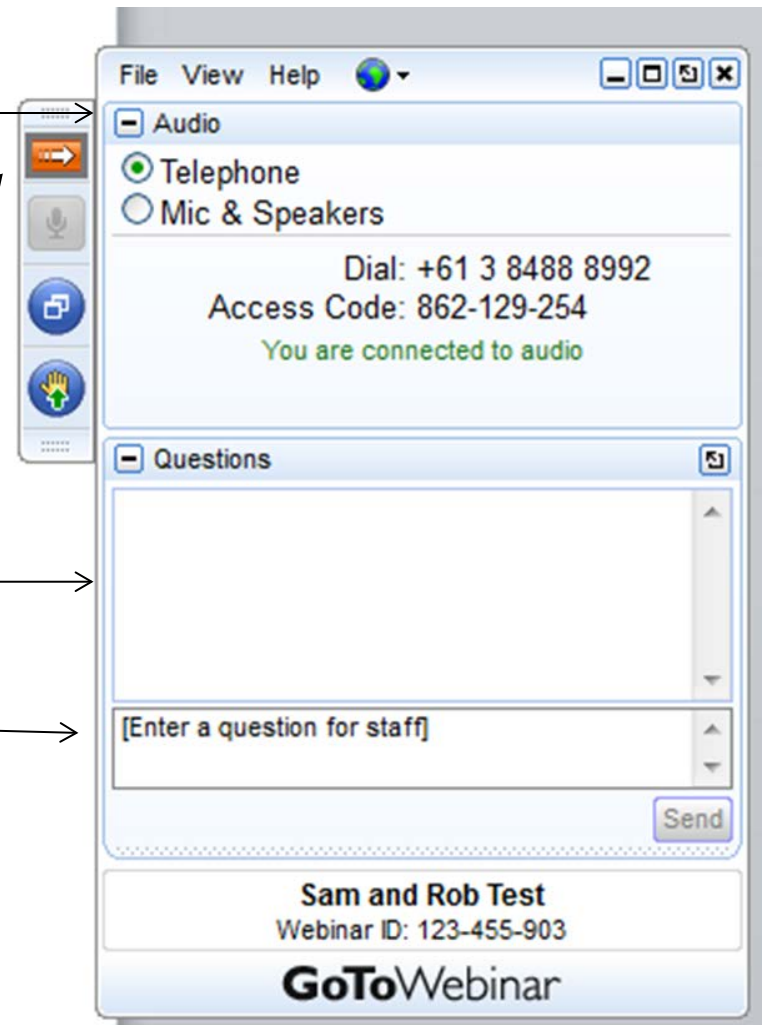


Understanding disclosure of pre-existing conditions

5 June 2014

How to interact today

- Select audio on the control panel to change between computer audio and telephone.
- Click on the red button to hide and unhide the panel.
- Your comments and questions will appear here throughout the webinar.
- Type your questions here.



Today's presenters

- Lydia Daly, Senior Associate, DibbsBarker
- Anne Andersen, Anti-Discrimination Commission Queensland

WCR Act amendments

- The Workers' Compensation Rehabilitation & Other Legislation Amendment Bill 2013 was passed on 17 October 2013.
- Significant changes were made to the Queensland Workers' Compensation and Rehabilitation Act 2003 (Qld) (WCR Act 2003).
- The new laws regarding information and documents about pre-existing injuries and medical conditions took effect **29 October 2013**.

Outline

1. WRC Act amendments
2. What information can be requested?
3. What can / cannot be done by a prospective employer?
4. Other statutory obligations
5. Issues for employers
6. Risk management strategies

What info can be requested?

- A prospective employer may now:
 1. request a prospective worker to disclose pre-existing injuries or medical conditions; and
 2. ask the Workers' Compensation Regulator for a copy of a prospective worker's claims history.
- Applies to an employment process to select a prospective worker for employment.

What info can be requested?



WCR ACT 2003 (QLD): S 571B

- A prospective employer's request for disclosure of a pre-existing injury or medical condition must:
 - be in writing;
 - specify the nature and duties of the position;
 - specify the consequences if a person makes a knowingly false or misleading disclosure; and
 - give a person a reasonable opportunity to respond.

Pre-existing injury / condition

WCR ACT 2003 (QLD): S 571A

- ‘Pre-existing injury or medical condition’
 - an injury or medical condition;
 - existing during the period of the employment process; and
 - that a person suspects or, ought reasonably to suspect, would be aggravated by performing duties the subject of the employment.
- The term ‘existing’ not defined, but includes an injury or condition that has not resolved. May extend to resolved injuries/conditions depending on requirements of position.

What other info may be requested?

WCR ACT 2003 (QLD): S 571D(1)

- A prospective employer may apply to the Regulator for a copy of a prospective worker's **claims history summary**.
 - Document issued by the Regulator stating the number and nature of the person's current or previous applications for compensation or claim for damages.
- The application must be:
 - in the approved form; and
 - endorsed with the prospective worker's consent.



What can / cannot be done by prospective employer?

WCR ACT: CLAIMS HISTORY SUMMARY S 571D(3)

- A prospective employer can only obtain a person's claims history summary:
 - during a recruitment process; and
 - with the consent of the person.
- The prospective employer must not:
 - disclose the contents or information to anyone else;
 - give access to the document to anyone else; or
 - use the contents or information for any purpose other than the purpose of the recruitment process.

What can / cannot be done by prospective employer?

WCR ACT: GENERAL USE/OBTAINING OF DOCS S 572A

- An employer must not obtain or use (or attempt to obtain or use) a 'workers' compensation document' in the process to select a person for employment.
- A 'workers' compensation document':
 - any document relating to the worker's application for compensation or damages under the WCR Act.
- Breach of s571D, 572A WCR Act = Offence
 - Currently \$11,000 (100 penalty units)

Other statutory considerations

FAIR WORK ACT 2009 (CTH): GENERAL PROTECTIONS CLAIM

- A prospective employer must **not take adverse action** against a prospective employee, by refusing to employ them, because the person:
 - has a workplace right; or
 - has, or has not, exercised a *workplace right*, or
 - proposes or proposes not to, or has at any time proposed or proposed not to, exercise a *workplace right*.
- Claim for statutory workers' compensation claim or damages under the WCR Act is a 'workplace right'.

Other statutory considerations

FAIR WORK ACT 2009 (CTH): GENERAL PROTECTIONS CLAIM

- Discrimination: s 351
 - An employer **must not taken adverse action** against an employee, or a prospective employee, because of the employee's **protected attribute**.
- Protected attribute:
 - person's race, colour, sex, sexual preference, age, **physical or mental disability**, marital status, family or carer's responsibilities, pregnancy, religion, political opinion.

Other statutory considerations

PRIVACY ACT 1988 (CTH)

- Outlines obligations of Commonwealth public sector and some private businesses around use, disclosure, access, storage etc of personal information, including sensitive/health information
- The Privacy Act applies to ‘organisations’:
 - Businesses with a turnover of more than \$3 million;
 - Credit providers and reporters;
 - Private health service providers; and
 - Some other small businesses who may trade in personal information.

Other statutory considerations

PRIVACY ACT 1988 (CTH)

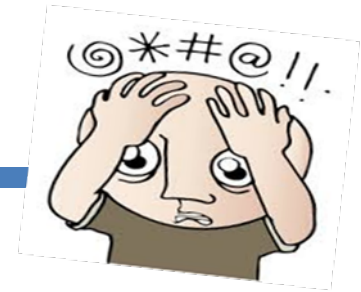
- Handling of personal information by a private sector employer is exempt from the Privacy Act if it is directed to an 'employee record' concerning current/former employment relationship
- **Warning:** Personal information obtained by a prospective employer does not fall within exemption if:
 - prospective employee is not then employed;
 - person is a labour hire employee supplied to your business;
 - person is an intern, work experience student or volunteer.

Issues for prospective employees

WCR ACT: FALSE OR MISLEADING DISCLOSURE

- Any disclosure which would lead the employer to believe the employment duties would not aggravate a pre-existing injury or condition.
- Where a valid request is made, and person employed:
 - Worker is not entitled to compensation or to seek damages for any event that aggravates the pre-existing injury or medical condition (s 571C(2) WCR Act).
 - Risk of future disciplinary action

Issues for employers



WCR ACT

- False and misleading disclosure:
 - Likely to be very contentious.
 - Injury must 'exist' (be known) during employment process.
 - Whether an aggravation or new condition is subjective.
 - Workers might allege multiple injuries, where particular aggravation might be excluded.
- An employer who knows about a worker's pre-existing condition owes a heightened standard of care.

Issues for employers

WCR ACT

- Consider **when** to request information or documents about pre-existing injury or condition:
 - Likely number of job applicants;
 - Length of role (casual v fixed term v permanent);
 - Urgency to fill vacancy;
 - Resources of business;
 - If person was previously employed, how long ago did employment relationship end?
- Who will have access to the information once disclosed by a prospective worker?

Issues for employers

WCR ACT

- Claims history summary provided by the Regulator is a simple claims listing (not a full copy of claim files).
- Consider possible contractual requirements by principal regarding supply of labour
 - Eg Principal may require warranty from employer that it has no basis to believe, based on any disclosure by employee, that the employee could not fulfil the inherent requirements of the position for which they are being supplied.

Risk management strategies

- Only obtain pre-existing injuries or medical condition information relevant to the position.
- Ensure relevant recruitment documentation requesting disclosure also contains warning of consequences for false/misleading disclosure.
- Ensure any request meets the relevant statutory requirements.

Risk management strategies

- Privacy: Ensure appropriate disclosure is made to a person about the reason for obtaining their personal health information and how that information will be used/stored.
- Recommend have a clear policy in place for what the business will do with the information once disclosed (whether the person is employed or not).

Risk management strategies

- Consider whether a claims history is necessary, and at what point in recruitment process requests for pre-existing medical injury/condition are made.
- Consider possible discrimination issues.

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What discrimination is unlawful under the Anti-Discrimination Act 1991?

- Makes unlawful –
 - Discrimination – direct & indirect (s8,10 &11)
 - Unnecessary questions (s124)
 - On the basis of an impairment
 - In the area of work
 - Unless it is excused by an exemption
- and gives a person affected the right to lodge a complaint with the ADCQ.
- Similar provisions exist under the Disability Discrimination Act 1992

What impairments can be the basis for unlawful discrimination?

- Impairment of a person is broadly defined to mean -
 - (a) total or partial loss of bodily functions, including the loss of a part of body; or
 - (b) malfunction, malformation or disfigurement of a part of body; or
 - (c) condition or malfunction that results in learning more slowly; or
 - (d) condition, illness or disease that impairs thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
 - (e) presence in the body of organisms capable of causing illness or disease; or
 - (f) reliance on a guide dog, wheelchair or other remedial device;
- whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that--
 - (g) presently exists; or
 - (h) previously existed but no longer exists.

What working arrangements are covered by discrimination laws?

- Work includes:
 - applying for work
 - full time, part time, casual, permanent, temporary work
 - contract work, subcontract work, commission work
 - work experience, vocational work
 - voluntary and unpaid work; and
 - work in a sheltered workshop

What are requests for unnecessary information?

- Unlawful to request information on which discrimination might be based (section 124)
- Defence for respondent to show that the information was “reasonably required for a purpose that did not involve discrimination”

How to seek information about impairments and workers' compensation

- Obtaining information about a person's impairments and workers' compensation history leaves open the possibility that a person not employed will think that the decision was based on discrimination.
- Better to provide a detailed job description as requests for information about impairments should relate exclusively and directly to the essential tasks of the job.
- Better to inform applicants of the purpose of the request, how it relates to the position, ways the results will be used, and whether the information will be kept confidential.

What use can you make of the information disclosed?

- Employers can use the information to understand whether reasonable adjustments should be made to facilitate the person doing the job.
- Employers can refuse to employ someone based on a disclosed impairment or workers' compensation history **only if**:
 - the discrimination is excused or exempt under the *Anti-Discrimination Act 1991*

Exemptions to discrimination relevant to Workplace Health and Safety

- Genuine occupational requirements s25
 - Employer can refuse to employ a person who cannot perform those requirements/tasks which are essential
- Special services/facilities for impaired person is unjustifiable hardship s35-36
 - Employer must generally provide special services or facilities to enable an employee with an impairment to do the job unless it causes an unjustifiable hardship
- Special terms where job capacity restricted by impairment s34
 - Employer can set special terms eg. In terms of pay, if a person is assessed as incapable of doing all of the job

Exemptions relevant to information about impairments or workers' compensation history

- Necessary to comply with or specifically authorised by earlier legislation (pre 6/92), court order, prior industrial award/agreement or ADT order (s106) or where authorised by inconsistent later legislation
- Reasonably necessary to protect public health (s107)
 - Need to show a clear public health risk by employing the person
- Reasonably necessary to protect workplace health and safety (s108)
 - Need to show an unreasonable risk of injury exists that cannot be mitigated by reasonable steps being taken by the employer to protect WH&S

Fitting it all together

- Mere fact that a person has an impairment or a workers' compensation history is not sufficient to justify discrimination
- Employer must assess each applicant's fitness for the specific job requirements
- Carefully consider the individual's recent job history and personal experience to assess their abilities
- Employers should ask the person how they can do the job and whether they need any special arrangements to facilitate this
- Employers must satisfy themselves whether the person is fit for the job and not simply rely on a worker's compensation history, a disclosure of an impairment or a medical report
- Employers should ensure that doctors asked to report on an applicant's ability to do the job are familiar with anti-discrimination laws and the actual duties of the job

More information

- Anti-Discrimination Commission Queensland: [Medical information and recruitment – brief](#)
[adcq.qld.gov.au > Resources > Brochures and guides > Fact sheets > Medical information and recruitment brief factsheet]
- WorkCover Queensland: [Disclosure of pre-existing injuries or medical conditions](#)
[workcoverqld.com.au > Insurance > Rights and responsibilities > Disclosure of pre-existing injuries or medical conditions]

Thank you

- Webinar recording will be available on WorkCover Queensland's YouTube channel in the coming days.

youtube.com/WorkCoverQueensland