriately contained, safe way.

An example of appropriate expression of one’s feelings:

“When we reach an agreement and you do not honour it or tell me that you won’t honour it, I feel disappointed because my professional needs and boundaries have not been respected and met.’ (in this case, using ‘disappointed’ instead of ‘angry’ is the ‘appropriateness’ component in action).

Characteristic 3: Healthy & Appropriate Boundaries

Boundaries enclose and define our personal territory/space. As individuals, we all have physical, mental, emotional and spiritual boundaries. As workers, we also have our professional boundaries. Our boundaries vary in their rigidity and flexibility, strength and vulnerability, closeness or expansion from person to person. We therefore need to take others’ rights and needs into consideration and may need to negotiate with and adapt to them.

Many problems in the workplace arise from inappropriate or unhealthy personal or professional boundaries. To facilitate the creation of characteristics 1 and 2 above, we need to be clear about our boundaries and feel comfortable asserting them. Absence of healthy boundaries can give rise to intentional or unintentional bullying behaviour and the victims’ perceived inability to respond to such appropriately. Presence of clear and appropriate boundaries supports a culture based on the tenets of respect, personal responsibility and professionalism.

Impact of inappropriate boundaries – a real-life example:

Mark, a foreign aid worker, was brought up by a strict, autocratic father who treated him more like a marine recruit than a child. Mark’s behaviour can by him, Mark’s behaviour can be interpreted as aggressive and inappropriate. Unnoticed son in turn never learned to respect his father who treated him more like a child. Mark brought up by a strict, autocratic father who treated him more like a marine recruit than a child. Mark now treats his employees (he is a manager) with complete disregard for their needs and boundaries. He interferes with everyone’s job, supervising in the most minute detail workers who are not even under his supervision. His father did not respect his personal space and right to self-determination, and the son in turn never learned to respect the boundaries of others. Unnoticed by him, Mark’s behaviour can create a work environment full of tension, hidden resentment, passive aggressive behaviour and lower retention/high absenteeism rates.

Characteristic 4: Absence of Organisational Taboos

Every organisation has its quota of ‘no-go’ areas – situations that are unmentionable. These taboos are often based on the often largely unconscious drive to avoid the anxiety that arises when the status quo is challenged and/or certain unpalatable truths are brought to the surface. The consequences? Lack of transparency and accountability, a split between stated values and values-in-use, formation of cliques, passive aggressive behaviour etc.

An example of an organisational taboo:

The volunteer CEO of a community organisation had known the community’s spiritual leader and guru for more than 20 years and had a close relationship with him. The CEO progressively took on more responsibilities despite the fact that he simply did not have sufficient time to handle his existing ones. The outcome was that things were not getting done and the community was suffering but nobody dared to bring this issue up for fear of insulting the CEO who had become, through his association with the spiritual leader, untouchable.

The first step towards overcoming organizational taboos is to create a culture where devils’ advocates offering alternative ways of perceiving or doing things are encouraged rather than scapegoated – which is an all too common reality in most organizational cultures. No shortcuts here, I am afraid – only a culture that is built on trust and a firm commitment to the reality principle is an antidote against organizational taboos.

Characteristic 5: Workplace Culture Supportive of Constructive Conflict

There is generally a taboo against feeling and expressing anger and/or engaging in conflict in the
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workplace. There are a number of reasons for this, most traceable to the anxiety that conflict gives rise to, our lack of skill in managing this area and the uncertainty and chaos that often result.

However, in order to be able to express one’s feelings authentically and appropriately, and in order to maintain one’s boundaries and be capable of dealing with organisational taboos, staff need to be able to feel at home with conflict (i.e. be able to communicate assertively, use active listening and apply conflict resolution skills). Furthermore, the organisation’s culture needs to be willing to be open to constructive conflict and appreciate its importance in creating a culture that promotes transparency, diversity, respect and personal responsibility.

In turn, integrating these characteristics into an organisation will build the foundations for the long-term health and functionality of its culture as well as minimising dysfunctional interpersonal/group dynamics such as harassment and bullying.

Conclusion

In summary, I offer some things to consider:

1. Cultural change will not eventuate unless clear and unambiguous support is given by senior management. Without executive support, it is difficult to attempt major organisational change as the perceived divergence between what is said (espoused values) and what is practised (values-in-use) will lead to widespread cynicism and more resistance to much needed change.

2. An organisation choosing to develop its emotional health will face a ‘healing crisis’ of sorts as hitherto repressed dynamics and issues are brought to the surface to be resolved. This needs to be acknowledged and accepted and sufficient resources made available to manage this.

3. Imparting basic communication skills across all levels of the organisation (assertive communication, active listening and conflict management skills) is invaluable in promoting functional relationships generally and emotionally healthy organisations specifically.

4. At an individual level, being able to reflect on what conditioning and emotional issues drives us in different circumstances and how this may be affecting the quality of our interactions within the workplace, is invaluable.

Maintaining a harassment free office

This two DVD training resource for employees and managers has been developed by Informed Business Training. It may be a useful resource to talk about workplace behaviour that is ‘unacceptable’ and the consequences of workplace harassment for staff. It informs employees, supervisors and managers about their rights and responsibilities in regard to workplace harassment. It includes various scenarios illustrating different types of harassment.

Maintaining a Harassment Free Office – Employees (20 minutes)

This DVD offers definitions and scenarios in an office-based environment.

Maintaining a Harassment Free Office – Managers (20 minutes)

This DVD aims to ensure Managers take appropriate steps to create a workplace that has ‘zero’ tolerance of harassment. Managers hold the key to recognising, preventing and dealing with harassment. Training of managers is essential to minimise the risk of harassment occurring in an organisation and ensuring that complaints are resolved appropriately.

The DVD offers practical solutions to Managers. It emphasises the need to focus on the ‘behaviour’ when interviewing and use of appropriate questions.

This DVD may be useful to organisations as it has universal themes. However, as it was produced in Victoria, it is advisable that you review the ‘grounds’ under which harassment is ‘unlawful’ in your State. A ten day evaluation preview is offered. If you require more information please contact Informed Business Training: (www.informedbusinesstraining.com, aussales@informedbusinesstraining.com)
The Board has recently been liaising with groups within the African Community to assess the issues affecting this community and has been presenting a series of discrimination rights and responsibilities seminars.

In March a session was held for African Youth at the Parramatta, Holroyd and Baulkham Hills Migrant Resource Centre. Twenty young people aged 12–18 years attended and were provided with information about anti-discrimination law, their rights and how to get assistance.

The young people expressed concern about constant race discrimination by strangers in the street, and the lack of knowledge the Australian community had about Africa (the continent) and the diverse backgrounds they come from. The young people had a tendency to just ‘get on with life’ rather than do anything about the discrimination they faced and had not realised they were able to make a complaint.

A seminar for the whole community was then held at the Parramatta, Holroyd and Baulkham Hills Migrant Resource Centre. Participants revealed personal stories of discrimination. They spoke of how, culturally in their community and particularly in refugee camps, they ‘treat fire with fire’ to resolve issues. This can create challenges when dealing with conflict in situations such as the workplace. They also mentioned the governments in their countries often cannot be trusted, therefore it is a difficult thing for them to consider making a complaint to a government body like the Anti-Discrimination Board.

In July a seminar for Liberian and Ethiopian women was held at Blacktown Community Health Centre. Twenty women attended and, with the support of their community workers, discussed discrimination they had experienced. They revealed stories of discrimination and harassment on public transport and difficulties they had in finding employment. Often as soon as they rang a company and stated their name, indicating they were from another country, they were told there were ‘no jobs’. They also felt great frustration in attempting to get a job as they were always told they needed experience in Australia, which they did not have as new migrants to this country. Often they had to take positions such as nursing aides in aged care facilities and felt they were treated badly by other staff because of their cultural background and because they do not speak English as well as other staff members.

A second seminar for Liberian and Ethiopian women was held at Auburn Migrant Resource Centre on 5 August. Fifteen women attended. They discussed cultural differences which often cause confusion and discrimination in their workplaces.

They were pleased to know Australia had anti-discrimination laws but were concerned businesses did not take notice of them when working with the African community.

Claire Williams (front row right) with some of the participants at the seminar for Liberian and Ethiopian women held at Blacktown in July.
Legal developments

Terrorist insult costs employer 25,000

The NSW Administrative Decisions Tribunal has found that a company breached the Anti-Discrimination Act when it failed to take any effective action to stop racial discrimination against a staff member.

The former employee, who is a Muslim, was called ‘bombchucker’ and ‘Osama Bib Laden’ by fellow staff including managers and a long-term union delegate.

The worker had delayed complaining about the insults because he was afraid of losing his job, but eventually took his case to the Anti-Discrimination Board, which referred it to the Tribunal.

The managers denied abusing the former forklift driver but the union delegate conceded under cross-examination that he had heard of the name calling. The delegate, who was of Italian background, claimed that racial slurs were common at the workplace and that he had been called ‘wog’ and ‘dago’.

The Tribunal said that the name calling in this case was qualitatively different from being called a ‘wog’ or ‘dago’ because it ‘suggested that by being a Muslim the [driver] was also a terrorist’.

The conduct breached the prohibitions in section 7 of the NSW Anti-Discrimination Act on racial discrimination, specifically on ‘ethno-religious’ grounds. It found that the name-calling had occurred over several months and had caused the worker ‘a great deal of distress, humiliation and embarrassment’.

The Tribunal ordered general damages of $25,000 plus court costs.

Abdulrahman v Toll Pty Ltd trading as Toll Express [2006] NSWADT 221 (1 August 2006)

Anti-bullying HR policy upheld

The Federal Court has found that Goldman Sachs JB Were Services Pty Ltd breached a financial advisor’s employment contract when it failed to adhere to its own HR policies.

The employee developed a depressive disorder and his employment was subsequently terminated by the company. His depression developed after a long dispute over the method of allocating clients to advisors.

The Federal Court’s ruling is a clear indication to employer’s that HR policies are legally binding as parts of employment contracts.

The company’s Working With Us (WWU) policy set out grievance handling procedures, the company’s goals in providing a healthy and safe working environment, strict policies against bullying and harassment of staff, and a code of conduct dealing with ‘integrity’.

Justice Wilcox ruled that the provisions of the WWU were binding on employer and employee. Despite contrary arguments by the company, he said that Company managers and employees all considered the WWU binding.

Mangers were expected to adhere to the policy when dealing with staff and employees could be disciplined for breaching it.

Justice Wilcox ordered damages of $515,000 for past and future loss of income and general damages for breach of contract. Unusually, the award contained a provision that if there wasn’t an appeal, then damages would be reduced by $50,000. Justice Wilcox reasoned that, while the company had a right to appeal, an appeal would delay the worker’s return to work and recovery; this would therefore justify the extra damages.

Nikolich v Goldman Sachs JB Were Services Pty Ltd [2006] FCA 784 (23 June 2006)

Demotion due to depression discriminatory

The Federal Magistrates Court has ruled that the Navy discriminated against a former officer who was demoted after she took sick leave for depression. Federal Magistrate Murray McInnis found that the Navy discriminated against the female Lieutenant on the grounds of disability in breach of the federal Disability Discrimination Act.

Federal Magistrate McInnis rejected additional allegations of sex discrimination involving the officer’s treatment at HMAS Stirling naval base in Western Australia in 2000. He said that these allegations were ‘vague’ and ‘lacking in particulars’.

However, he said the Navy was wrong to transfer the officer without consultation from her position to what she described as a ‘dog’s body’ job in the public

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affairs office. While her rate of pay was unchanged, the transfer was effectively a demotion and occurred because she took sick leave for around two weeks as treatment for depression.

The Navy should have ensured the commanding officer knew of her medical condition and additional staff could have been used to fill in during the officer’s rehabilitation, Federal Magistrate McInnis said.

He rejected the Navy’s argument that it transferred the officer ‘for operational reasons’. ‘The transfer . . . would not have occurred in circumstances where an officer was not disabled’, he said.

The Navy was ordered to pay $25,000 in damages. Federal Magistrate McInnis awarded the damages for hurt, upset and humiliation suffered after the effective demotion, which led to the former officer’s resignation from the Navy.

In awarding what he acknowledged as a significant award of damages Magistrate McInnis noted ‘it is inappropriate in these circumstances where it would seem that the policy of the respondent has operated in a manner which effectively permitted the unlawful discrimination to occur’.

Wiggins v Department of Defence-Navy [2006] FMCA 800 (9 June, 2006)

‘Medically retired’ prison officer reinstated

The Queensland Anti-Discrimination Tribunal has found that the Queensland Department of Corrective Services discriminated against a 56-year-old prison officer by pushing him towards retirement instead of allowing him to complete a rehabilitation program. The officer was ‘treated less favourably than other (officers) without the impairments,’ in breach of s10(1) of the Queensland Anti-Discrimination Act.

The officer, who had injuries and osteoarthritis in both knees, was involved in a rehabilitation and return-to-work program when the department required him to undergo a medical examination. The results of the examination were used to retire him on health grounds in 2004.

Tribunal Member Gerard Mullins was ‘not satisfied to the requisite standard that the complainant is unable to perform the genuine occupational requirements of his position. Neither do I consider that the respondent has discharged its onus of proving that the complainant is an unacceptable risk of personal injury.’

“The acting general manager had certified that the conduct of the enterprise would not be adversely affected by permitting him to complete that program. There was no justifiable reason at the time, based on workplace health and safety considerations, to not permit the complainant to complete his return to work program,” Member Mullins said.

The Department was ordered to reinstate the officer and pay $44,852 in compensation.

Toganivalu v Brown & Department of Corrective Services [2006] QADT 13 (18 April 2006)

Nose stud ban reasonable

A full bench of the Australian Industrial Relations Commission (AIRC) has found that Woolworths was entitled to ban a long-standing employee from wearing a nose stud at work, despite failing to enforce its policy for a decade.

The decision overturned a ruling by Deputy President Ian Watson last year that Woolworth’s subsidiary Safeway should allow the employee to wear her diamante nose stud at work, except when handling or preparing fresh food or taking part in substantial customer contact.

He had taken into account the company’s ‘belated’ application of the policy – Safeway had not objected to the nose stud when it hired the woman in 1990 and had failed to apply the 1996 policy for nine years. The company subsequently sought to enforce its uniform policy which banned body jewellery apart from two earings.

The full bench stated that the company dress policy definitely prohibited the employee’s nose stud. The question under consideration was whether it was reasonable for Woolworths to require the employee to remove the stud.

The bench overturned Deputy President Watson’s decision, saying it wasn’t unreasonable for an employer to belatedly apply its policy, and that failing to enforce a policy didn’t render it unenforceable.

‘Looked at from a general perspective, it cannot be that an employer who condones or permits a breach of the policy by a particular employee loses the right to apply the policy to that employee for all time as a consequence’.

‘There may be situations in which it would be unreasonable or unconscionable for an employer remained reasonable.”

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to withdraw a representation that what would otherwise be a breach of policy was not, but it would need to be shown that the employee would suffer some financial or other detriment”, the bench said.

The bench criticised Woolworths saying its conduct was ‘clearly unsatisfactory” and that inconsistently enforcing policies can cause uncertainty, disharmony and ill-feeling among employees.

B. Miller v Woolworths Limited t/as Safeway. PR971351 (1 May 2006)

Inadequate procedures to prevent sexual harassment

The Queensland Anti-Discrimination Tribunal has found Queensland Health liable for sexual harassment of a female employee.

Tribunal member Peter Rooney said that Queensland Health failed to take reasonable steps to prevent the harassment occurring during a three-month period after the employee complained of the sexual harassment. When action was finally taken the offender was counselled, moved to a different location and eventually dismissed.

Member Rooney found that it was not sufficient for the complainant’s supervisors to inform the complainant that she should speak to him and ask him to stop his behaviour but not do anything else to ensure ‘he understood his responsibilities to ensure that his conduct fell within acceptable limits’.

The Member agreed that there had been difficulties in acting on the early informal reports of the harassment because of the complainant’s requests for anonymity and he also found Qld Health had acted reasonably after it held the counselling session with the offender.

The offending actions included prolonged staring at the victim’s breasts, comments about her sex life and calling her ‘la petite poon poon’ (slang for vagina).

The Tribunal ordered Queensland Health pay $14,665 in compensation. It reduced the compensation award against the State Government as vicarious employer by $6,500 (less costs) already paid by the offending co-worker in a separate settlement. The tribunal awarded the counsellor $7,500 in general damages and $6,823 for loss of salary, plus medical costs and interest.


Colour blindness not a barrier

The NSW Administrative Decisions Tribunal has found that the Ambulance Service of NSW discriminated against a colourblind man who applied for employment as a trainee ambulance officer.

Mr Clunes was required to undergo a series of steps in the process of successfully becoming a trainee officer. He was up to stage five which involved a health assessment. As part of the assessment he had to undergo some vision tests; he was assessed as failing the Service’s colour vision standard (he registered as red/green colourblind). The Service indicated it was reviewing its standard but, in the meantime, said that Mr Clunes had not done so.

It referred to the process of developing a colour vision testing process to be used in assessing suitability for employment as an ambulance officer. The Tribunal said it was unable to do so and that the appropriate move for the Service would have been to apply for an exemption from the ADA to cover it in the meantime. It had not done so.

The Tribunal ordered the Service to reconsider Mr Clunes’ application without reference to the standard for colour vision which it had previously applied to him and offer him employment, and also ordered it to pay $5000 compensation for the amount of time and effort he had spent in pursuing his goal of becoming an ambulance officer.

The Service is appealing against the decision.

Clunes v Ambulance Service of NSW [2006] NSWADT 103

Virgin Blue face $80,000 damages for age discrimination

The Queensland Anti-Discrimination Tribunal has

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determined substantial damages against Virgin Blue following a Tribunal decision that it had discriminated against eight women over the age of 36 who applied for flight attendants’ jobs but were rejected because of their age.

The case involved a group of experienced flight attendants, aged between 36 and 56, who applied for positions with Virgin but were rejected after attending the group assessment stage of its recruitment process.

In determining the damages Tribunal member Douglas Savage SC said the rejected flight attendants had ‘at least as much chance as any other person displaying the requisite behavioural competencies and other matters necessary to obtain employment’.

‘It is manifestly unlikely that the complainants, all of whom were trained flight attendants, would fail basic training in the skill in which each had been performing for many, many years.’

‘Further, their life experience and maturity probably would have seen them do well in the situation of a personal interview.

‘In my view, each would have been more likely to obtain employment than a ‘newcomer’,” he said.

While Virgin Blue had actively sought out former Ansett staff because of their qualifications and experience they ‘did nothing to address the concern that its recruitment process for a very significant period did not employ any one over 36 years of age, although the selection process was professedly age neutral and there were substantial number of older applicants for employment after Ansett collapsed’ Tribunal Member Savage said.

Tribunal member Savage found that while the initial discrimination was unintentional, the system of assessment was deficient and ‘too cursory to properly test behavioural competence, rather than irrelevant personal features such as age’. He found that Virgin Blue’s recruitment processes for cabin crew was not merit based, and ‘treated older people differently than younger people in similar circumstances’.

Tribunal member Savage criticised the airline’s argument that any general damages should be nominal, and that the injury the attendants had suffered was ‘not great’. He said this trivialised Virgin’s ‘significant contravention’ of the State Anti-Discrimination Act.

He said the airline’s action in ‘very publicly’ arguing there was no basis for the complaints had ‘exacerbated the affront’ to the applicants and justified a greater amount of damages.

Tribunal member Savage awarded between $7,000 to $12,000 in total damages to each of the former flight attendants, plus interest. The women also won costs.

Hopper and others v Virgin Blue Airlines Pty Ltd [2006] QADT 9 (29 March 2006)
Carers’ responsibilities discrimination

The woman worked for a company as an assistant manager of one of its retail outlets. She requested part-time work on return from maternity leave to enable her to care for her baby. The employer refused her request on the basis that the role at the particular outlet at which the complainant worked could not function on a part-time basis. The matter was resolved at conciliation when the employer made an offer of appointment to the woman, as a manager (in a job share situation) at one of its other retail outlets. The offer was accepted as the proposal represented a promotion for the woman and also met with her need for part-time work. She has since commenced in the position and reports being very happy with the outcome.

Transgender discrimination

A recognised transgender woman applied for membership of a women’s only sport centre. A recognised transgender person is someone who has a new birth certificate or equivalent document in their preferred gender.

She said that she would have been happy for the centre to sight a copy of her birth certificate, but the centre’s management insisted that she provide a photocopy that they would retain, which she felt was inappropriate. She made a complaint of transgender discrimination to the Board.

At conciliation, she said she was no longer interested in joining the centre, due to the problems that had occurred. However, the complaint was resolved with the respondent agreeing to pay an amount to the law centre from which the complainant had received advice, and an amount to the complainant as compensation for humiliation and suffering.

Carers’ responsibilities discrimination

The complainant requested five weeks of accrued annual leave to enable him to care for his pre-school daughter whilst his partner was overseas. The request was refused by his employer on the basis of operational requirements. After the Board wrote to the employer, it reconsidered the complainant’s request and granted him approval to take leave.

Marital status discrimination

A woman attended a presentation by a vacation club, which was offering a travel voucher as an inducement. When she arrived she was told she was ineligible to attend the presentation or receive the voucher as she was separated rather than single or married.

She made a complaint of marital status discrimination, and in 

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ADB Complaints Finalised

Complaints closed between 1 July 2005 and 30 June 2006

1075 complaints closed since 1 July 2005

66% (707) closed within 6 months of receipt of complaint

92% (984) closed within 12 months of receipt of complaint

97% (1045) closed within 18 months of receipt of complaint

3% (30) longer than 18 months.
response the company said that the complainant was quite welcome to attend the presentation but only single or married people were eligible for the travel voucher, as they wanted to market their product to people whose financial status was clear.

When the Board pursued the matter further, the company eventually agreed that they had not followed their own procedures correctly or adequately assessed the complainant’s financial status. The complaint was resolved when the company agreed to change their procedures and to give the complainant the travel voucher.

**Carers’ responsibilities discrimination**

The complainant sought to take a combination of sick leave and accrued annual leave in order to care for his elderly and infirm parents. He alleged that his employer failed to give due consideration to his request and at the time of lodging his complaint, had not yet determined whether the requested leave would be granted. After the Board wrote to the employer, it granted the complainant’s request to approve the leave.

**Disability discrimination**

The complainants were a couple who have disabilities that severely impair their mobility. One is paraplegic and requires the use of a wheelchair; the other suffers from a muscular degenerative disorder and requires the use of callipers. They are both unable to climb stairs and require disabled access to entertainment venues. They allege that the respondent, a third party ticketing agency, discriminated against them on the ground of disability in the provision of goods and services. When trying to pre-book tickets to an entertainment event, they were advised that tickets for disabled seating could not be pre-booked through their agency because disabled seats are only made available by the various venues on the general release date of the tickets.

The complainants accepted this explanation but indicated that they were frustrated by the service’s web site which gave misleading information. With the assistance of the Board the complainants agreed to settle the matter. They accepted the respondent’s offer of free tickets to a show of their choice, and an undertaking to correct the misleading information on its web site.

**Marital status discrimination**

A woman attended a job interview and the interviewer asked her if she was married, and when she said she was not, whether she was in a relationship. When she said she was in a relationship, the interviewer began asking her how long she had been with her partner, when they were planning to get married and when she was planning to have children, as she (the interviewer) wanted someone for the long term and not someone who was going to leave to have children.

The complainant asked that the Board call the respondent and advise her about marital status discrimination and her obligations under anti-discrimination law. The complaint was resolved when this occurred.

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**Australia Post mature age employment policy applauded**

Australia Post has been recognised for its work in relation to mature age employment, in a presentation of an Employer Champion Award by the Hon. Kevin Andrews MP.

Employer Champions is an Australian Government initiative that recognises businesses that have a formal mature age employment strategy and employ staff of a range of ages (with at least 20 per cent 45 and over).

As part of a recent initiative, Australia Post surveyed older members of its workforce to better understand the needs of this group. They conducted age audits and profiled the entire organisation to provide greater understanding of job divisions, by age.

Australia Post also surveyed staff who stopped working within the past five years, to get a clearer picture of the ‘retirement experience’ within the company.

“Reviewing the experiences of staff, present and past, assists us in future planning of our workforce and provides us with the tools to better facilitate individual requirements for staff as they get older,” said Managing Director of Australia Post, Mr Graeme John.

Australia Post was one of the first organisations in Australia to talk publicly about the importance of mature workers to Australia’s future.
What types of discrimination do we deal with?

The NSW Anti-Discrimination Board can only deal with discrimination complaints that are covered by the NSW Anti-Discrimination Act. This means that we can only deal with a discrimination complaint if:

- it is based on any of the grounds listed below and happens in one of the areas of public life listed below; or
- it is racial, homosexual, transgender or HIV/AIDS vilification, that is, a public act of incitement to hatred, serious contempt or severe ridicule.

The laws do not allow us to deal with discrimination complaints based on other grounds (e.g. religion, political conviction), or based on events in your private life.

**Grounds**

- Sex (including sexual harassment and pregnancy)
- Race (including colour, nationality, descent, and ethno-religious or national origin)
- Marital status
- Homosexuality (male or female, actual or presumed)
- Disability (past, present, future, actual or presumed)
- Age
- Transgender (transsexuality)
- Carers’ responsibilities (in employment only)

**Areas**

- Employment
- Education
- Obtaining goods and services (e.g. credit, access to public places, entertainment, government or professional services)
- Accommodation
- Registered clubs

**Where we are**

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