

# Equal Time

Newsletter of the Anti-Discrimination Board of New South Wales



Number 65 November 2005

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**The contents of this publication are for information purposes only and should not be substituted for legal advice.**

**International Day of People with a disability is celebrated on 3 December each year to publicise the achievements of people with disability and promote the benefits of a fully inclusive society.**

**Refer to our story on page 3 for more information**

## Rugby tackles racism

*The Rugby Union Players' Association (RUPA) is launching a training program to celebrate racial diversity and prevent racial vilification on and off the field.*

The program has been developed in consultation with the Anti-Discrimination Board of NSW.

Key players and other RUPA officers will be trained to deliver workshops to elite and academy Rugby players. The program features stories about players from culturally diverse backgrounds, informs participants about vilification laws and teaches them how to handle difficult situations without being abusive.

Tony Dempsey, CEO of RUPA said: 'We are committed to ensuring the excellence of our members both on an off the field. The training will be undertaken over ensuing months for our Academy member

players. Senior players such as Justin Harrison will ably assist. Special thanks to the Anti-Discrimination Board for their assistance.'

Murray Burke, Education Services Manager at the Anti-Discrimination Board said:

'Addressing the issue of racial vilification in sport is a very important one. Players need to be able to compete without racial harassment.'

'We are very pleased to be involved in this project. The RUPA team have been fantastic in their support and enthusiasm and it will be very beneficial to the players, officials and the sport of Rugby Union.'

## Play by the rules

Play by the Rules, a website promoting fun, fair and safe sport, is a partnership between the Australian Sports Commission and all State/Territory sport and recreation and anti-discrimination agencies.

It provides quality information on discrimination and sport including frequently asked questions, links to relevant publications and relevant State and Federal legislation.

The website was launched in

late 2001 and has had well over 3,000,000 hits and nearly 6,000 people have registered for training.

The website includes free online training courses. There are four courses on discrimination and harassment for coaches, administrators, umpires and players.

There are also courses in how to achieve child protection within sport and recreation.

<http://www.playbytherules.net.au>

# From the President

This final edition of *Equal Time* for 2005 deals with a wide range of issues and a number of initiatives of the Anti-Discrimination Board.

Of particular note is the training program jointly developed with the Rugby Union Players Association. The program is designed to celebrate racial diversity and prevent racial vilification on and off the field.

International Day of People with a disAbility is celebrated on 3 December each year. While awareness about the rights of people with disabilities has increased in recent years, unfortunately there is still a great deal of discrimination against people with disabilities, particularly in terms of employment and access to facilities. A comprehensive article starting on page 3 reviews the issues and recent disability discrimination cases.

## Changes to *Equal Time*

ADB management recently decided that *Equal Time* will now be published three times a year in March, July and November.

This change will enable ADB publications staff to continue to provide interesting and comprehensive coverage of discrimination news, issues and initiatives in *Equal Time* and at the same time will allow them to better maintain and update the Board's large range of publications and web resources.

## Thanks and Congratulations

I would like to wish all of *Equal Time's* readers a pleasant end to the year and a restful and revitalising festive season.

On behalf of the Board I would also like to publicly thank the staff



of the Board for their hard work and dedication in 2005. They should be congratulated for their myriad achievements.

Particular congratulations should go to **Milly Stylli** who this year celebrated 20 years of service with the Anti-Discrimination Board. Milly initially worked for 9 years with the Board's Conciliation Branch and now is the administrative backbone of our Education Services branch. At her celebration party a former supervisor said Milly was (amongst other things) an 'Awesome Administrator', 'Empress of Ed Services', 'Queen of the Question', and 'Unbelievably Unique'.

*Stepan Kerkyasharian AM*

## Review

### Video/CDs on Workplace Discrimination

Two CD-Roms have been developed to inform employees and supervisors and managers about their rights and responsibilities in regard to discrimination.

***Employee Awareness and Response*** (approx 14 minutes) explains what workplace discrimination is and its consequences. It points out that an employee has the right to a workplace free of discrimination and the employer has a duty of care to eradicate workplace discrimination or else they can be held liable.

It explains grounds of discrimination and that these vary between countries, States

& regions. It explains levels of discrimination, what direct and indirect discrimination means, what harassment means and what to do if you are subject to discrimination or victimisation.

***Responsibilities for Supervisors and Managers*** (approx 20 minutes) explains that a Supervisor or Manager has to take all reasonable steps to prevent discrimination. It emphasises that failing to do so could result in the Manager/Supervisor being personally held responsible for acts of employees.

The final section is about the following five steps of the cycle of 'Duty of Care':

1. Culture: Instil the right culture
2. Training: Put in place training and create awareness
3. Reporting: Have a reporting system that everyone knows and understands
4. Investigation: Monitor the workplace, deal with complaints swiftly & fairly.
5. Response: Take appropriate action

If you are interested in obtaining these videos you can obtain a free 30 day preview prior to purchase. The cost of each video is \$285 plus GST and \$12.98 postage and handling.

The CDs were produced by Duty of Care Pty Ltd. For more information on these CDs call 1300 88 2250 or visit [www.dutyofcare.biz](http://www.dutyofcare.biz).

# Disability day highlights discrimination awareness

*International Day of People with a disAbility is celebrated on 3 December each year to publicise the achievements of people with disability, create awareness of disability issues and promote the benefits of having a fully inclusive society.*

Awareness about the rights of people with disabilities has increased in recent years and there are more people with disabilities participating in the workforce and other aspects of community life. Many say that the most important thing for them is to be seen in terms of their personality and skills rather than their disability.

However, unfortunately there is still a great deal of discrimination against people with disabilities, particularly in terms of employment and access to facilities. In many cases this is based on stereotyped assumptions about what they can or can't do, or a belief that it will cost too much, or it is all too hard.

The *Anti-Discrimination Act 1977 (NSW)* makes it unlawful to discriminate against or harass a person on the basis of disability in most types of employment, in most types of goods and services, in rental accommodation, in government schools, colleges and universities, and in registered clubs.

In this context a disability includes a physical disability, a physical illness that makes any part of the body or brain work differently, a mental or psychiatric disability (including behavioural disorders), an intellectual or learning disability, a disfigurement or different formation of any part of the body, and any organism that could cause disease or illness, such as hepatitis or HIV.

As well as current disabilities, the law also covers any disability you had in the past or might have in the future, any disability anyone thinks you might have now, or might have had in the past or might have in the future, and any disability of any of your relatives, work colleagues or associates.

People must not discriminate against you because you need someone or something to assist you because of your disability, such as a guide dog, or a piece of equipment or another person to help you with a particular task like interpreting information.

In the workplace, you have the right to be fairly considered for jobs and training on the basis of merit. Employers can refuse to give you a job if you can't do the essential requirements of the job – for example it is a driving job and you are unable to drive because of your disability.

In a recent case in the NSW Administrative Decisions Tribunal, the NSW Ambulance Service was found to have discriminated against a man who was colour blind when it refused him employment. The Service had argued that he would have a reduced ability to perform inherent requirements of the job, such as driving at high speeds, identifying symptoms and seeing warning lights and LEDS.

The Tribunal said the Service had

made assumptions about the man's abilities and had failed to consider his individual circumstances. He had learnt to perform similar tasks without difficulty, had an excellent driving record – including years of driving commercial vehicles and machinery – and had also successfully worked as an operating theatre assistant [Browne v NSW Ambulance Service [2004] NSWADT 192 (3 September 2004)].

If you are the best person for the job, employers must provide any special facilities you need to do the job, unless it would cause them 'unjustifiable hardship' to do so. Obviously there will be times when employers could say it would cost them too much to provide the facilities you need, for example if they had to install lots of ramps or provide you with very expensive equipment. But they must take into account all the benefits from the facility if they provided it, including those for other staff.

If there is a part of the job that you cannot do but it is not essential to the job, for example you cannot reach the photocopier because you are in a wheelchair, another option is for the employer to exchange these duties for other duties that you can do. An employer is allowed to ask you to go for a medical to work out if you can do the essential parts of the job.

Once you are in a job, an employer  
*continued on page 4*

## Disability day highlights discrimination awareness continued from page 3

cannot withhold opportunities such as training, promotion or particular types of work from you because of your disability, unless you cannot perform the essential requirements of the relevant position.

In a case in the Federal Magistrates Court of Australia, the NSW Police Service was found to have discriminated against a man with sickle cell anaemia when it placed him on restricted duties on the basis of a report from his GP, who called for 'precautions'.

The court found that the Service had not properly assessed what types of restrictions might have been required, and had ignored another report from a specialist who said that the man could continue on full duties [Trindall v New South Wales Commissioner for Police [2005] FMCA 2 (7 February 2005)].

Similarly, an employer cannot dismiss you, medically retire you, or make you redundant because of a disability, unless this stops you from doing the essential parts of your job. They cannot make you do non-essential parts of the job, and they must provide you with any facilities or services you need to stay on in your job — as long as this won't cause them unjustifiable hardship.

One area where problems often occur is when people have been injured while doing their job. There can be considerable confusion about what rehabilitation is required, what work an employee can do during rehabilitation, and whether they can return to their original job.

Employers may be reluctant to return employees to their original job after rehabilitation, even if they have been certified as fit to

do so. In other cases the employee may no longer be able to perform the essential requirements of the job, even after rehabilitation. The Board encourages employers in this situation to find alternative roles for employees wherever possible.

In the case of *Cosma v Qantas*, the full bench of the Federal Court of Australia upheld the dismissal of a former baggage handler who could no longer lift the required weight of baggage after an injury.

The court had found that his initial job as a baggage handler was the relevant test in terms of whether he could perform the essential requirements, not subsequent jobs that he had done while on rehabilitation. The court accepted that the termination arose from a genuine inability to employ the man when he had limited prospects of returning to his original job and had declined offers of employment in other areas [*Cosma v Qantas Airways Ltd* [2002] FCAFC 425 (20 December 2002)].

However, in many cases of workplace discrimination there may be a simple solution that the employer has simply not thought of because it is slightly 'outside the envelope'. In one recent case, the Federal Court found that Australia Post indirectly discriminated against a woman with arthritis and varicose veins when it made a rule that all staff must stand up to serve customers.

Australia Post argued that the stools that staff had previously used were an occupational health and safety hazard. However the court found that the woman could perform the essential requirements of the job, there had been no history of accidents in the time

when the stools were used, and the requirement to stand at all times was not reasonable. It is likely that in such situations other employees would also benefit from the use of stools [*Daghlian v Australian Postal Corporation* [2003], FCA 759 (23 July 2003)].

People with disabilities also have the same rights as anyone else when accessing goods and services such as shops, pubs, restaurants, entertainment places, banks, government departments, health services and transport.

Buildings that you need to use must be accessible to you, unless it would cause the owner unjustifiable hardship to make them accessible. Obviously it will be very expensive to make some existing places accessible, but there may be smaller changes that would make it easier for you without causing unjustifiable hardship, such as installing or extending handrails. And large service providers should at the very least have plans for how they are going to make their service accessible in the future.

People must not refuse you service because you have a guide dog, even in eating areas, or because you are in a wheelchair, or because they are worried that you might upset or offend other customers.

They must not make assumptions about what services you should or shouldn't have on the basis of your disability. For example, a bank should not assume that a person with a developmental disability can't manage a bank account. They may be able to do so perfectly well, or they may be able to learn to do so, or they may have people to help them.

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## Disability day highlights discrimination awareness continued from page 4

There are two exceptions to the law on goods and services. Superannuation and insurance providers can discriminate on the basis of disability if there is statistical evidence to support their decision, or if another law says that they must discriminate against you. People organising sporting activities can discriminate against you on the basis of disability in some circumstances, for example if your disability means you can't perform the actions required.

In a recent case in the Federal Magistrate's Court, QBE Insurance was found to have discriminated against a woman with metastasised breast cancer when it denied her any form of travel insurance, including property insurance.

QBE argued that it was justified on the basis of actuarial evidence, and gave anecdotal evidence of two expensive claims where cancer was a factor, although it was not a direct cause of the claims.

However, the court found that the decision was "too formulaic or tended to stereotype the respondent by reference to her disability" [Bassanelli v QBE Insurance [2003] FMCA 412 (26 September 2003)].

The same sorts of rules apply to State education, renting accommodation and registered clubs – you have the same rights as anyone else, and the person or organisation involved must provide you with access and any special facilities you need, unless this would cause them unjustifiable hardship.

In the case of education, the institution must assist you to learn, study and sit for tests as necessary. This could mean scheduling classes in locations that are easy for you to get to, providing equipment or other assistance to make notes from classes or read study materials, or modifying exam procedure to allow for your disability.

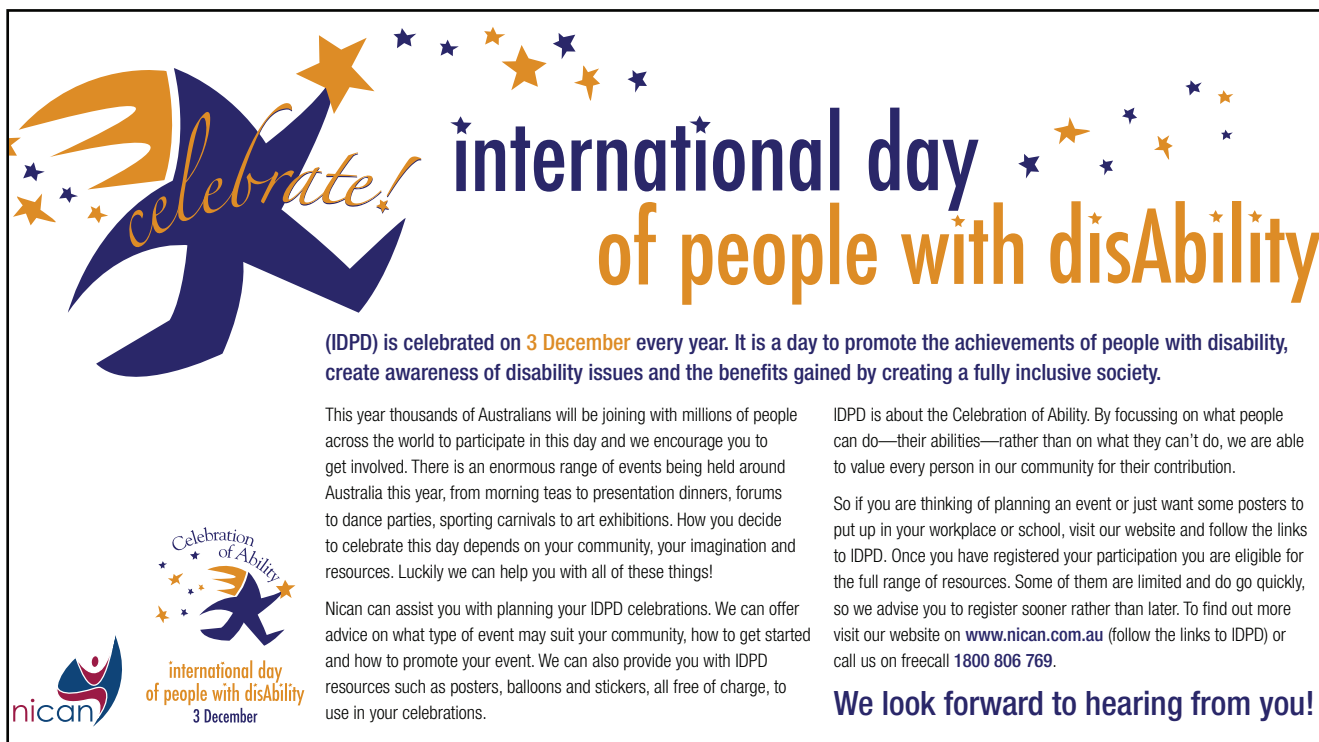
In the case of rented accommodation, the rules do not

apply if the accommodation is provided by a charity for people with a different type of disability that you don't have, or it is shared accommodation in a private household of six people or less.

Registered clubs can also refuse you access if the club is for people with a particular type of disability that you don't have, and refuse you access to some sporting activities, for example if you can't perform the actions required.

For all types of organizations the message is clear – assess people on their individual merits and abilities rather than on stereotyped ideas about what they can't do, and where possible make adjustments to enable them to perform the tasks and access the facilities they need.

Above all, be flexible and be creative. That is the best way to ensure that people with disabilities can interact in and contribute to our community.



**celebrate!** international day of people with disAbility

(IDPD) is celebrated on 3 December every year. It is a day to promote the achievements of people with disability, create awareness of disability issues and the benefits gained by creating a fully inclusive society.




This year thousands of Australians will be joining with millions of people across the world to participate in this day and we encourage you to get involved. There is an enormous range of events being held around Australia this year, from morning teas to presentation dinners, forums to dance parties, sporting carnivals to art exhibitions. How you decide to celebrate this day depends on your community, your imagination and resources. Luckily we can help you with all of these things!

Nican can assist you with planning your IDPD celebrations. We can offer advice on what type of event may suit your community, how to get started and how to promote your event. We can also provide you with IDPD resources such as posters, balloons and stickers, all free of charge, to use in your celebrations.

IDPD is about the Celebration of Ability. By focussing on what people can do—their abilities—rather than on what they can't do, we are able to value every person in our community for their contribution.

So if you are thinking of planning an event or just want some posters to put up in your workplace or school, visit our website and follow the links to IDPD. Once you have registered your participation you are eligible for the full range of resources. Some of them are limited and do go quickly, so we advise you to register sooner rather than later. To find out more visit our website on [www.nican.com.au](http://www.nican.com.au) (follow the links to IDPD) or call us on freecall 1800 806 769.

**We look forward to hearing from you!**



# Emails can do more than cause embarrassment

*The recent public exposure of a 'private' email conversation between two employees of a large legal firm demonstrates that it is best not to send or receive anything that you wouldn't want the whole world (especially you employer) to know.*

*Margaret White, one of the Board's Senior Workplace Relations Consultants, discusses the issues.*

Most employers have strict policies concerning the misuse of computers. Inappropriate screen savers, emails and internet access are all targeted. Such activities affect productivity and give rise to the possibility that other employees will be offended, intimidated or humiliated. In other words, harassed.

Employers must take reasonable steps to ensure that employees are not bullied or harassed. This requirement arises under both anti-discrimination and occupational health and safety legislation. Monitoring email or internet use is a necessary part of the requirement.

## Reasonable steps

Reasonable steps can include, of course, having a comprehensive and accessible email policy which clearly states what is, and what isn't, acceptable behaviour.

Employers must also take reasonable steps to ensure that their employees are aware of their policies. 'Reasonable steps' include: showing employees a video describing company policy<sup>1</sup>; ensuring staff have read and understood the policy and reinforcing it with a message each time they log on to a computer<sup>2</sup>; and reinforcing the policy,

contained on the employer's intranet, through the use of emails and screen savers<sup>3</sup>.

The employer's responsibilities have not been met, however, where employees have limited computer knowledge, misunderstand the effect of their company's email policy, and the employer has "assumed" that they have read the policy. In one case where the policy was among a large volume of documents given to them at induction, it was held that the employer had failed to make workers aware of its internet usage and email policy.<sup>4</sup>

On the other hand, employees have a duty to be aware of the content of policies which been brought to their attention. Excuses which did not help dismissed employees include: they hadn't taken any notice of the video<sup>5</sup>; they hadn't read the policy despite training as an harassment contact officer<sup>6</sup>; that a photo of a naked woman draped in a pink sheet was a 'family portrait'<sup>7</sup>; that repeated access to a pornographic site was accidental<sup>8</sup>; and that the recipient had requested the email; and that the employee had not read the Code of Conduct despite being a Duty Manager whose his duty statement required him to enforce it<sup>9</sup>.

Most policies raise the prospect of dismissal and State and federal industrial relations commissions are mostly unsympathetic to employees who have been terminated.

## Due process

Employers are, however, still bound by the rules of natural justice (or due process) in the enforcement of their policies.

Under the rules of natural justice, both the process and the outcome must be fair. That the employee knew of the allegations and was given ample opportunity to reply is fundamental. The opportunity to make a written submission may be fair, even though no actual interview has taken place<sup>10</sup>

Due process also requires a decision-maker to consider all relevant evidence when deciding whether or not an employee is guilty of an accusation. When an employee claimed that he had not sent an email; that email security was poor; and that staff commonly knew each others' passwords and used their computers, it was held that the employer should have investigated these claims before dismissing the employee<sup>11</sup>.

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## Emails can do more than cause embarrassment continued from page 6

### The outcome

The rules of natural justice require a fair outcome. The punishment must fit the crime.

A fair outcome is one that is applied consistently to all employees who have been found guilty of the same or similar workplace offences. When only two of 24 employees involved in sending and receiving pornographic emails were sacked, one of them argued that this was unfair.

In dismissing the worker's claim, the Australian Industrial Relations Commission took note of the facts that he had sent more and worse emails than anyone else, that he had received training as a harassment contact officer and should have known better, and that, unlike his colleagues, he showed no remorse<sup>12</sup>.

In another case, however, two employees who had little computer experience were caught because they did not know that they could delete emails. They were dismissed while their more savvy colleagues received lesser punishments, despite having received the same emails<sup>13</sup>.

To achieve a fair outcome, it is necessary to take into account any "mitigating circumstances". The fact that someone hasn't read a policy is not a mitigating circumstance when they should have read it, given their circumstances<sup>14</sup>. Nor when the employer has taken all reasonable steps to ensure that employees are aware of the policy<sup>15</sup>. Reading the policy **after** you've been caught doesn't help.<sup>16</sup>

The Commissions take a dim view of steps taken by an employee to avoid detection, such as loading an uninstaller onto his computer<sup>17</sup> or downloading 8,000 files after being

told there was to be an investigation into his email use<sup>18</sup>.

Provided that the employer has taken all reasonable steps to ensure that employees understand their email policy, and provided that an accused person has been accorded natural justice prior to his dismissal, it is not necessary to warn or counsel a person who has been found guilty of a dismissible offence.

### Privacy

Many employees have found, to their sorrow, that deleting an email doesn't mean that it cannot be found later. Due to concerns about the possible breach of privacy inherent in the surveillance of emails and internet use, the Workplace Surveillance Bill 2004 (NSW) requires employers to inform employees of the surveillance to which they are subject.

Monitoring the use of computers is, therefore, a responsibility of employers, but employees are entitled (except in certain approved cases) to advance notice of the nature of the surveillance to be carried out.

### Notes

- 1 Micallef v Holden Ltd PR 900664 (5 January, 2000) IRC
- 2 Murray v Department of Family and Community Services. PR913897 (1 February 2001)
- 3 Williams v Centrelink, PR942762. (15 January 2004)
- 4 Public Service Association v NSW Roads and Traffic Authority. NSW IRC 7486 and 7487 or 2001. 14/6/02
- 5 Micallef v Holden, note 1.above
- 6 Williams v Centrelink. Note 3.above
- 7 Wazir v WTH Pty Ltd t/as Avis Australia. NSWIRC 5330 of 2002 (21 January, 2002)
- 8 Murray v Department of Family and Community Services, note 2.above
- 9 Rogers v State Rail Authority of NSW, PR959994, 13 July, 2005.
- 10 Rogers v State Rail, note 9. above
- 11 Harrington v Phillip Morris Limited PR 15206 (13 March, 2002)
- 12 Williams v Centrelink, note 3.above
- 13 Public Service Association v the RTA, note 4. above.
- 14 Williams v Centrelink, note 3. above and Rogers v State Rail, note 9.above
- 15 Micallef v Holden, note 1. above and Wazhir v Avis Australia, n.7, above
- 16 Rogers v. State Rail, note. 9 above.
- 17 Murray v Department of Family and Community Services
- 18 Wazir v Avis, note 7. above

## Information sharing and complaint referral arrangements

The NSW Anti-Discrimination Board has entered into an Information Sharing and a Complaint Referral Arrangement with NSW Privacy, the NSW Ombudsman, the Health Care complaints Commissioner, and the Legal Services Commissioner. These arrangements enable the signatory agencies to refer a complaint to another agency if that agency has the powers to deal with it.

For more information about the arrangements go to: [http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_information\\_sharing](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_information_sharing)

# Is age diversity the new black?

It's fashionable but not enough is being done

*A recent survey has found that while leading Australian employers are changing their attitude towards older workers and taking positive steps to retain them they have not fully embraced this growing demographic.*

The Equal Employment Opportunity Network of Australasia (EEONA) surveyed 32 leading employers (including ING, BlueScope Steel and Westpac) to identify why and how they are implementing diversity and equality programs.

Key findings included:

1. Age diversity is the new black. In 2005 44% of best practice organisations had programs to address age diversity, in comparison with only 25% in 2003. The research shows that the majority of these programs focus on the retention of older workers (94%) and maximising their performance (95%). 'This is a great improvement, but it's a narrow focus. We still

- don't think about the broader agenda, for example changing our recruitment or marketing strategies to embrace older workers. A continued focus on recruiting younger workers and youthful advertising, for example, misses an opportunity to market to the growing ageing demographic" says Juliet Bourke Chair of EEONA. The research showed that only 53% of age programs target recruitment, and only 18% marketing and sales results.
2. Diversity programs are not diverse. Even in best practice organisations, diversity programs are not diverse and prioritise women, harassment, caring responsibilities and disability

ahead of religion, nationality and race.

The report recommends that to improve diversity and equality in Australian workplaces:

1. Employers should identify the business benefits beyond attracting and retaining employees. For example older workers may develop new products and identify new ways to market to mature consumers.
2. Employers need to address all aspects of diversity, measure diversity program outcomes and hold managers accountable for implementation.

More information on the report is available on the NEEOPA website – [www.neeopa.org](http://www.neeopa.org)

## For More Information

The following Anti-Discrimination Board publications are available for a small charge:

- Anti-Discrimination and EEO Guidelines – For Managers, Team Leaders and supervisors
- How to implement EEO in any organisation
- Harassment in the workplace
- Grievance Procedure Guidelines

To order, contact Milly Stylli on 9268 5555

## Need help with grievance handling or harassment and bullying issues?

*The Anti-Discrimination Board can provide on-site training in your workplace, custom-designed to meet your individual needs.*

*For more information contact:*

*Sydney: Murray Burke on (02)9268 5519*

*Wollongong: Lesley Coombs on (02) 4224 9960*

*Newcastle: Belinda Munn on (02) 4926 4300*

# Legal developments

## AIRC upholds harassment dismissal

The AIRC has upheld the dismissal of a Victorian Department of Human Services employee for sexually harassing male and female employees he supervised at a Victorian Government juvenile justice facility. The AIRC also recommended the Department remedy a pervasive inappropriate culture.

The employee was dismissed after a female employee alleged he made offensive comments and inappropriately hugged and touched her. Male employees also claimed he had simulated sex and touched them inappropriately.

Deputy President Ken Ives upheld four of the five counts on which the DHS sacked the man:

1. making comments to a female employee including 'let's go out for a root' and 'your arse looks good' as well as making suggestions he'd like to perform oral sex on her;
2. sexually and physically assaulting the female employee by forcing her onto the ground, licking and biting her on the neck and ear and by hugging her;
3. assaulting a male employee by grabbing him and simulating sexual intercourse; and
4. touching other male employees' genitals and buttocks.

The supervisor told the AIRC that hugging and putting his arm around his colleagues was meant 'more in the sense of familiarity than in any sexual sense' and that in general he was just a 'touchy-feely guy'.

Deputy President Ives said that the acting supervisor should have been mature enough 'to appreciate that physical contact in the workplace is, in all but exceptional circumstances, most likely to be inappropriate'.

As a supervisor the employee's duties included modelling appropriate positive behaviours. Deputy President Ives said that 'By engaging in inappropriate conduct... the [supervisor] has failed to satisfy those duties'.

The AIRC heard evidence that suggested the workplace had a pervasive 'inappropriate culture of sexual banter and innuendo and physical contact'. The deputy president said that if such a culture existed, 'it is incumbent upon the Department, especially given the client base for which it is responsible (and not in spite of it), that it be remedied as soon as reasonably possible'.

*John Mangiafico v Department of Human Services – Melbourne Juvenile Justice Centre. PR963416 (4 October 2005)*

## Employee victimised for making discrimination complaint

The Federal Magistrates Court has found that an employer victimized a former employee when it refused to re-employ him because he had previously complained to HREOC and had threatened to lodge another complaint.

The Court ruled that Andreco Hurlll Refractory Services Pty Ltd breached provisions of the Federal Disability Discrimination Act by refusing to engage the refractory

labourer on a maintenance project at Whyalla in South Australia.

The employee had previously worked for the company for about 30 years, working about nine months a year.

While working for the company he sustained an injury and ultimately made an unsuccessful disability discrimination complaint to HREOC, claiming that Andreco Hurlll terminated his employment because of his injuries and failed to provide him with alternative or light duties.

After being declared fit to return to work, the labourer advised Andreco Hurlll he was seeking work. However, the company didn't offer him any work on the Whyalla job.

Federal Magistrate Kenneth Raphael stated that 'a job could have been found and was not provided'. He went on to say that it was 'not difficult to infer that one of the reasons was his previous conduct in taking the company to HREOC and this court and his threat to repeat that action'.

He ordered the company to pay the worker \$5,000 in general damages for the victimisation, compensatory damages for lost earnings (expected to amount to \$10,000 to \$15,000), plus costs.

*Drury v Andreco Hurlll Refractory Services Pty Ltd (No.4) [2005] FMCA 1226 (30 August 2005)*

## Laws cleared of breaking Code of Practice

John Laws has been cleared of breaking broadcasting codes of practice by describing Carson Kressley, the star of *Queer Eye For the Straight Guy*, as a 'pillow biter' and a 'pompous little pansy prig'.

However the Australian Communications and Media (ACMA) found that radio station 2UE had breached its Code of

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## Legal developments *continued from page 9*

Practice by not responding to complaints about the comment quickly enough.

The ACMA ruled that while the comments were offensive and tasteless, the licensee of 2UE did not breach clause 1.3(e) of the Commercial Radio Australia Codes of Practice.

It said the comments were 'unlikely to have incited or perpetuated hatred against or vilified any person or homosexual identifying people as a group, on the basis of their sexual preference'.

But the ACMA also found 2UE did breach the codes by not responding to the complaints within the 30 days stipulated in the codes.

2UE has apologised for the breach and 'it has reminded staff of the importance of ensuring that responses to listener complaints are dispatched promptly', the judgement said.

'ACMA considers that these actions address the compliance issues raised by the investigation and will continue to monitor the licensee's compliance with this requirement,' the decision said.

Gay rights activist Gary Burns has filed a complaint with the NSW Administrative Decision Tribunal (ADT) about the comments.

### Sexual harassment sacking upheld

The Supreme Court of NSW has upheld a decision by the NSW Transport Appeals Board. The decision prevents a State Rail Authority employee appealing against his dismissal for sexual harassment.

The SRA dismissed the employee

for breaching its code of workplace standards and its anti-discrimination and harassment policy.

The duty manager was accused of sexually propositioning a female customer services attendant at a suburban railway station in Sydney.

The duty manager challenged the Board's decision to throw out his appeal. He argued the Board misapplied the law by unreasonably accepting the attendant's account of harassment, failing to apply the correct standard of proof and disregarding its duty to protect the public interest.

Justice Hall found the Board had adequately sought 'cogent proof in line with what has been termed the *Briginshaw test*' which requires consideration of the seriousness and consequences of an allegation when determining its veracity, including the civil standard of proof based on a balance of probabilities. He rejected the other grounds as inadequate or unfounded and dismissed the application. He granted leave to make submissions on costs.

Justice Hall said that in determining the reasonableness of the dismissal relevant matters for the employer and the Board included:

- the employee's statements;
- the persistent nature of the conduct;
- the relative vulnerability of the complainant, taking into account the supervisory job occupied by the duty manager;
- the absence of mitigating circumstances; and
- the responsibility of the employer to provide a work environment free from sexual

harassment in accordance with its code of workplace standards.

*Dubbihur v. Transport Appeal Board & Anor [2005] NSWSC 811(12 August 2005)*

### Pregnancy dismissal claim upheld by AIRC

A pharmacy assistant sacked due to her pregnancy has been reinstated. The AIRC ruled that Eleano Nominees Pty Ltd, the operator of a chemist shop in Melbourne, unlawfully dismissed the assistant because of her pregnancy.

The case demonstrates that unlawfully dismissed employees of small to medium sized businesses can succeed in the AIRC's unfair dismissal jurisdiction without having to pursue an unlawful termination action in the courts. Commissioner John Tolley's ruling is timely given the debate over access to unfair and unlawful dismissal remedies under the Federal Government's proposed IR changes, which would remove access to the AIRC's unfair dismissal jurisdiction for employees of businesses employing fewer than 100 workers.

The Commission heard that the assistant experienced severe morning sickness during the early stages of her pregnancy that required her to take some time off work.

During 'a particularly severe bout of illness', the assistant's husband rang the pharmacy and spoke to the director/pharmacist in charge, who said his wife shouldn't be working in the pharmacy while pregnant. When the husband asked the director to clarify his position, he said: 'we both know that if she's

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## Legal developments *continued from page 10*

pregnant she's not good enough to stay here, she should be at home and you should work for her'.

Commissioner Tolley found that she was dismissed because of 'the effects (morning sickness) of her pregnancy'.

The director didn't oppose the assistant's reinstatement. The Commission also ordered she be compensated for lost earnings.

*Scarpa v Elaeno Nominees Pty Ltd.*  
PR96 1595 (19 August 2005)

### Disability discrimination in employment

The NSW Administrative Decisions Tribunal has found that a NSW TAFE teacher with Hepatitis C was

discriminated against when offered a redundancy payout.

The teacher was awarded \$19,575 in compensation.

The Tribunal ruled that the teacher had received less favourable treatment than fellow workers partly 'because of his fitness for work which, in turn, was inextricably linked to his disability'.

The teacher had Hepatitis C, advanced liver disease and widespread arthritis. The Tribunal concluded that he was not offered the same redeployment and transfer opportunities as his colleagues who had also been made redundant. The Tribunal concluded his disability influenced TAFE management's decision not to offer him

redundancy on similar favourable terms.

The written offer of redundancy did not include the retraining and transfer opportunities offered to other teachers. Management had also failed to make an 'exhaustive survey of possible options' for his re-employment.

The full bench ordered TAFE to pay the teacher \$16,075 in damages for economic loss (assessed at 30% of lost income based on an estimated 30% chance of redeployment denied) plus \$3,500 in damages for non-economic loss (claimed for depression and unfair treatment).

*Nesci v TAFE Commission of NSW (No 2) [2005] NSWADT 183 (8 August 2005)*

## Outworkers

The Anti-Discrimination Board met with Asian Women at Work and Korean Resource Centre to develop a series of anti-discrimination and harassment training sessions to assist over 100 Chinese, Vietnamese and Korean speaking clothing outworkers. The sessions were provided in Villawood, Cabramatta, Lidcombe, Hurstville and Eastwood with the assistance of community interpreters. ADB multilingual fact sheets providing information on unlawful unfair treatment and avenues of assistance was also provided to participants.

The sessions were welcomed by all participants and comments such as "I was unaware of my rights until now", "I will pass this information on to other workers in the area", "I found the information useful and practical". Participants at the training revealed personal



The Hurstville Outworker English Class of women outworkers with Rhonda Stewart-Crisanti (ADB Trainer 3<sup>rd</sup> from left) and Angela Zhang (Community Worker far right).

stories of sexual harassment by sub-contractors providing material to them as outworkers to sew into garments. The benefits of speaking up and against harassment were voiced by the women who developed a clearer understanding of avenues of assistance in cases of discrimination and harassment.

The information sessions provided clothing outworkers, mainly women whose first language is other than English, access to training, knowledge on their rights

and responsibilities and avenues for complaint resolution. These included Anti-Discrimination Board of NSW on 9268 5544; Human Rights and Equal Opportunity Commission on 1300 656 419; Asian Women at Work on 9793 9708; NSW Rape Crisis Centre on 98196565; NSW Police Service Customer Assistance-Ethnic Community Liaison on 1800 622 571; Community Justice Centre on 9228 7455 and the Office of Industrial Relations on 131628.

# Anti Discrimination Board

## Conciliations



### Carers responsibilities discrimination in employment

The complainant was an accountant with a commercial organisation. She went on maternity leave and two months before she was due to return she contacted her employer and proposed that she return to work three days per week.

The employer rejected this proposal. She then proposed that she return four days per week and be available by telephone on the other day. This was also rejected, and the employer said that her position was a full time role.

At conciliation, the employer said the employee was very valuable to the organisation and they wanted her back, but they needed her to work full time. The complaint was settled when the parties agreed that the employer should pay her \$12,500 and give her a good reference.

### Race discrimination in service provision

An Aboriginal man applied to his housing provider for a larger house, for reasons relating to his Aboriginality. His application was rejected on the grounds that he did not provide a 'Certificate of Aboriginality' (see definition below) to prove that he was Aboriginal.

The man made a complaint of race discrimination to the Board. He explained that although he did not have a Certificate of Aboriginality, he had legal documents relating to his removal from his Aboriginal family as a child.

At conciliation, the housing provider said that the man had not provided the legal documents when he made the original application, and they would have accepted these as proof of Aboriginality. The man said the housing provider had not told him he had the option of providing other documentation apart from the Certificate of Aboriginality.

The complaint was resolved when the housing provider agreed to transfer the man to a larger house near where he was receiving medical treatment, to provide him with a statement of regret and pay him \$3,000 compensation, and to review its policy regarding proof of Aboriginality in consultation with the complainant and the relevant agencies.

#### Certificate of Aboriginality

The accepted definition of an Aboriginal person (for example, as defined by the Aboriginal Land Rights Act 1983), is a person who:

- is of Aboriginal descent;
- identifies as an Aboriginal person; and,
- is accepted by the Aboriginal community in which they live.

As a result of such (legal) definitions of Aboriginality, government departments now require Aboriginal people to provide 'proof of Aboriginality' to be eligible for any financial or other assistance (Eg. public housing).

Aboriginal people can approach their Local Aboriginal Land Council, or an Aboriginal Community Organisation to

apply for a 'Confirmation of Aboriginality' or a 'Certificate of Aboriginality'. Essentially, such documents state that the person is known to identify as an Aboriginal person and is accepted by that community as an Aboriginal person.

### Carers responsibilities discrimination in employment

The complainant was a sales representative for a small food distribution company. While she was on maternity leave, a larger company bought the company and existing staff were transferred to the new company.

The new company contacted the complainant to ask her if she wanted to continue working with them, and she said yes. However, she said that when she wanted to return to work, the regional manager told her that there was no suitable job available, apart from one that was too far away to be practical.

The woman made a complaint of discrimination on the grounds of carers' responsibilities. At conciliation, the respondent agreed that the company had in effect not re-employed the woman after her maternity leave.

The company offered to re-employ the woman, but she declined this. They agreed to pay her \$17,000 compensation for loss of income.

### Carers' responsibilities discrimination in employment

A man who was a middle manager in the human services industry wanted to negotiate more flexible working arrangements so that he could take care of his young children. He said that after he did this, he was harassed and bullied by his manager.

The man said that the manager put pressure on him to make child care

*continued on page 13*

## Conciliations *continued from page 12*

arrangements that would mean he didn't need to work flexible hours, accused him of not doing enough to find appropriate child care, and made phone calls on his behalf to find the kind of care that the manager considered suitable.

The man became very stressed, went on leave and made a complaint of carers' responsibilities discrimination to the Board. The complaint was conciliated when the respondent agreed to pay him a separation payment and compensation totalling \$10,000, in exchange for his resignation.

### Sex discrimination in employment

A male applied for a job as a cleaner with an agency. The agency provided its clients with various cleaning as well as personal care services to people in their private homes. The applicant alleged that the agency failed to consider his application because of his sex. The agency advised that there were no current vacancies for industrial cleaning, which it determined most suited the applicant. The agency maintained that many of its clients sought female cleaners and would be likely to complain if provided with a male cleaner.

The matter was resolved when the complainant accepted a written apology from the respondent. The respondent also sought advice from the Board about the process for seeking an exemption from the *Anti-Discrimination Act 1977 (NSW)*.

### Age discrimination in provision of goods and services

The complainant lodged a complaint against his superannuation fund alleging age discrimination in the provision of goods and services.

The complainant stated that after turning 65 he was no longer able to access his account details online. The respondent agreed that the complainant, because of his age, fell into a class of people who were no longer able to access details of their superannuation scheme online. However, the respondent asserted that there were few members in this particular class of membership and that it would be a financially prohibitive exercise to provide services in this way to the complainant. They asserted that it would require the building of a whole new website, including the various scripts and programs required to calculate the account status of the few members who fell into the complainant's class.

The complainant argued that the respondent should prepare itself for increased numbers of people who like him, were not intending to retire from employment for some years to come.

The matter was resolved when the complaint accepted an offer that he would be sent detailed quarterly account statements. The complainant was also advised that he could access information of his account via the telephone service.

### Disability discrimination in provision of goods and services

The complainant, a returned veteran, suffers from severe pain if required to stand for any length of time. He lodged a complaint against the branch of his local bank because he was required to queue in line to receive services from the bank teller. The complaint was resolved when a procedure was instituted where by the complainant was not required to stand physically in the queue. The complainant now goes to the

information desk, which then maintains a place for him in the teller's queue.

### Carers' responsibilities discrimination in employment

The complainant was employed as an Assistant Manager on an isolated rural property and had lived and worked there for 16 years.

On one occasion, the complainant, a single father, had to take his youngest son to school and received permission from the Station Manager to do so. On his return, he was advised, by one of the Directors, that he was being stood down for that week. No reason was given. The complainant was subsequently told that his position had been made redundant and his employment terminated. This meant that he had to vacate the family home and try to find a new job and a new home for his sons.

The complainant lodged a complaint of alleging that he had been discriminated against on the basis of his carers' responsibilities. He claimed that a Director had commented that he would not have been able to do his job and take his son to school. The complainant was upset as he argued that his family responsibilities had never affected his work performance and that his employer had given him no opportunity to respond before he was dismissed.

The respondent denied that they had discriminated against him on the basis of his carer's responsibilities, but asserted that the drought and the changing nature of the Assistant Manager's role had necessitated their decision to terminate the complainant's employment. The matter was

*continued on page 14*

## Conciliations *continued from page 13*

resolved when the complainant accepted a payment of \$10 000 in settlement of his complaint.

### Disability discrimination in the provision of goods and services.

The complainant has multiple disabilities including monocular vision and poor memory as a result of a head injury. She is also an amputee and uses a walking frame. She alleges that the respondent, a pharmacist, discriminated against her on the ground of disability when he advised her to leave his pharmacy and not to return. She alleges that he did this because she needed assistance in reading the product labels and that he thought she was wasting his staff's time.

The respondent denied evicting her from the pharmacy on the ground of disability. He asserted that the complainant was brought to his attention by staff upon his return from leave. He said that staff had advised him that the complainant would regularly attend the pharmacy and loiter around beauty and nail products

for up to an hour without making a purchase. He advised that his staff were suspicious of the complainant's behaviour and were concerned for the security of the stock. He asserted that on the day in question, the complainant was asked on several occasions if she needed assistance, which she declined.

It was not in dispute that on the day of the alleged incident the complainant walked out of the pharmacy with products that she had not paid after the pharmacist refused to sell them to her.

The parties agreed to settle the matter when the complainant accepted an ex-gratia payment of \$1000.00 and agreed not to return to the pharmacy.

### Sex discrimination, pregnancy in employment.

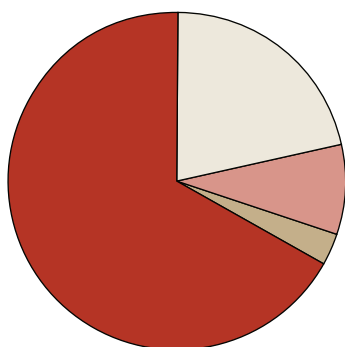
The complainant worked as a security operative for the respondent. Her normal rostering arrangements required the working of 12-hour shifts. Sometime into her pregnancy her doctor advised

her that she should restrict her hours of work to 8 hours each day. Whilst her employer facilitated the working of 8 hrs to meet her needs, it refused to allow her to work these hours in her substantive position.

The complainant contended that there was no reason that she could not work on reduced hours in her substantive position other than it was the respondent's policy that 12-hour shifts were a requirement of the position. Despite her many requests to her supervisor he refused her reduced hours in her substantive position.

The complainant alleges that as a result she was forced to work on less satisfying and more menial duties for approximately three months. She alleges that it was only after complaining to HR, that she was returned to the security centre. The complainant alleged that she became stressed as a result and lost the enjoyment of her job. The complaint was resolved when the complainant accepted an ex-gratia payment of \$3,000.00 in settlement of the matter.

## ADB Complaints Finalised *Complaints closed since 1 July 2005*



383 complaints closed since 1 July 2005

67% (257) closed within 6 months of receipt of complaint

88% (339) closed within 12 months of receipt of complaint

97% (372) closed within 18 months of receipt of complaint

3% (11 files) outside the 18 months.

Closed within 6 months
  Closed within 12 months
  Closed within 18 months
  Closed after 18 months

# What is Alternative Dispute Resolution?

Alternative Dispute Resolution (ADR) is one aspect of effective dispute management. ADR consists of a set of formal processes to assist in the resolution of disputes. It was originally developed as a quicker and cheaper way to resolve disputes by avoiding costly court litigation.

## Mediation

The most practical and popular process in ADR is mediation. It is appropriate for all types of disputes, particularly useful to save time, preserve business relationships or maintain confidentiality.

The mediator assists you to find your own solutions by isolating the issues and developing options for reaching an agreement which best accommodates the needs and interests of each participant. The mediator does not impose a solution, or provide legal advice. The parties retain control over the process.

Participation is usually voluntary. Mediation is a process which provides maximum flexibility for the resolution of disputes.

## Workplaces

Contemporary organisations are embracing Alternative Dispute Resolution processes to save time, money and keep the staff morale at an optimum. Any wise professional involved in resolving disputes, defending clients, managing workers' compensation, employee assistance programs and managing staff know the benefits of implementing and incorporating ADR processes and training into their organisation.



The Australian Commercial Disputes Centre (ACDC) is a non-profit organisation supported by the NSW Government. ACDC exists to promote Alternative Dispute Resolution (ADR) and one of its main functions is to educate and train individuals and organisations on ADR.

Below is a list of workshops that ACDC has programmed for the rest of 2005.

### Conflict and Dispute Management Systems

This one day workshop is for Executive Officers; Compliance and Risk Managers; Human Resources Managers; Internal Auditors; Systems Designers; Policy Developers and Complaints Managers.

**Bathurst 16 November**

### Stage 1 Certificate Conflict Resolution / Dispute Avoidance

A one-day workshop that includes the foundation skills and information to handle conflict and disputes. It also prepares participants for the Stage 2 Mediation / Conciliation workshop.

**Newcastle: 6 December**

### Stage 2 Accreditation Mediation / Conciliation – skills, techniques & practise

A three-day accredited workshop that includes activity, practise, coaching and assessment.

**Sydney: 8-10 Nov**

**Newcastle: 7-9 December**

### Stage 3 Accreditation Mediation / Conciliation - advanced experiences & review

A three-day accredited workshop that includes advanced experiences and review through discussion, coaching and further assessment.

**Sydney 22-24 November**

### COMPLAINT HANDLING / CUSTOMER SERVICE

A one-day workshop tailored to meet the requirements of your organisation.

*Other flexible options to suit your individual or organisational needs*

### Contact

**Australian Commercial Disputes Centre Limited (ACDC)**

Phone: (02) 9267 1000

Email: [info@acdcltd.com.au](mailto:info@acdcltd.com.au)

Website: [www.acdcltd.com.au](http://www.acdcltd.com.au)

# The Anti-Discrimination Board of NSW

*The Sydney office of the Anti-Discrimination Board of NSW has moved. Please see our new Sydney address below.*

## 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 (eg 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 (eg credit, access to public places, entertainment, government or professional services)
- Accommodation
- Registered clubs

## Where we are

### Sydney

Level 4, 175-183 Castlereagh Street, Sydney NSW 2000  
PO Box A2122, Sydney South NSW 1235  
ph (02) 9268 5555, fax (02) 9268 5500, TTY (02) 9268 5522  
Enquiries/Employers Advisory Service (02) 9268 5544

### Wollongong

84 Crown St, Wollongong NSW 2500  
PO Box 67, Wollongong East NSW 2520  
ph (02) 4224 9960 fax (02) 4224 9961

### Newcastle

Level 1, 414 Hunter St  
Newcastle West NSW 2302  
ph (02) 4926 4300 fax (02) 4926 1376  
TTY (02) 4929 1489

Toll free number — 1800 670 812

Website — <http://www.lawlink.nsw.gov.au/adb>