



## SAFETY WATCH - SEPTEMBER 2006

### WORKING SAFELY IS ESSENTIAL TO THE JOB

A recent legal decision illustrates the tension that can occur between workplace laws and draws attention to the principle that the capacity to work safely is a critical aspect of employment.

In *Vickers v. Ambulance Service of NSW* (25 August 2006), the Federal Magistrates Court of Australia found that the Ambulance Service of NSW acted in a discriminatory manner when it discontinued an employment application by an insulin dependent job candidate. The candidate, Mr Vickers, applied for a position as trainee ambulance officer and participated in a pre-employment medical assessment. Mr Vickers suffers from a diabetic condition and requires regular doses of insulin administered by injection. The Service considered that the impairment would prevent Mr Vickers from carrying out the essential requirements of an ambulance officer. Consequently, the Service declined to process his application any further.

A medical condition such as diabetes is a disability within the meaning of the *Disability Discrimination Act* 1992. The Act provides that it is unlawful for an employer to discriminate against a job candidate based on the person's disability. There is, however, an exception if the candidate is unable to perform the inherent requirements of the employment and there are no reasonable actions to accommodate that disability. In response to the rejection of his application, Mr Vickers brought a discrimination claim under that Act. He asked the magistrate to order the Ambulance Service to reinstate his employment application and allow it to proceed in accordance with the normal recruitment procedure. The Ambulance Service admitted that it had relied upon the diabetes condition to refuse the application. The Service argued that its action was permissible because Mr Vickers could not safely carry out the duties of ambulance officer and so

was incapable of carrying out the inherent requirements of the position.

The 'inherent requirements' exception reflects the principle that in any employment it is essential that a person be able to carry out the work with reasonable safety to themselves and to others. The High Court of Australia has considered this principle in several cases including a 1999 case regarding a discrimination claim made by an individual dismissed from the army due to HIV infection. The High Court acknowledged the possibility that a disabled person may be incapable of carrying out certain types of employment for reason that the person cannot perform the work to the requisite degree of safety. The decision confirmed that an essential aspect of employment is the ability to work safely and without risk. With respect to the assessment of risk, two critical considerations can be distilled from that case: the chance of the risk being realised and the seriousness of the harm that will ensue if it is realised. Both considerations were contested in the proceedings before the Federal Magistrates Court and the court was presented with a great deal of evidence about the nature of the employment and the effects of diabetes.

The Service described to the court the nature of the employment and presented evidence of the irregular hours and rotating shift patterns typically worked by ambulance officers. The Service argued that it was foreseeable that, on occasion, Mr Vickers would not have ready access to insulin and his judgment would diminish due to a fall in his blood glucose level. In the Service's view, the employment posed an unacceptable risk to Mr Vickers and others with whom he may come into contact. The court heard evidence from two medical experts concerning the effects of diabetes. The opinion divided on the critical issue of whether Mr Vickers' condition posed a real risk to safety. Ultimately, the magistrate preferred the opinion of the endocrinologist who had treated Mr Vickers for nearly 17 years and who was familiar with his history of



dealing with the condition. The magistrate was also impressed with Mr Vickers' ability to manage his condition and his awareness of the need to maintain his blood glucose at the appropriate level. Having regard to these matters, the magistrate ordered that Mr Vickers' employment application proceed to the next step in the Service's recruitment process.

As an employer, the Service has a duty to provide a safe workplace and a duty to ensure that its activities do not compromise the safety of the community. Despite the outcome, the case reveals that health and safety were the overriding considerations of the Ambulance Service. The case does not support the proposition that employers should abandon pre-employment medical screening and it would be unwise to do so as workplace safety can be jeopardised if a person is placed in employment for which the person is not physically suited. The safety conscious employer is aware that

properly managed pre-employment medical screening is a useful tool in the management of workplace safety including the assessment and identification of risk.

**Tip for your business:**

Make job candidates aware of the physical requirements or special considerations of the employment. Use accurate and sufficiently detailed position descriptions to identify the essential requirements. Pre-employment medical screening must be relevant to the employment on offer. Review medical screening protocols on a regular basis to ensure the tests are appropriate. If you are unsure about your rights as an employer, seek out professional advice from Australian Business Lawyers.

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#### When the OH&S inspector calls: what to do

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- The powers of WorkCover inspectors;
- Employers and others' obligations;
- How to manage an inspection;
- What to do prior and after the inspector calls.

Presented by [John Stanton](#), Partner and Richard Taylor, Senior Associate Australian Business Lawyers

**LOCATION**

[Sydney CBD](#)

[Parramatta](#)

**DATE**

24 October, 7.30 – 9.00am

31 October, 7.30 – 9.00am

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**John Stanton**  
Ph: (02) 9458 7555  
Email: [john.stanton@ablawyers.com.au](mailto:john.stanton@ablawyers.com.au)



**Tim Capelin**  
Ph: (02) 9458 7497  
Email: [tim.capelin@ablawyers.com.au](mailto:tim.capelin@ablawyers.com.au)



**Richard Taylor**  
Ph: (02) 9458 7022  
Email: [richard.taylor@ablawyers.com.au](mailto:richard.taylor@ablawyers.com.au)



**Kelly Godfrey**  
Ph: (02) 9458 7525  
Email: [kelly.godfrey@ablawyers.com.au](mailto:kelly.godfrey@ablawyers.com.au)



**Gordon Jervis**  
Ph (02) 9458 7581  
Email: [gordon.jervis@ablawyers.com.au](mailto:gordon.jervis@ablawyers.com.au)



**Jason Donnelly**  
Ph: (02) 9458 7431  
Email: [jason.donnelly@ablawyers.com.au](mailto:jason.donnelly@ablawyers.com.au)



**Sydney**  
140 Arthur Street  
North Sydney NSW 2060  
Telephone: (02) 9458 7005  
Facsimile: (02) 9954 5029

**Melbourne**  
Level 22, 535 Bourke Street  
Melbourne VIC 3000  
Telephone: (03) 8319 1800  
Facsimile: (03) 8319 1822

Email: [ablawyers@ablawyers.com.au](mailto:ablawyers@ablawyers.com.au)  
Internet: [www.ablawyers.com.au](http://www.ablawyers.com.au)