Your *Partners* in Workplace Law

Strateg-Eyes:
Workplace Perspectives

ISSUE 1 | AUGUST 2010

PCS: Our Journey Begins

A message from our Managing Principal

It is a pleasure to announce that People + Culture Strategies is well and truly up and running and to welcome you to our new business.

After 13 years in other law firms, including the last five as Managing Partner of a leading specialist firm, I decided late last year that there was a need in the market for a holistic workplace relations solution-provider: a firm that goes beyond legal advice or even solving problems. In fact, a law firm that establishes itself as the first port of call for employers (and in particular those in HR) in this country and become a name synonymous with excellence in service, quality, innovation and foresight. In other words, a firm that genuinely partners with its clients in workplace law through a full suite of advice, training, mediation and strategy consulting.

We have started PCS with 9 lawyers and 4 support personnel. This is a sizeable team for what in some ways is a start-up. All members of the PCS team share a united sense of purpose and energy and I hope you can join us at one of our welcome functions so I can introduce you to them.
If not, we would be delighted to show you through our newly fitted-out offices in the Spectrum building at 56 Clarence Street when you have a chance.

"The vision must be followed by the venture. It is not enough to stare up the steps - we must step up the stairs."

Dr Vance Havner, American revivalist

We are privileged to already have over 130 Australian organisations as clients (across nearly every industry and in the public, private and not-for-profit sectors). These include some of Australia's (and indeed the world's) most prominent employers and brands. To those clients I give my thanks for their support (some over many years) and my personal assurance of accessibility and attention.

Our website (**www.peopleculture.com.au**) is also now live and we would value greatly your feedback on it. We also hope that you utilise our website as a source for up-to-date news on, and commentary in relation to, key workplace relations events.

Which brings me to Strateg-Eyes.
I recognise that there are numerous HR/IR information sources available to our clients and I did not want to create "yet another newsletter". In this publication and future ones you will find a number of thought-leadership pieces that are designed to challenge and interest (including interviews with some key players). On behalf of the team, we look forward to partnering with you in workplace law.

Joydeep Hor
Managing Principal

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IR and the upcoming election

ED AUSTIN-WOODS

In the eyes of the electorate, industrial relations policy remains a key point of difference between the ALP and the Coalition. This is notwithstanding the Coalition's recent promise that it would preserve the ALP's current legislative framework for at least a first term if elected. The Coalition has recognised that its workplace relations policy is a politically sensitive subject and is seeking to neutralise it as an election issue by taking this position. However, employers need to be aware of the possibilities for change that may occur to ensure that their industrial strategy is thorough and properly considered. This is especially pertinent when planning whether an industrial instrument should be entered into or re-negotiated, or whether it should be delayed so as to await a more favourable legislative framework.

Historically, and previous to this latest announcement, the ALP and Coalition had significantly different policies which demonstrated the contrasting ideologies between the parties. The ALP believes in collective bargaining with strong union power and involvement, and that this affords employees the best representation and strongest position in workplace negotiations. On the other hand, the main objective of the Coalition's industrial relations policy is to foster a more direct relationship between employers and employees at the workplace level without union interference. The Coalition's core values include individual freedom and free enterprise, and it positions itself as the champion of small business.

When the ALP was elected to Government in 2007, one of its central platforms was that it would abolish the WorkChoices legislation implemented under the Howard Government. It promised to bring in a new system that would guarantee both employers and employees a "fair go all round", a concept which was mirrored in the names of the *Fair Work Act 2009* (Cth) ("**FW Act**") and Fair Work Australia ("**FWA**").

The FW Act heralded a number of significant workplace reforms. Access to unfair dismissal laws has been extended to allow workers relief where they are employed by a company with less than 100 employees. The National Employment Standards have been introduced which comprise 10 minimum employment standards (replacing the Australian Fair Pay and Conditions Standard). The prohibition on discrimination has been broadened through the introduction of the general protections provisions.

Importantly, the FW Act has also provided unions with stronger right of entry powers and an increased ability to negotiate enterprise agreements on behalf of employees they industrially cover. Under the Good Faith Bargaining ("**GFB**") Principles, employers are now legally obliged to negotiate with unions in good faith. This includes the requirements to recognise and bargain with the other party's bargaining representatives, attend and participate in meetings, disclose relevant information, respond and give genuine consideration to proposals in a timely manner, and refrain from capricious and unfair conduct that undermines freedom of association and collective bargaining. However, the FW Act also specifies that the obligations do not require concessions to be made or agreement reached on proposed terms.

Where an employer refuses to bargain, a union or employees can ask FWA

to determine if there is 'majority employee support' for negotiating an enterprise agreement. If FWA determines there is majority employee support, the employer will be required to bargain collectively.

The GFB Principles have forced employers to re-think their negotiating strategy. Considerable thought must be given to how replies are drafted, and future bargaining positions to be adopted. All possible outcomes, and their necessary responses, must be properly prepared and planned.

The Coalition has stated that if elected it will not amend the current legislative framework for at least three years. It maintains that, in doing so, it is respecting the opinion of the Australian public who voted against WorkChoices at the last election, and listening to small business who do not want any more changes.
On 26 June 2010, the Coalition released a policy document called "Our Action Contract" which provides that they will not revisit WorkChoices or reintroduce Australian Workplace Agreements ("**AWAs**").

Although the Coalition has made these promises, we can expect it to return gradually to a position where it will wind back unfair dismissal laws for small businesses, address penalty rates, diminish union right of entry, and re-introduce non-union contracts. Furthermore, it is expected that a Coalition Government will eventually remove the GFB Principles. Consequently employers would no longer be legally obliged to negotiate with their employees and/or representatives, and the involvement of unions would be considerably weakened. This would then also necessarily strengthen the position of employers in negotiating the terms of any proposed agreement.

Employers will need to remain informed on workplace policy development so they are able to make proper and educated industrial decisions. Industrial relations is certain to play a central role in the upcoming election. In 2007 it was reported that the ACTU spent $30 million in advertising against the Howard Government and WorkChoices. The Coalition's election pitch is that it will not amend the FW Act for at least three years if elected. However, the Government will argue that the Coalition cannont be trusted and that wholesale changes will occur. The ALP will continue with the rhetoric that a Coalition Government will reintroduce WorkChoices and bring back AWAs. ●

Pre-election HR Actions

Be familiar with the current industrial legislative framework and the changes brought about by the FW Act.

Consider and understand how this framework affects your workplace obligations in relation to current contracts, agreements, policies and future industrial negotiations.

Understand the importance and relevance of the GFB requirements, and the correct procedures that must be followed when bargaining is deemed to have commenced.

Keep up-to-date and informed on changing policy developments, and consider their consequences and implications.

Have a sound IR strategy in place that reduces risk exposure through consideration of both current legislation and possible future movements. ●

The New Paid Parental Leave Scheme:

Your questions answered

TIM WILSON

Some of PCS' clients have been asking us for advice on implementation of the Government's paid parental leave scheme. We answer your key legal and strategic questions below.

What is it?

On 21 June 2010, the *Paid Parental Leave Bill 2010* (Cth) ("**Bill**") was passed by both houses of parliament. The Bill establishes Australia's first national paid parental leave scheme.

When does it start?

Employers will not be required to comply with the provisions of the Bill until 1 July 2011 but can choose to "opt in" from 1 January 2011.

How does it work?

Broadly, the key elements of the scheme are as follows:

- it will be wholly funded by the Commonwealth Government;
- the Family Assistance Office will inform employers which employees have applied and are eligible for the payments;
- employees will be eligible if:
  - they are working mothers or initial primary carers of a child born or adopted on or after 1 January 2011 (including certain part-time, seasonal, casual and contracted employees);
  - they satisfy the "work test" – performing 330 hours of qualifying work within the qualifying period;
  - their income is equal to or less than the indexed income limit (currently $150,000); and
  - they satisfy the "Australian residency test";
- employers are not required to make payments until they have received the relevant payment from the government; and
- employers will then be responsible for administering the making of payments (up to 18 weeks' base rate of pay at the National Minimum Wage – currently $569.90) to eligible employees.

Additional guidance and conditions of eligibility may be included in the Paid Parental Leave Rules ("**PPLR**"). At the time of writing the PPLR have not been released.

What if a paid parental leave scheme is already in place?

A number of employers currently exceed their legal obligations and already provide employees with some form of paid parental leave. How then would these two schemes interact?

The Bill (as amended) clarifies that an employer's obligation to make payments under the Bill is in addition to any other legal obligation that an employer may have to make parental leave payments to an employee.

Where a paid parental scheme is already in place, employers should consider what the source of that scheme is. If the scheme forms part of an industrial instrument or a contract of employment, careful consideration needs to be given before any payment is reduced or offset against the government contribution as this creates at least some potential for claims to be brought (including potential claims of discrimination or breach of the Fair Work Act's general protection provisions).

Likewise, where a policy confers disproportionate benefits in terms of paid maternity, paternity and adoption leave, consideration of any potential discrimination may be necessary.

What are the consequences of non-compliance?

If concerns are raised as to compliance, the matter can be referred to the Fair Work Ombudsman for investigation. The Ombudsman can impose various civil penalty orders, including requiring repayment to the Commonwealth and penalties of up to $6,600 for each breach.

What are the top tips?

Employers may wish to consider:

- when industrial instruments, contracts of employment and any parental leave policies were last updated and reviewed;
- whether paid parental leave policies provide disproportionately for maternity, paternity and adoption leave;
- what administrative measures need to be put in place to ensure that government contributions are passed on to employees; and
- how any change in approach may be communicated to employees so as not to impact individual or collective morale. ●

Workplace Bullying & Harassment:

The year ahead

AMBER WOOD

On 17 June 2010, WorkCover NSW launched a nine-month anti-workplace bullying campaign targeting employers in the retail, hospitality, manufacturing, health and education sectors.

The very next day, a high profile CEO resigned from his position following an allegation of sexual harassment. In an unprecedented move by a Board of an ASX 200 company, the CEO's termination payment was severely curtailed, and immediate action taken to stamp out any other instances of sexual harassment within the organisation. This made front page news of major metropolitan newspapers.

On 14 July 2010, the St Vincent de Paul Society's NSW State Council was placed under temporary administration by the National Council amid allegations of bullying and harassment by staff.

Workplace bullying and sexual harassment are now front and centre issues in boardrooms across the country.

Workplace bullying is often defined as "repeated, unreasonable behaviour directed towards an employee or group of employees that creates a risk to health and safety". However, bullying can be an isolated one-off event.

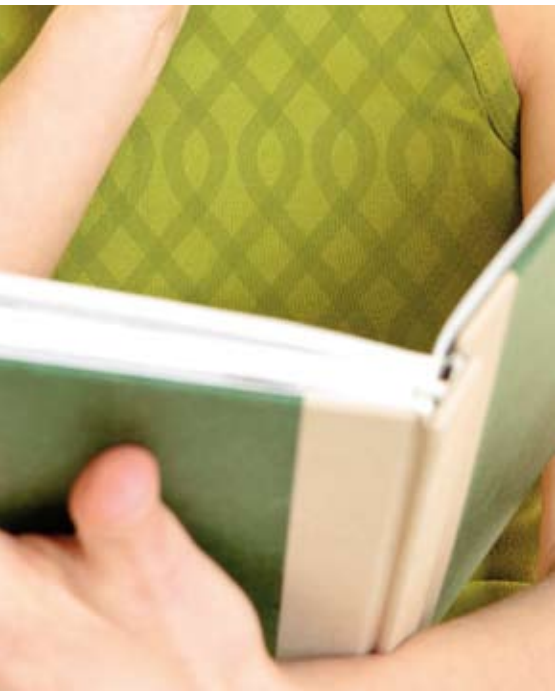
Over the past two years WorkCover has investigated 1,165 complaints relating to bullying and WorkCover's statistics show there have been around 2,400 workers compensation claims relating to bullying costing a total of more than $60 million.

WorkCover's renewed focus on workplace bullying and harassment reflects the huge emotional and monetary toll that workplace bullying can have on employees and employers alike.

The daily costs for employers of workplace bullying include: decreased productivity; low employee morale; increased absenteeism; and increased staff turnover. Reducing these costs should, on its own, be enough incentive for employers to prioritise prevention of bullying.

Employers seeking simultaneously to improve productivity and to avoid the scrutiny of WorkCover, can draw lessons from the outcomes of recent high profile bullying and harassment cases.

Perhaps ominously for employers, the three decided cases summarised below are from three different areas of law: workers compensation; occupational health & safety; and unfair dismissal. While the statement of claim in the fourth case has been publicly available, the other case is yet to playout in a court.



Workers Compensation (workplace negligence)

The recent workers' compensation case of ***Bailey v Peakhurst Bowling & Recreation Club Ltd*** [2009] NSWDC 284 (3 November 2009), also sends a clear message to employers about the seriousness of workplace bullying.

Justice Levy of the NSW District Court found that due to severe and sustained workplace harassment and bullying by her supervisor at the Peakhurst Bowling & Recreation Club, Ms Bailey, a bar worker, would never be able to work again. Justice Levy awarded Ms Bailey damages of $507,500 plus costs. The bullying occurred over a period of two years and included the following conduct:

- repeated indications by Ms Bailey's supervisor that her employment was precarious or in jeopardy;
- use of "extremely vulgar language" in Ms Bailey's presence;
- placing undue pressure on Ms Bailey by causing her to repeatedly break liquor licensing laws;
- demanding that Ms Bailey resign from her union;
- changing Ms Bailey's shifts from day to night including on Christmas Eve; and
- wrongfully implying that Ms Bailey was responsible for an alleged shortage in the cash float at her cash register.

Occupational Health & Safety

One of the most widely publicised recent bullying cases is the prosecution by WorkSafe Victoria of the employer which operated Café Vamp in Melbourne after an ex-employee committed suicide following "relentless bullying" at the hands of her fellow café staff.

The employer was fined $110,000 for breaching its obligations under the Victorian *Occupational Health & Safety Act* (Victoria) ("**Victorian OHS Act**") to provide and maintain systems of work that are safe and without risks to health.

The company's director was fined $30,000 in his capacity as director for failing to provide information, instruction, training or supervision to prevent risk.

Perhaps most significantly is that three fellow employees including one manager were fined $45,000, $30,000 and $10,000 respectively for breaches of the Victorian OHS Act which imposes a duty upon employees to take reasonable care for their actions to prevent risks to the health and safety of other persons. In Victoria and New South Wales, the prosecution of employees for safety breaches has, until now, been very rare.

Again, while the employees engaged in the bullying conduct, the employer allowed a culture of bullying to flourish at the café and did not take any steps to investigate or prevent the bullying. The individual liability of the employees and the high penalties awarded appear to show an intention to send a clear message to employers that workplace bullying and harassment is an issue which must be taken extremely seriously.

Unfair Dismissal

Failure to investigate allegations of bullying was a key issue in the recent unfair dismissal case of ***Adam James Harley v Aristocrat Technologies Australia Pty Ltd*** [2010] FWA 62. In this case, Mr Harley successfully argued that he was constructively dismissed from his sales role having received a "show cause" letter from the company and being required to attend a meeting with management to respond to allegations of alleged poor performance.

Fair Work Australia ("**FWA**") found that Mr Harley had been subjected to a course of harassment by his manager which culminated in the company's attempt to terminate his employment. Despite Mr Harley making complaints about his manager's constant criticisms, the company did not take the complaints seriously, and did not investigate the complaints.

FWA found that the Applicant had been unfairly dismissed and awarded the maximum of six months' compensation to Mr Harley. FWA was particularly critical of the company's Human Resources department for failing to investigate the matter, despite being a large multi-national company with ample resources including a dedicated human resources team.

Trial by media

The recent allegations of sexual harassment made by a female staff member from a high profile company marketing department against its CEO resulted in a shock resignation from the CEO, who had been widely regarded as one of Australia's most talented executives.

When announcing his resignation, the CEO released a statement acknowledging that he had 'acted inappropriately' towards the staff member at two company functions and as a result had 'inexcusably let down the female staff member'.

Regardless of any legal outcome, the allegations by the employee and the CEO response may have caused significant damage to the company's reputation.

The company lost a CEO who helped quadruple the company's market value during his seven year reign. The company's share price plummeted in the immediate wake of the resignation announcement. Arguably, the brand, which had been carefully crafted for over a century, suffered the most damage. A company with a predominately female customer base, 70 per cent female staff, and many female shareholders, could not have relished the extensive publicity surrounding the resignation.

Some commentators have praised the Board of the company for acting promptly and for paying out a relatively small termination payment to the CEO, allegedly stripping him of significant share entitlements. Other commentators have praised the CEO for publicly acknowledging his inappropriate behaviour and resigning.

The company's quick, public, and seemingly decisive steps should be of particular interest to employers. According to statements issued on behalf of the company, it is conducting an independent inquiry into sexual harassment within the company and has created an anonymous hotline for employees to report instances of harassment. These measures appear to be positive steps, designed to avoid a large damages award to the complainant. However allegations, if proven, that sexual harassment at the company was commonplace, or that there were previous complaints which were not properly investigated or resolved may prove problematic for the company. Employers "must do" list

The above cases show that an employer must negotiate through a maze of obligations it has to its employees. With the economic, social and legal costs and risks so high, what should employers do to ensure they maximise productivity and do not get caught in WorkCover's nine month campaign or face similar situations to those detailed above?

(i) Develop policies which specify what types of workplace behaviour will not be tolerated and the consequences of breaching these policies.

(ii) Policies and the corresponding processes should allow confidential internal complaints and thorough and transparent investigation processes so that any complaints can be dealt with promptly, discretely and thoroughly.

(iii) Policies must be reviewed and updated regularly and adapted to suit the needs of the employer and its employees.

(iv) The policies must be enforced consistently and fairly. Best practice is to ensure good workplace behaviour is part of the employer's culture.

(v) Employers should ensure that policies are supported by training so that employees understand the subtleties and consequences of poor workplace behaviour.

(vi) Employees must know they can make a complaint about a fellow employee regardless of seniority or status within the organisation.

(vii) Management and human resources staff must be properly trained to investigate and handle complaints appropriately.

(viii) Employers should keep detailed records of any complaints, investigation of complaints and the outcome of complaints including contemporaneous meeting notes and copies of all correspondence.

(ix) All complaints should be investigated promptly and taken seriously.

(x) Finally, complainants, alleged perpetrators and any witnesses should be treated with respect at all times. All parties should be afforded procedural fairness.

People + Culture Strategies will partner with you to determine how we can assist your organisation to develop the right solutions and strategies in all workplace issues, including the development and implementation of policies, workplace training, conducting investigations into allegations of bullying or harassment, performance management, and assisting with WorkCover investigations. ●

The team from left to right: Amber Wood, Kirryn West, Sarah Lilley, Tim Wilson, Nichola Constant, Joydeep Hor, Michelle Cooper, Ed Austin-Woods and Natalie Chyra

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