

# Government Lawyer

Newsletter of the Law Society of NSW's Government Solicitors Committee



The Law Society  
of New South Wales

## Chair's Message

By Kim Cull  
Chair, Government Solicitors  
Committee



I would like to take this opportunity to welcome new members of the Government Solicitors Committee, to particularly thank retiring Committee members and look forward to working again with continuing members in 2006. It is appropriate to acknowledge the work of the former Executive Officer of the Committee, Robyn Davies, and I welcome our new Executive Officer, Marilyn Thrupp, to the Committee.

A number of events have been programmed for the year, including the Government Legal Department Heads Forums. The Government Solicitors' Convention and Dinner will be held on Tuesday 12 September and there will be two CLEs held on Wednesday 3 May and Wednesday 2 August. I am extremely pleased that Dr John Griffiths SC has agreed to present the first of our CLE seminars this year on developments in freedom of information in Australia and the introduction of the new Act in the United Kingdom.

Our work will continue to provide an induction programme for new government solicitors across the New South Wales public sector in 2006 as well

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- John Hennessy Travelling Fellowship Award 2006

### STOP PRESS

**Government Solicitors' CLE Convention and Dinner** will be held at NSW Parliament House on Tuesday 12 September 2006. A programme will be available shortly. A limited number of places will be available. For 'early bird' inquiries please contact Marilyn Thrupp on 02 9926 0285 or email: [mht@lawsocnsw.asn.au](mailto:mht@lawsocnsw.asn.au)

as the work of the Committee in progressing the international liaison for government solicitors. Finally, the development of the Government Legal Care Handbook will continue.

I look forward to this extremely hard working Committee again this year and welcome any feedback on our initiatives that you may wish to make.

## The Committee's Projects for 2006

- Government Legal Department Heads Forums
- Excellency Award in Government Legal Service
- John Hennessy Travelling Fellowship Award
- Government Solicitors CLE Convention and Dinner – 12 September 2006
- Government Solicitors CLEs – May and August

### Topics for development in 2006 include:

- Indemnity and vicarious liability arrangements for government sector lawyers
- Pacific Rim Public Sector Lawyers Association (PRPSL)
- Government Legal Care Handbook
- Commonwealth Association of Public Sector Lawyers (CAPSL)

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## Law Society's Chief Executive Officer

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After 10 years as the Law Society Chief Executive Officer, Mark Richardson has announced his decision to step down at the end of this financial year. In the early '90s Mark worked with the Law Society to establish the Government Solicitors Committee and he has served on that Committee for many years. He was responsible for many regulatory reforms which have acknowledged that all solicitors, including government solicitors, are of equal standing and subject to common requirements.

As the President pointed out in her press release, Mark led the Law Society successfully through a period of profound change and challenge for the legal profession. During his time, significant regulatory reforms were introduced, including the establishment of the Legal Services Commissioner and a national approach to the regulation of lawyers. The Law Society also established a licensed insurance company to provide compulsory insurance to solicitors and the profession was protected against the fall-out from the demise of the HIH by a rescue package. The College of Law was incorporated and has become a successful national commercial provider.

Mark Richardson's leadership, strategic approach and commitment to the profession contributed to these initiatives. His achievements have been invaluable to the profession and have made the Law Society a highly regarded entity on both a national and international front.

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## THE GOVERNMENT LEGAL

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The Government Legal Care Handbook is being designed to form a collection of government legal support fundamentals which can serve as a reference source for practitioners in conjunction with their local agency-specific systems manuals and standard operating procedures. The handbook will thus assist the busy government legal practitioner to maintain situational awareness of vital government-wide legal aspects of the work being performed on behalf of the local agency.

The handbook is progressing towards its first draft with very helpful contributions from practitioners in NSW, Victoria and the ACT. The writing group had several constructive meetings over the course of

The Law Society is in sound shape with a secure and impressive financial base developed over the last 10 years due in large part to his prudent management and outstanding leadership. The organisation has become an influential lobbyist at a Federal and State level on a range of policy issues of importance to the legal profession and to the wider public. Over 92% of all solicitors in NSW have elected to take up membership of the Law Society, which demonstrates the profession's support for the organisation's activities and Mark's considerable efforts.

In addition to Mark's contribution to the Law Society generally, he has been a most valued member of the Government Solicitors Committee for a number of years. He will be greatly missed by this Committee and we wish him all the very best for the future.

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### 2006 Government Solicitors Committee

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**Executive Officer** Marilyn Thrupp, Law Society of NSW – mht@lawsocnsw.asn.au

2005. We are very keen to hear from government lawyers in all Australian jurisdictions as well as from regional jurisdictions such as New Zealand, Vanuatu, the Solomon Islands, East Timor, Papua New Guinea and elsewhere. Our aim is to assemble the most comprehensive handbook of government legal support fundamentals ever produced.

## **Progress to date**

At recent meetings of the current writing group, conducted at the NSW Law Society in Sydney with our interstate colleagues through teleconferencing, we have developed a draft list of contents for the handbook as well as having commenced drafts for several of the chapters likely to form part of the handbook. We are continuing to develop the chapter list. At this stage any government lawyers, be their experience from mainstream state or federal departments or agencies or farther afield, who are interested in learning more about this exciting project and perhaps suggesting an additional chapter and/or becoming a contributor of material for the handbook are strongly encouraged to contact the NSW Law Society's Government Solicitors Committee as soon as possible.

So far, topics include the broad legal needs of governments, legal knowledge sharing, public lawyer career management, government legal ethics, managing trends in litigation involving states and nation states and the challenges of information management in an increasingly complex working environment.

## **Scope for further development**

The nature of the above topics already identified for inclusion in the work, when read against the primary aim of the handbook, shows that the project is still in the developmental stage of its progress towards publication. That is why we are very keen to hear from you if you would like to share in its evolution. If the end product is sufficiently comprehensive to meet the whole-of government reference needs of government lawyers region-wide then clearly it will be of great benefit to our present and future colleagues who have the opportunity of providing legal service to governments.

We are also considering the development of a chapter addressing the special challenges legal service providers can face when advising government agencies on matters that are policy-based and when faced with controversies over impact of government decision-making on distinct stakeholders. This part of the work could extend to the legal effects of government activity on other governments as well as on non-government organisations, agencies dependent on government recognition and support, national and global movements, community groups and individuals.

## **Related projects**

The Government Solicitors Committee of the Law Society of New South Wales is also currently developing an induction program designed to meet the specific core knowledge needs of legal practitioners who are currently entering government legal practice in either state or local government agencies in New South Wales.

This project may be further developed, in conjunction with the handbook, to provide a training package that can equip participants with a familiarity and working knowledge of the whole of government knowledge areas common to all state and federal departmental agencies. It is envisaged that these topics will be dealt with at sufficiently general levels so as to eventually achieve the common induction training of government lawyers that will then enable them to gain the greatest developmental benefit from their individual agency's own induction training which will necessarily focus on more specific black letter legal topics, organisational systems and local processes and procedures.

A further project of direct relevance to the handbook is the still quite recent Ethical Guidelines for Government Lawyers launched in 2003 by the Law Society of New South Wales. The whole-of government focus of that guidance will enable much of its content to be utilised in what will appear as our handbook's Chapter 4 the working title of which is currently "Ethical Challenges in Government Law".

In general, any existing materials in which the common denominator of quality government legal service delivery is found will likely be of direct relevance to the current handbook project.

## **Theme of the book**

The current content of the handbook, outlined above in the context of our work in progress, probably highlights that it is the common subject matter of all government legal work that forms the foundation of the handbook. This is because the handbook is based firmly on the principle that at least from a regional perspective (and possibly from a broader viewpoint as well) there is a generic client who receives government legal services. Such an approach can be supported if one highlights the functional – as distinct from structural – identity of the government lawyer's client. This approach enables the government legal service provider to focus on the net value to government of discrete legal services when prioritising service delivery, determining service level standards and managing capability development. The latter are crucial to government legal managers as they enable specific *key government legal capabilities* to be advanced as a particularly useful yard stick for planning the service delivery levels to tomorrow's governments

in both the developed and developing worlds. If such key capabilities are to emerge as planning considerations then the legal principles germane to them needs to form the basis of both competency-based capabilities of legal business units and also the resources immediately and readily available to the practitioners who support the primary needs of the whole of government client.

For this reason a second theme that underpins the book is that of the Principle of Government Legal Needs Invariance (POGLNI) or the idea that there is a degree of invariance across all jurisdictional borders when it comes to identifying core government legal needs. It is this principle that enables us to conceive a capability-based foundation on which to build a client care template for government legal practice.

The handbook is therefore being developed on the basis that not only does there need to be increased certainty injected into the planning of quality legal services delivered to governments but that the measurement of the value of these services needs to be reflected directly in the processes by which we recruit, train, resource and career manage government lawyers.

In this way our government clients can be assured of legal service that is delivered by lawyers possessing optimal legal skill sets.

#### **The next steps**

The writer's group will next be meeting in Canberra around the middle of the year. The object of that meeting will be to finalise the ambit of the handbook. This will be reflected in the finalised chapter list with identified contributors for all chapters. All practitioners who would like to

advance suggestions to that forum either in person in Canberra or by teleconference should contact Howard Bell (telephone: 0408-251849; email: howardcbell@aol.com.au), Greg Williams (telephone: 9286 0925; email: gwilliams@ombo.nsw.gov.au) or Marilyn Thrupp of the Law Society of New South Wales' Government Solicitors Committee (telephone: 9926 0285; email: mht@lawsocnsw.asn.au).

Following the Canberra forum the finalised contents page and draft chapters will be tabled before the Government Solicitors Committee in Sydney.

A brief report on the chapter progress, together with key dates in the lead up to the launch of the handbook will be presented to the Government Lawyers Convention in Sydney in September.

The launch of the Government Legal Care Handbook will coincide with, and will effectively comprise, the launch of the Pacific Rim Public Sector Lawyers (PRPSL) group. Our plan is that all contributors to the development of the handbook will be invited to become foundation members of PRPSL. The joint launch is expected to take place before the end of the current calendar year.

We look forward very much to hearing from you with your suggestions now about scope, content, layout and potential readership base of the Government Legal Care Handbook. This will ensure that the work embraces all of the areas that should be included in a resource that will form a reference source of value to public lawyers in all Australian states and in jurisdictions forming our near neighbours in the Pacific rim and the Australasian region.

**Howard Bell, Member, Government Solicitors Committee, Law Society of New South Wales**

## **CRIMINAL CASE CONFRENCING AND THE JOHN EDMUND HENNESSY FELLOWSHIP**

### **The Award**

**O**n 6 September 2005, we were jointly awarded the John Edmund Hennessey Fellowship. The Fellowship enabled us to travel to Britain to study features of the criminal justice system of England and Wales with a view to enhancing processes here in NSW.

A significant aspect of the NSW Criminal Case Conferencing reforms – the provision of pre-charge advice to police – was modelled on the criminal justice system of England and Wales where the change was described as “the biggest change for the Crown Prosecution Service (CPS) since its commencement in 1986”.

An important aspect of the England and Wales system is the inability of police to lay charges unless they have first sought advice from the CPS. A commitment was made to provide a twenty-four

hour advising service to police, called CPS Direct.

New bail provisions also allow police to impose conditions on the liberty of a suspect prior to charging. The system in England and Wales has been described as a successful and innovative service to the police and to the criminal justice system.

### **The approach in England and Wales**

We examined the processes in England and Wales for:

- Provision of advice by the CPS to police.
- Imposition of pre-charge bail and the availability of legal aid at this stage.
- Early preparation of police briefs of evidence.
- Negotiation between the prosecuting authority and the defence.

In addition to the CPS staff we also spoke to police officers and defence lawyers to get a well-rounded view. We also visited Magistrates Courts, Police Stations, CPS Offices and the Legal Services Commission for England and Wales.

### **Auld Review**

In October 2001 Lord Justice Auld released the "Review of the Criminal Courts of England and Wales." This was a broad enquiry into how the system should combine fairness with efficiency, while also having regard to the interests of all who are exposed to the various processes of the Courts.

The following recommendations contained in the Review are relevant to our study:

- "The key to better preparation for, and effective and efficient disposal of, criminal cases is early identification of the issues. Four essentials are: Strong and independent prosecutors; efficient and properly paid defence lawyers; ready access by defence lawyers to their clients in custody; and a modern communications system."
- "A graduated scheme of sentencing discounts should be introduced so that the earlier the plea of guilty the higher the discount for it. This should be coupled with a system of advance indication of sentence for a defendant considering pleading guilty."
- "Urgent consideration should be given to changing the structure of public funding of defence fees in the Criminal Courts so as properly to reward and encourage adequate and timely preparation of cases for disposal on pleas of guilty or by trial."
- "The CPS should determine the charge in all but minor, routine offences or where, because of the circumstances, there is a need for a holding charge before seeking the advice of the Service."

Fundamental change has been introduced as a result of the Review. A major outcome was the introduction of the Criminal Justice Act 2003 (UK) which has initiated a large package of reforms to the criminal justice system, also arising from a white paper titled *Justice for All*. The reforms make the CPS responsible for determining charges in all but routine cases and encourage consultation and cooperation between the police and the CPS.

### **The Crown Prosecution Service**

In September 2004, we met in Sydney with the Director of Public Prosecutions for England and Wales, Mr Ken MacDonald QC. Mr MacDonald observed that since the introduction of the reforms in the UK, there had been a 30% increase in guilty pleas at first court appearance, and that there had been a cultural change in the relationship between the CPS and the police, who now work together in a much more effective way.

The CPS was established in 1986 under the

*Prosecution of Offences Act 1985*. Its budget for 2004-05 was £560 million. Annually the CPS deals with around 1.1 million prosecutions in Magistrates' Courts and 95,000 prosecutions in the Crown Court (the equivalent of the District and Supreme Courts in NSW). Overall the CPS has around 7820 staff of which 2714 are front-line prosecutors.

The *Code for Crown Prosecutors* states that a prosecution should only be started or allowed to continue if:

- There is enough evidence to provide a realistic prospect of conviction against each defendant on each charge, and, if so
- A prosecution is needed in the public interest.

### **CPS Advice**

The CPS has recently introduced a statutory charge system. This system will eventually require that all allegations of criminal conduct must be referred to the CPS by police for charges to be sanctioned.

For urgent out of hours requests the CPS has set up a 24 hour telephone, fax and e-mail advice line, CPS Direct, which is staffed by CPS lawyers.

### **Police Bail**

This form of bail is available prior to charges being laid. The standard period is up to 36 hours after arrest or for a longer period with the consent of the Court. If the accused disagrees with the imposition of the bail, police must either charge or release the suspect.

The suspect can receive legal advice at the Police Station as to the appropriateness of agreeing to Police Bail. The Criminal Justice System in England and Wales is dependant upon the availability of legal aid at Police Stations through the provision of a duty solicitor service, which was introduced at the time of the removal of the right to silence. This is a generous scheme and costs £130 million pa to administer.

### **Police Attitude to Change**

The view was generally expressed by police that we spoke to that they are now able to gather enhanced evidence as a consequence of having to obtain CPS advice. Prior to providing advice, the CPS can indicate that additional evidence be gathered to ensure elements of the particular offence are met before charges are laid. However, the difficulty is the time sometimes taken by the CPS to give the advice. In general junior police prefer the new system as it assists them to prepare briefs and this saves their time in the longer term. It was expressed in our discussions with police that some senior police have not embraced the changes. Should police not agree with the advice received an appeal process is available to a more senior position in the CPS.

### **Defence Lawyers Attitude to Change**

The general view is that a "power shift" has occurred to the CPS. This has caused delay as clients are in custody longer particularly at weekends and

nights whilst advice is sought. The delays have occurred in the view of the defence lawyers we spoke to as the result of what they see as understaffing in the CPS. They also consider that the CPS solicitors are more skilled in issues applying to evidence and brief preparation.

Other than the delays in police receiving advice from the CPS the other criticism of the new approach to charging is that in appropriate cases defence lawyers cannot put a defence perspective, or subjective issues applying to their clients, to the CPS prior to charging, particularly in serious cases. The consequences are that the defence are powerless in having clients committed for trial. Once the matter is in the Crown Court this is the first real opportunity to seek a discontinuation or to negotiate a lesser charge.

The Director has instructed CPS staff that they are not to enter into a dialogue with a suspect's legal representative prior to police being informed of the charge(s) to be brought. The rationale appears to be that this will not give the appearance of transparency and may also give rise to a perception of a plea bargain.

#### **CPS Attitude to Change**

The requirements for the CPS to become involved in pre-charge advice was put to us by CPS staff as a necessity. Generally the CPS has embraced the changes. There are however some concerns about the role of CPS Direct and the inability of the CPS to negotiate with the defence pre-charge.

The relationship with the police has improved considerably and has also taken on a new dimension. Police in England and Wales are moving away from the traditional role of an OIC of the police investigation. This position is being replaced by what is termed an Evidence Review Officer who leads, or more correctly manages, the investigation. This has enabled an enhanced dialogue for the CPS with the police on the central issue the CPS is focused upon, the available evidence to support the elements of the offence. Therefore the prosecution system has seen a fundamental change in its processing.

#### **Committal Proceedings**

We have not detailed the current committal process in England and Wales because in December 2006 committal proceedings will come to an end. Strictly indictable or "either way" offences will be listed directly in Crown Court and will bypass the Magistrates Court.

#### **Sentence Indication**

This approach to sentencing was found to be unsatisfactory in New South Wales some time ago. It is to be introduced in England and Wales and will only be available in the Crown Court. The procedures to apply are founded on the common law.

## **Scotland**

Although it was not part of our original schedule, we also took the opportunity to visit the Scottish Legal Aid Board.

The Scottish Criminal Justice System has been the subject of two recent reviews.

#### **McInnes Report and Bonomy Reforms**

Sheriff Principal, John McInnes' report of 2004 on Legal System Reform addressed the alternatives to bringing cases before the District and Sheriffs Courts (our equivalent of the Local Court) and the early resolution of those cases that are brought before the Court. Sheriff McInnes identified that if a prosecution comes before the Court, sentence discounts should apply to early pleas of guilty.

Lord Bonomy recommended in 2002 (Review of the Practices and Procedures of the High Court of Justiciary) that a greater focus should be given to the earlier stages of the criminal case process to ensure the proper availability of the Crown's evidence including disclosure to bring about the earlier and appropriate resolution of cases in the High Court (equivalent to the District and Supreme Courts in NSW).

In these cases legal aid is granted by the Court when the proceedings are before the Sheriffs Court, which is a more generous scheme than in NSW. If committed for trial under the Bonomy Reforms each matter is now the subject of a preliminary hearing before the High Court. However, preceding this process the parties are required to meet (without the accused or police) to formally respond to a list of about 90 questions, aimed at distilling the issues. Although there is no defence disclosure the defence are required to indicate if they have any issues about the admissibility of any of the prosecution evidence. If they do not raise an issue at this stage which subsequently the defence seek to raise as a disputed issue at trial, the Court can refuse to allow the issue to be put in context. However, the Court retains the discretion to allow the issue to be raised.

#### **Pleas of Guilty**

Offers of pleas of guilty to lesser charges originate in all indictable cases by the defence writing to the prosecution. This has become more prevalent as a consequence of the decision of *DuPlooy and ors v HMA (2003 SCCR 640)*, where the High Court of Scotland laid down the guidelines for pleas of guilty prior to trial. The case has given authority to the practice of imposing sentence discounts including the range of factors to be taken into account in deciding what if any discount is to be applied. The case says that the level of discount should not exceed a third of the sentence which would otherwise have been imposed.

Lord Bonomy also stressed the importance of well prepared defence solicitors and of a legal aid system which provided positive incentives for early case preparation and, in particular, for continuity in

defence representation of a client from the managed meeting through to the trial.

## Conclusion

We intend in the near future to present a more detailed report together with recommendations to the Attorney General. Thereafter we hope to publish a summary of this material in the Journal for the information of the profession.

We thank the Law Society for its generosity and support in having provided this opportunity to us.

Steve O'Connor  
Deputy Chief  
Executive Officer  
of the Legal Aid  
Commission

Claire Giroto  
Deputy Solicitor  
(Operations)  
Office of the Director  
of Public Prosecutions  
(NSW)

## Excellence in Government Legal Service Award 2006

SINCE 1992 the Law Society of New South Wales' Government Solicitors Committee has been administering the Excellence Award in Government Legal Service which recognises the outstanding achievements of public sector solicitors. The award is given to a solicitor or legal team who has performed 'above and beyond the call of duty'.

Lawyers employed in New South Wales by Commonwealth, New South Wales or Local Governments are eligible for nomination for the 2006 Excellence in Government Legal Service Award if their legal work:

- makes a contribution to the community that is worthy of notice
- enhances the standing of the government legal service
- contributes to good government

The Award is presented at the Annual Government Solicitors' Dinner which will be held this year on Tuesday, 12 September. Last year the recipient of the award was Robert Vellar, Acting Deputy

Director Civil Law Division, Legal Services, NSW Police, for his development of a risk management legal response team. The two highly commended winners were Jennifer Atkinson, Policy Manager, Legislation and Policy Division, NSW Attorney General's Department, and Christopher Matthies, Manager Legal Policy and Research, Administrative Appeals Tribunal.

***Nominations are now open for the 2006 Excellence Award. You can nominate your own work or that of a colleague or staff member.***

Please contact Marilyn Thrupp at the Law Society of New South Wales on telephone 02 9926 0285 or email [mht@lawsocnsw.asn.au](mailto:mht@lawsocnsw.asn.au) for an Excellence Award package containing a nomination form, as well as the rules and conditions for the 2006 selection criteria.

The closing date for nominations is Friday 18 August 2006.

## John Hennessy Travelling Fellowship

APPLICATIONS for the John Hennessy Travelling Fellowship for 2006 are now open. Applications will be considered by the Government Solicitors' Hennessy Travelling Fellowship Sub-Committee.

The Law Society of New South Wales' Government Solicitors Committee (GSC) is proud to sponsor the John Hennessy Travelling Fellowship. John Edmund Hennessy was born in 1940 and commenced work in the Crown Solicitor's Office in 1957. John was admitted as a solicitor in 1965 and in 1980 was appointed Assistant Crown Solicitor, Civil Law Branch, where he worked until he was appointed an Acting Magistrate in 1996 and Magistrate in 1997. John served on the Legal Aid Review Committee as the Attorney General's nominee for 17 years. John retired on 31 January 1999 and died on 13 February 1999.

John served the Attorney General's Department,

the profession and the administration of justice for over 40 years and in doing so he combined the highest professional standards as a solicitor with long and dedicated service to the public. The GSC considers it most fitting that the Travelling Fellowship for public sector solicitors should be awarded in his name.

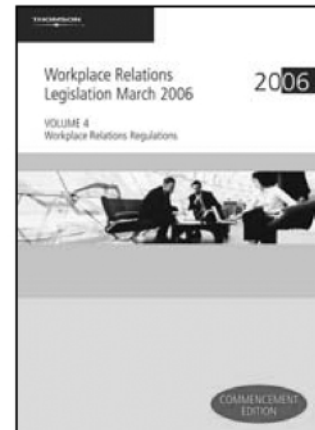
The John Hennessy Travelling Fellowship, administered by the Government Solicitors Committee, has been established by the Law Society of New South Wales to support public sector solicitors to undertake a research project into legal systems in another jurisdiction and to make recommendations for the improvement of the legal system in New South Wales.

Applications should be directed to Marilyn Thrupp at the Law Society on 02-9926 0285 or email: [mht@lawsocnsw.asn.au](mailto:mht@lawsocnsw.asn.au)

# Workplace Relations Legislation March 2006

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Extending its tools for practitioners, Thomson offers you a brand new essential reference for the renumbered *Workplace Relations Act* and accompanying Regulations consolidated as at 27 March 2006. This two-volume set is indexed and includes a detailed Comparative Table of Provisions cross-referencing the primary materials.



- Each volume contains
- expanded & updated comparative table (including new Regulations column)
  - cross-references between sections & regulations
  - boxes highlighting new material

Volume 3: *Workplace Relations Act 1996 - Renumbered*

Volume 4: *Workplace Relations Regulations* (including new and RAO regulations)

Thomson's earlier two-volume *Work Choices Consolidation* contains the mechanics of the Work Choices legislative changes. It allows you to trace the changes to the sections and readily compare new and old. Copies of the *Work Choices Consolidation* set of Volumes 1 and 2 are still available for purchase if required.

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