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People+Culture Strategies

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A LOOK INSIDE:

Message

from Founder and Managing Principal

As another year draws to a close, we find ourselves facing into some particularly interesting societal journeys. The recent scandals involving Harvey Weinstein in the US and Don Burke and others here in Australia are enlivening a phenomenon that is not without peril. Relevantly for clients of our firm, the ramifications of this societal shift for what may transpire within organisations forces organisations to look very closely at their culture and the extent to which behaviours may have been allowed to occur (perhaps even decades ago) that will surface for the first time now.

Modern democratic societies have long had statutes of limitation. Indeed, even cases that would-be applicants seek to bring for sexual harassment and anti-discrimination claims are required to be brought within a particular timeframe. The need to strike a balance between respecting that matters should have to be actioned within relevant timeframes while at the same time not allowing individuals to be recidivist in improper or illegal behaviours is an important balance. I wonder what would happen in your organisation if someone voiced concerns about behaviours that one of your executives engaged in 20 years ago? And would your answer to this question be any different in light of recent events as against what it might have been two years ago?

Our job as legal and strategic advisers to our clients in matters of "people" and "culture" is to challenge them on what they stand for as organisations. Genuine issues need to be handled appropriately; less genuine issues need to be handled even more appropriately.

We have just announced our firm's Schedule of Events for 2018 and once again we look forward to bringing our clients and business partners our unique insights and thought leadership on areas of our firm's practice.

2018 will also be a special year as it marks the first year that PCS will be appearing on the "kit" of the NSW Waratahs in the Super Rugby competition that goes from February thru July. Under the guidance of Daryl Gibson and his leadership team (with whom we as a firm are also working as the Official People Partner of the Waratahs and NSW Rugby) the Waratahs are looking to a much-improved performance in 2018.

I wish you all a restful and joyous festive season and thank you for the support you continue to show our firm. Without that support we would not have achieved any of the successes we are so proud of as a team.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL

Power, sex and silence in the workplace:

Cultures of complicity

David Weiler, Associate

Perhaps what is most concerning about the sexual harassment and assault alleged against Harvey Weinstein by several women is that it was an open secret in Hollywood for years. It was joked about by some and ignored by many others. However, it took two independent investigations, one from the New York Times and another from the New Yorker, for those with the power to step up and take a stand against the alleged behaviour.

It is not uncommon for those who take steps to report sexual harassment to find their experiences dismissed or trivialised. For example, in a landmark sexual harassment case in Australia[1], the claimant stated that she had reported to her employer instances of sexual harassment. She recounted that the response from her supervisor was allegedly to laugh and say that *"he himself had been hit with the ugly stick and that he never had the pleasure of being a target of sexual harassment and fantasies, and unfortunately no one had wanted to have an affair with him."* [2]

These stories not only ignite a necessary dialogue within workplaces about such behaviour, but also provide a useful case study of how sexual harassment is aided and abetted by the inactivity and silence of those in a position to speak out about such behaviour.

Power

Following the Weinstein accusations, several women made public allegations of sexual misconduct against the comedian, Louis C.K.. The celebrity responded by admitting to the claims and in a statement said:

"These stories are true. At the time, I said to myself that what I did was O.K. because I never [did anything] without asking first, which is also true. But what I learned later in life, too late, is that ***when you have power over another person, asking them…isn't a question. It's a predicament for them.*** *The power I had over these women is that they admired me. And I wielded that power irresponsibly."*

The power that certain individuals have over those who might potentially speak out against inappropriate conduct is an important insight into how complicity is solidified within a culture. Take, for example, the situation of Quentin Tarantino whose movies, including Pulp Fiction, were distributed by Mr Weinstein. As far back as 1995 he knew of Weinstein's conduct from his own girlfriend's experience. As an "up-and-coming" director, the support that Mr Weinstein gave Mr Tarantino was critical to his success. Following the publicity around the allegations, Mr Tarantino reflected that he wished he *"had taken responsibility for what [he] heard. If I had done the work I should have done then, I would have had to not work with him."*

Power and control are central to the employment relationship, and organisations must be enlivened to the possibility of such power being exploited. The power dynamic may contribute to an environment that prevents those affected from speaking out, as well as the willingness of peers, bystanders and other workers, who are dependent on the support of more powerful colleagues, from speaking out.

Silence

As the NY Times reports, the organisational silence echoes that of the broader industry. In 2015, an employee of Weinstein's company, Lauren O'Connor, had written a letter to several executives in the business outlining inappropriate conduct against a colleague and notifying them that:

"There is a toxic environment for women at this company…

I am just starting out in my career, and have been and remain fearful about speaking up…But remaining silent is causing me great distress…

Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10…I am a professional and have tried to be professional. I am not treated that way however. I am sexualized and diminished."

According to the report, *"some Weinstein Company board members and executives… were alarmed about the allegations….in the end though, board members were assured that there was no need to investigate. After reaching a settlement with Mr. Weinstein, Ms. O'Connor withdrew her complaint and thanked him for the career opportunity he had given her".*

These accounts offer a rare and candid glimpse into an industry where success is built, in part, on ignoring unfortunate facts and protecting one's own interest in the face of inappropriate sexual conduct.

As a result of women coming forward to speak up against the systemic issues, change is possible. In a statement announcing the expulsion of Mr Weinstein from the body that awards the Oscars, the Board of Governors for the Academy of Motion Picture Arts and Sciences explained its decision as follows:

> *"We do so not simply to separate ourselves from someone who does not merit the respect of his colleagues but also to send a message that the era of willful ignorance and shameful complicity in sexually predatory behaviour and workplace harassment in our industry is over. What's at issue here is a deeply troubling problem that has no place in our society."*

It is fair to be skeptical of the industry's ability to change, but this sentiment draws attention to how institutional silence on issues such as sexual harassment plays a significant role in the perpetuation of this type of conduct and in disempowering those who experience harassment from bringing forward their allegations.

In Australia, organisations often have policies and procedures that make provision for raising allegations of this nature. But it is worthwhile considering whether the culture of an organisation creates a climate of silence and implicitly discourages the reporting of such allegations.

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1 *Ewin v Vergara (No 3)* [2013] FCA 1311.

2 *Ewin v Vergara (No 3)* [2013] FCA 1311) at [497].

Liability

Another significant aspect is the liability that may arise for individuals who turn a blind eye towards inappropriate sexual conduct in the workplace. In terms of accountability within an organisation, the personal liability of individuals for breaches of the *Fair Work Act 2009* (Cth) ("**FW Act**") and anti-discrimination laws such as the *Sex Discrimination Act 1984* (Cth) ("**SD Act**") may become an issue for those considered to be "involved" in a contravention. This can include directors, compliance officers, managers and senior human resources staff.

Under the FW Act, involvement in a contravention is treated in the same way as an actual contravention. An individual is taken to be "involved" in a contravention if he or she:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

To be *"knowingly concerned in or party to the contravention"* (s 550(2)(c)), the conduct in question may take the form of an act or omission, with the potential to capture a failure to act where some form of action would have been the appropriate response. For example, where an HR manager had knowledge of the essential matters that made up the employer's contraventions, he was found to have been knowingly concerned in these contraventions on the basis that *"as human resources manager, he should have been aware of, and at least attempted to give advice on, [the employer's] obligations under the [Act]."* [3]

Borrowing from the criminal law concept, "willful blindness" can arise *"where a person deliberately refrains from making enquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he might learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring".*

Where a remedy for sexual harassment or discriminatory conduct is pursued in the discrimination context, the personal liability of an individual alleged to be involved in a breach can also arise. Under the SD Act, a person who *"causes, instructs, induces, aids or permits"* another person to breach the legislation is taken also to have done the unlawful act.

In this context, the reach of the SD Act has been held to extend to the role of an employment agency that knew that several young women it sent to a particular employer had made sexual harassment allegations. The agency was found to have *"permitted"* the unlawful conduct that took place in relation to a young woman who was harassed at that workplace, on the basis that the prior complaints relating to that workplace should have alerted it to the distinct possibility that any young female sent to that workplace was at risk.[4]

Take the example of a senior employee or director who is aware of instances of inappropriate conduct occurring in workplace, but who remains silent in circumstances where, because of their position of authority in that workplace, action on their part could have had an impact on the behaviour. By their own inertia on the issue, they may run the risk that they are taken to have condoned or permitted such conduct. This becomes a greater risk where there are repeat and consistent allegations, making silence a poor choice.

The recent accusations made around the abuse of power and inappropriate sexual conduct by celebrities have brought to light how systemic sexual harassment in organisations thrives on silence and complicity. Key personnel in such organisations run the risk of being viewed as potentially involved in contraventions, where their awareness and position give them the capacity to influence such behaviour.

Key takeaways

- Organisations need to be mindful of the power dynamics in the workplace that can foster a culture of silence and absence of complaints.
- Diligent adherence to compliance obligations requires active, not passive, engagement.
- "Wilful blindness" may be considered actual knowledge for the purposes of liability.

[3] *Fair Work Ombudsman v Centennial Financial Services* [2011] FMCA 459 at{ [38].

[4] *Elliott v Nanda* (2001) 111 FCR 240.

When parting is not sweet sorrow:

A critical look at the messaging around terminations of employment

Chris Oliver, Director

As our lovers exchange their goodnights in Shakespeare's Romeo and Juliet, Juliet says to Romeo "*Good night, good night! Parting is such sweet sorrow, That I shall say good night till it be morrow*". For Juliet, the sorrow of parting ways is sweetened by the wondrous anticipation that they will soon be reunited.

Perhaps self-evidently, rarely can the same be said of dismissals. In truth, the reverse is possibly more accurate with any joy being tied to the goodbye, and the sorrow being tied to any possibility of a future greeting.

Undeniably, terminations are possibly one of the more emotionally challenging aspects of the employment relationship. While you can certainly apply an Einstein relativity analysis to terminations, it is almost always a relatively unpleasant one. It is the ultimate sanction for an employer to apply, and it is a decision that can have long lasting impacts, not only for the dismissed employee but for every participant in the process and its many spectators.

What are we really saying when we dismiss someone (and also when we decided not to)?

While some employer-initiated terminations are proactively planned, in most instances they're reactive. Consequently, how often do we genuinely consider the messages that will be created by not only the reasons for the dismissal, but all of the surrounding circumstances? Equally, how often do we consider the messages that are created by our decisions not to dismiss? For example:

- Performance-based dismissals have a punitive element for the individual involved, but what do they say (and what do our decisions not to dismiss say) for the inevitably large group of internal and external spectators who are not involved, have limited

visibility, but are certainly reaching their own conclusions about the messages;

- Conduct-based terminations tend to also be punitive, but coupled with our decisions not to dismiss can send powerful messages as to the conduct that we will or will not accept;
- Terminations for operational reasons tend not to be viewed punitively, but carry the potential to create a broad range of messages regarding the health of the business, the operational direction the business is taking, (in)security of employment and the importance the business places on its people and its compliance with its own processes.

As we make our decisions to terminate (or not to terminate as the case may be), it's important to question and be aware of the messages the organisation is inevitably sending with our decision.

The standard we walk past is the standard we accept

Almost all organisations promote their values and culture across many and varied contexts - in recruitment, at organisational off-sites, during strategy sessions, team building exercises, our inductions, our policies and procedures and in our external marketing material. Those values are also regularly cited when the same organisations make their decisions to undertake investigations, disciplinary processes and dismissals.

But what is the real and practical purpose of values and culture within your operational decisions? As an organisation, can you honestly say they permeate everything your organisation does? Or is the organisation prepared to trade off culture and values against the expediency of short-term decision making?

On 12 June 2013, the Chief of Army, Lieutenant General David Morrison posted a YouTube video in response to various and apparently systemic instances of plainly unacceptable behaviour finding public light. Morrison's powerful message included the following:

"Every one of us is responsible for the culture and reputation of our army and the environment in which we work."

"I will be ruthless in ridding the army of people who cannot live up to its values. And I need every one of you to support me in achieving this. The standard you walk past, is the standard you accept. That goes for all of us, but especially those, who by their rank, have a leadership role."

While Morrison's speech may have taken its place as a seminal moment in the army's own recent journey, his words should continue to resonate more broadly as a clear articulation of the fundamental role decision-making has in the creation and maintenance of organisational culture.

The reinstatement dilemma

What could be worse than spending time, money, emotion and sleepless nights on a termination of employment and then the employee is reinstated?

Many organisations over-discount the risk of reinstatement. They tell themselves *"we will show the relationship has broken down, or we have hired someone else - so we cannot have the employee back"*. In practice, it's unlikely to be that easy. Organisations need to remember that under the *Fair Work Act 2009* (Cth) reinstatement is the primary remedy and the Fair Work Commission cannot make an order for the payment of compensation unless it is satisfied that reinstatement is not appropriate.

Statistically, reinstatement is not as uncommon as most employers think. While it's true that, on average, around 92% of unfair dismissal claims result in a settlement prior to a decision being made, that still leaves around 8% that are determined by a decision. Of those decisions where a finding of 'unfairness' is made, around 18% result in a remedy of reinstatement or reemployment.

While an order for reinstatement will create an obvious challenge for any organisation, every organisation should also consider the broader challenges that the resulting message will create. While the organisation is unlikely to be able to effectively or positively message the reinstatement of an employee, it is guaranteed that many questions will be asked and answered around the watercooler. For example,

- What does the reinstatement say about our employer?
- Did it try to enforce an inappropriate policy?

- Did it fail to follow a fair process, and did it breach its own processes?
- Did it "jump the gun" in its decision making?
- Was there a "sloppy" investigation?
- Was the termination just a 'stitch up'?

Part of the problem is that everyone is watching. The challenges of reinstatement don't just include the internal messaging and cultural challenges, but it also includes the brand damage. There can be brand damage amongst both customers and potential new employees. Even in a world of short news cycles, these matters do get traction, develop their own notoriety and can become topics of ongoing discussion for the years ahead.

Creating a settlement culture

It's not uncommon for organisations to approach a dismissal with a mindset of "cutting a deal" on the way out, or at conciliation. While statistically the prospects of settling at some point between dismissal and hearing are good, organisations need to consider carefully the messages they are sending, and the culture they are creating, by routinely adopting this approach.

Where an organisation routinely 'cuts a deal' with employees on the way out, or settles all claims filed against it, it's common for a counter-culture to develop where employees:

- lose part of the incentive for maintaining performance;
- delay making their own decision to move on;
- adopt obstructionist strategies in disciplinary processes;
- file claims in the expectation that a settlement will follow.

Regrettably, this counter-culture is often easier to create and harder to undo, than the high-performance culture, and the culture of accountability to which most organisations aspire.

Key takeaways

- Terminations are not just about individual performance or behaviour, but are intrinsically tied to your organisation's values and culture.
- If you are prepared to "run it", either terminate well or be prepared for the possibility of reinstatement and the basket of cultural consequences that follow.
- How you dismiss and how you "clean up" play an unavoidable role in the creation and maintenance of your organisation's culture.

Going, going, gone:

Employment-related issues in divestment and acquisition

Michael Starkey, Associate

Divestment and acquisition are processes that are most often viewed through a regulatory lens. While it is certainly important to assess whether a divestment or acquisition will add value to your organisation, all too often, a key determinant of whether this is likely to be the case is overlooked – that is; the human "aspect".

An organisation is in essence only as good as its people, and the truth of this is evident in the context of divestments and acquisitions. As well as covering off important employment-related basics, this article provides guidance on how organisations can adopt a strategic focus to managing people issues that arise in divestment and acquisition, with a particular emphasis on how organisations can enhance the retention of their best talent throughout this process and beyond.

Questions to ask during due diligence

While due diligence is often tedious, frustrating and time-consuming, it is essential in determining whether or not it is worthwhile for a business to enter into a transition in the first place, what might need to be negotiated in order to get the best deal, and whether the business is going to be well-positioned to complete its post-acquisition objectives. Investing time and resources into a thorough due diligence process from the outset helps a business avoid unexpected problems and the unnecessary costs that may be incurred to rectify these at the back-end of a transaction.

In considering the type of questions to ask during a due diligence process, it can be helpful to think in terms of certain categories.

Operational

Operational questions include asking what is the overall structure of the business that is being acquired, what roles exist within the business, what terms and conditions of employment are common within the organisation, and which parts of the business are doing well and which are not. It is important for a purchaser to ask these questions so that they know the landscape

they are entering, and what things they may need to change in order to achieve the post-acquisition goals.

From an employment perspective, a thorough knowledge of the terms and conditions of employment that are applicable to the business is important for a number of reasons. In the first instance, it helps gauge what are likely to be the expectations of any employees who you may wish to offer future employment to as part of the acquisition. It is also important to know the source of the employees' terms and conditions of employment, and particularly whether the employees are covered by a modern award or enterprise agreement. There are circumstances where the terms and conditions under an award or enterprise agreement will "follow" the employees upon their transfer.

Compliance

The next category we suggest are questions relevant to compliance issues. The focus of these questions is often about the "nitty gritty" of the employment relationship; for example, ascertaining the state of documentation such as employment contracts, what employment-related liabilities are accrued (for example leave balances), and the details of any current or threatened legal action against the business.

Apart from giving a clear picture of the current employment landscape within the business, these questions are directed to determining whether the business has had any compliance issues in the past, and whether there may be any record-keeping or documentation issues which could give rise to compliance issues in the future.

Ascertaining the current state of existing employment contracts is also vital in an acquisition so that the incoming organisation can determine what is the most appropriate documentation to use when the business is acquired. In most cases, best practice will be to issue new employment contracts. However, there may be circumstances in which more simple documentation that makes reference to previous employment contracts can be utilised.

Strategic

The final category, which is often overlooked in the due diligence process, relates to questions that are more strategic in nature. These are questions which are less likely to be answered by looking at data and employee records, and requires a purchaser to actively engage with relevant personnel in the business that is being acquired.

The first type of question we recommend in this category goes to the skills of relevant personnel. If a purchaser intends to continue to run the business following its acquisition (either as a separate entity or within an overarching corporate structure), it pays to have a thorough knowledge of which personnel are the "brains", "key players" or "star performers". By making offers of ongoing employment to these people, an organisation can help establish some continuity in a time of change, and can capitalise on their skills moving forward.

Another consideration for an incoming employer is what the culture of the organisation is like. While it is unlikely that a prospective purchaser will have access to all levels of the business in question, it may be possible to conduct a high-level cultural audit with executives and key personnel of the target business to determine whether they believe there are any major impediments to acquisition – for example, how does the organisation generally deal with change? Does the organisation go through change often, or is it more of a static organisation? While it is almost certain that there will be some obstacles to change, an organisation with knowledge of these obstacles is better positioned to address these issues in a proactive manner.

Finally, a prospective purchaser should consider what its organisation can contribute to the business, not just what they can take from the business. For example, organisations should consider whether they will be able to improve a business by providing better managerial oversight, transferring valuable skills, and sharing capabilities. If the answer to these questions is no, it may be time to reconsider the acquisition.

Talent retention

One of the most difficult issues for organisations to handle, particularly during divestment, is retaining talent up until the point when the business ceases operating in its current form. During an organisation's "wind down" period, there will usually be a tension between employees seeking to either secure redeployment or "jump ship", and the business'

need to remain well-managed and profitable up until completion of the sale.

Organisations need to accept that a loss of employees will be inevitable. In some cases, this may not necessarily be a bad thing. An organisation need only be concerned if it is losing employees who add value to the business, or who are a vital part of the transition team. However, there are a number of strategies an organisation can implement to help keep people happy and "the wheels spinning" during this time.

Transparent and well-timed communication

"What's in it for me?" Within all levels of an organisation employees will ask the same questions regarding their pay, recognition of prior service, retention of benefits, location and job title. Therefore, a strategy around clear communication, onboarding and other transitional processes should be developed with those questions and answers in mind.

Some organisations might think they are assisting their employees by giving them as much notice of a business sale or acquisition as possible. However, on occasions, this can be to the organisation's detriment, particularly in respect of employees for whom there is no position in the new entity or with the new employer, or for employees whose position may be uncertain. By providing employees with a long period of advanced notice of the event employers run the risk of employees "jumping ship" during the transition period.

Employers who are covered by a modern award are required to comply with the consultation provisions contained in the award. These provisions generally require that employers consult with employees who are likely to be affected by a major workplace change once a "definite decision" to introduce that change is made. When a "definite decision" is made will often be open to interpretation. However, in previous cases, courts have held that there is no requirement to commence consultation where a redundancy only remains a possibility. In a divestment context, this means that in most circumstances it will be unnecessary to begin consultation prior to the business sale being finalised, including any agreements between the outgoing and incoming employer in respect of the possible transfer of staff. It has also been held that in certain circumstances, the period between consultation beginning and a redundancy being implemented can be short. For example, the Fair Work Commission has held that (subject to particular circumstances) it may be reasonable to inform an employee of a redundancy (during consultation) and provide a termination date of the next day.[1]

However, this flexibility must be balanced against other considerations. For example, employers should consider how their communication process will be perceived by employees, particularly those who are remaining with the business. If there is a perception of unfairness or unreasonableness, this can have an impact on morale and, consequently, performance. In circumstances of change, it is also the case that employees are highly likely to appreciate communication that is transparent and honest. While none of us like to hear bad news, many people can appreciate that it is better to be prepared for change and its possible consequences, than to feel it has been sprung on us. Employees who leave an organisation where they perceive that communications have been handled in an open and honest manner are less likely to be bitter about their circumstances, and may be less likely to pursue some form of claim.

Skill-building opportunities

Another key to talent retention during a transition period is to promote opportunities for employees in facilitating the change. For example, during mergers and acquisitions, it is often the case that an employer will need to establish a transition team to lead the business through the period of change. Where employees are placed into roles in which they feel like they are actively contributing to the transition, rather than waiting out their days in an organisation, they are likely to be more satisfied with their work and more likely to remain with the organisation.

Incentives to stay

In cases where there are the financial resources available, organisations may wish to use monetary incentives, such as retention bonuses, for employees who "stick it out" until

[1] *Appeal by Ventyx Pty Ltd* [2014] FWCFB 2143

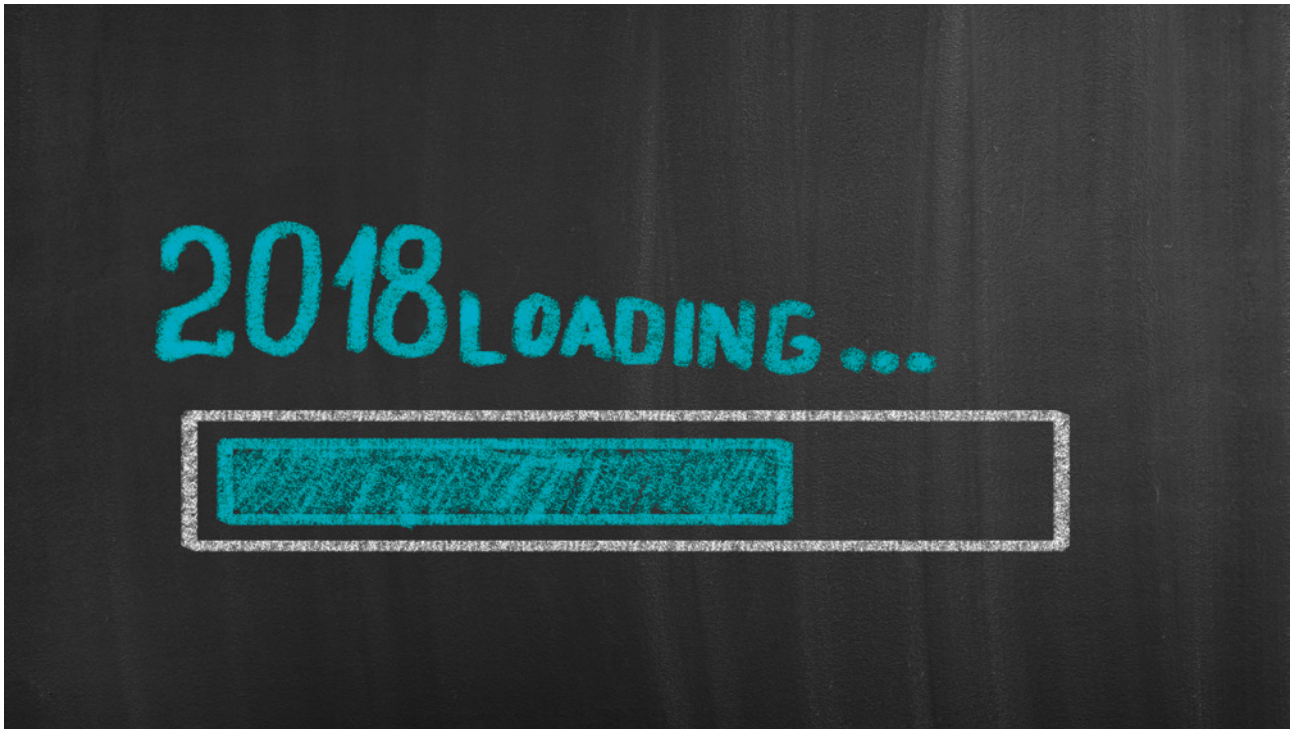
the end. Such bonuses need to be carefully considered, bearing in mind exactly what it is the organisation is trying to incentivise. Retention is only really valuable if the staff retained are continuing to add value to the business by performing their duties to a high standard. Therefore one option is to link retention bonuses to performance outcomes during the transition period.

Alternatively, employers may be able to offer employees additional services as a component of a redundancy package on the basis that employees remain with the business until its final day. An example of this is career transition support services, which can be of significant value to employees, particularly where they are not confident about their capacity to secure alternative employment.

In the case of award-free employees, it should also be made clear that in order to receive a redundancy payment, they will need to remain with the business up until the date on which it has been determined that their employment will come to an end as a result of a redundancy. In other words, if an employee resigns prior to this date, their employment has not terminated at the employer's initiative, and there is no entitlement to redundancy pay.

Key takeaways

1. While it is important to get the "nitty gritty" aspects of due diligence right, due diligence should be used strategically in terms of people management to better position a business for post-acquisition success.
2. Communication about change should be open, well-timed and tailored to the circumstances.
3. Organisations should be willing to invest in their talent during times of change and should promote the opportunities available to those willing to take on the challenge.



Flexibility, compliance and culture:

Ideas for 2018

Sam Cahill, Associate

For many employers, the summer break offers an opportunity to recalibrate and plan for the year ahead. In this article, we look ahead to the new year, and suggest some initiatives employers might consider implementing to enhance employee satisfaction, address cultural issues and ensure compliance with workplace laws.

Flexibility

In today's workforce, the opportunity to work flexibly is coveted by many employees. But when employers think of flexible working arrangements, they usually limit themselves to the right to make a request for flexible working arrangements under the National Employment Standards ("**NES**"). This right is limited to employees who meet the eligibility requirements (for example, 12 months' continuous service, returning from parental leave, carer's responsibilities or over 55 years of age).

In 2018, employers should consider taking a proactive approach to flexible working arrangements, rather than simply waiting for eligible employees to make a request under the NES. A more open approach to flexible working arrangements can be used to attract talented people to the organisation and enhance satisfaction and retention among existing staff.

A proactive approach necessitates a focus on identifying particular functions, positions or duties that can be performed on a flexible basis (for example, at different locations and times). A good starting point for this exercise is to review the flexible working arrangements that have been provided to employees in the past and where the functions, positions or duties that have been the basis for flexible work arrangements can be expanded or modified in light of current operating needs.

Compliance

In recent years, the Fair Work Ombudsman ("**FWO**") has pursued employers in relation to a range of compliance issues, particularly the underpayment of wages and entitlements.

In September this year, the *Fair Work Act 2009* (Cth) was amended to include a number of new measures aimed at protecting "vulnerable workers".[1] These measures include:

- stronger powers for the FWO to collect evidence in investigations;
- new penalties for providing false or misleading information to the FWO, or hindering or obstructing an FWO investigation;
- increased penalties for "serious contraventions" of workplace laws (ie, deliberate contraventions);
- increased penalties for breaches of record-keeping and pay slip obligations; and
- a reverse onus of proof in underpayment claims where an employer has not met record keeping or pay slip obligations and cannot show a reasonable excuse.

This means that it is more important than ever for employers to take a proactive approach to ensuring compliance with workplace laws. An important first step towards ensuring compliance is to conduct a thorough review of the organisation's employment arrangements, including:

- the engagement of employees and other workers (including the procurement of any external labour services);
- the coverage and application of industrial instruments (Modern Awards and Enterprise Agreements);
- compliance with award/agreement requirements with respect to rostering, minimum rates of pay, loadings, penalties and allowances;
- the accrual and payment of leave entitlements, including the recognition of prior service where appropriate;
- compliance with obligations in relation to pay slips and record keeping; and
- the impact of any changes to Modern Awards made by the Fair Work Commission as part of its Four Yearly Review of Modern Awards (for example, the introduction of new provisions regarding annual leave and casual conversion).

The purpose of such a review is to uncover any existing or potential compliance issues so they can be resolved internally and with minimum disputation and/or external scrutiny. The review may also highlight areas in which the organisation will need to develop systems and processes to ensure compliance going forward.

An employer's compliance obligations under the various workplace laws are subject to almost constant change. This means that employers are required to continually review and adjust their systems and processes. For example, in July this year, as part of the Four Yearly Review of Modern Awards, the Fair Work Commission decided to incorporate a model "casual conversion" clause into 85 Modern Awards. The model clause provides that:

- the employer must inform casual employees of their right to request a conversion within the first 12 months of employment;
- casual employees who have worked a standard pattern of hours over the 12-month period will be eligible to make a request to convert to full-time or part-time employment; and
- a request to convert can only be refused on reasonable business grounds (for example, where the conversion would require a significant adjustment to the casual employee's hours of work or where it is known or reasonably foreseeable that the employee's position will cease).

For some employers, the idea of casual conversion is nothing new, as it has existed in certain industries for some time. However, for others, it will be necessary to develop the appropriate systems and processes for:

- monitoring the engagement and pattern of work of casual employees;
- notifying relevant employees of their right to request a conversion to permanent employment; and
- considering and making decisions in relation to requests for permanent employment.

[1] *Fair Work Amendment (Protecting Vulnerable Workers)* Act 2017.

The performance of these systems and processes will then need to be measured as part of the next review of the organisation's employment arrangements.

Culture

In recent months, a number of allegations, mainly relating to sexual harassment and other inappropriate behaviour, have surfaced in relation to a growing list of high-profile men, including Hollywood celebrities, politicians and business leaders. In some cases, the alleged conduct was repeated over many years and was even well-known within certain organisations and industries. This has raised the question: why has it taken so long for the allegations to surface?

As discussed in the earlier article, "Power, sex and silence in the workplace", this delay has been attributed to a number of factors, including a reluctance to report misconduct due to fear of victimisation, leading to a "culture of silence" within particular organisations. Some have argued that this culture of silence amounts to a "culture of complicity" in the action of the perpetrator. This topic will be one of the topics addressed in our series of PCS webinars next year.

Employers can take a number of steps to try and overcome a "culture of silence". These include:

- encouraging a culture of appropriate conduct modelled by senior staff within the organisation;
- ensuring that anyone who reports conduct is treated with respect and their experience is not minimised;
- ensuring the policies are drafted so that employees are specifically required to report any inappropriate conduct;
- introducing stronger protections against victimisation for workers who report conduct; and
- ensuring that workers receive training in relation to bullying, harassment and discrimination and what to do if they experience or witness this type of behaviour in the workplace.

Events

International Bar Association conference

The PCS team was delighted to host fellow labour and employment lawyers from around the world who were in Sydney in October for the IBA Conference at an exclusive lunch at Sydney's iconic Quay Restaurant.

Events

End-of-year function

PCS hosted clients and guests at its end-of-year function at Sydney's Monkey Baa Theatre on Thursday 30 November 2017. An exceptional panel of business leaders (Andrew Hore (CEO of NSW Rugby), Dr David Bowman (Organisational Psychologist, YSC), Michele Grow (CEO of Davidson Trahaire Corpsych), Richard Appleby (TEC Chair), Natalie Jones (People & Organisation Director, Mars Food Australia) and Dig Howitt (recently-appointed President and CEO of Cochlear Australia)) participated in a lively and provocative discussion on "The Real Challenges of Leadership" facilitated by Joydeep Hor, followed by a pleasant few hours of drinks and canapes.

Calendar of Events

BY MONTH

FEBRUARY 2018

WEDNESDAY 14 FEBRUARY
WEBINAR: The journey to High Performance

THURSDAY 22 FEBRUARY - FRIDAY 23 FEBRUARY
Advanced Strategic People Management

SATURDAY 24 FEBRUARY
NSW Waratahs v Stormers (Allianz Stadium)

MARCH 2018

SUNDAY 18 MARCH
NSW Waratahs v Rebels (Allianz Stadium)

WEDNESDAY 21 MARCH
WEBINAR: On the record: recording meetings, undertaking surveillance and dealing with privacy in the workplace

APRIL 2018

WEDNESDAY 11 APRIL
WEBINAR: What's age got to do with it? Dealing with an ageing workforce

THURSDAY 12 APRIL – FRIDAY 13 APRIL
Legal Concepts for HR Professionals

SATURDAY 14 APRIL
NSW Waratahs v Reds (Allianz Stadium)

FRIDAY 20 APRIL
NSW Waratahs v Lions (Allianz Stadium)

MAY 2018

SATURDAY 5 MAY
NSW Waratahs v Blues (Allianz Stadium)

WEDNESDAY 16 MAY
WEBINAR: The "face" of your organisation: dealing with your online presence and that of your employees

SATURDAY 19 MAY
NSW Waratahs v Highlanders (Allianz Stadium)

TUESDAY 22 MAY
Key Breakfast Briefing (topic to be confirmed)

JUNE 2018

WEDNESDAY 13 JUNE
WEBINAR: The robots are coming: technology and the impact of artificial intelligence and automation

FRIDAY 29 JUNE
End-of-Financial-Year HR Networking Event

JULY 2018

SATURDAY 7 JULY
NSW Waratahs v Sunwolves (Allianz Stadium)

SATURDAY 14 JULY
NSW Waratahs v Brumbies (Allianz Stadium)

WEDNESDAY 18 JULY
WEBINAR: The nerdy webinar: calculating leave accruals, record keeping and more

AUGUST 2018

FRIDAY 3 AUGUST
Issues in People Management

WEDNESDAY 15 AUGUST
WEBINAR: Healthy, wealthy and wise: understanding the impact of, and dealing with, mental health in the workplace

SEPTEMBER 2018

WEDNESDAY 12 SEPTEMBER
WEBINAR: Home away from home: defining the new workplace

THURSDAY 20 SEPTEMBER - FRIDAY 21 SEPTEMBER
Legal Concepts for HR Professionals

OCTOBER 2018

WEDNESDAY 17 OCTOBER
WEBINAR: Show me the money: dealing with executive termination payments

WEDNESDAY 24 OCTOBER
Partnership Clients Luncheon

NOVEMBER 2018

WEDNESDAY 14 NOVEMBER
WEBINAR: Hands Off: Am I a bystander to harassment?

THURSDAY 29 NOVEMBER
2018 Hypothetical / Panel Discussion and End-of-Year Function

People + Culture Strategies

Labour & Employment Law

People Partner of the Waratahs

NSW RUGBY WARATAHS

Sydney
Level 9, NAB House
255 George Street
Sydney NSW 2000

Contacts
T +61 2 8094 3100
E events@peopleculture.com.au
www.peopleculture.com.au

Innangard International Employment Law Alliance

170917