Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

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Election 2013: What Does the Future Hold for Workplace Relations?

With the leadership of the major political parties now settled and the 2013 federal election looming, PCS examines the workplace relations policies of the major parties and considers what the Australian workplace relations landscape may look like in the not-too-distant future.

Workplace relations will be an important issue in the campaign platforms of the major parties—the Australian Labor Party ("**ALP**") and the Liberal-National Coalition ("**Coalition**") for the 2013 federal election campaign.

In this article we consider some of the areas of workplace relations policy that are likely to be the subject of debate between the major parties in the lead up to the election and beyond.

The Policy Framework

At the time of going to print, the ALP is yet to release its formal workplace relations policy. However, recent legislative amendments and public statements by Prime Minister Rudd and other senior government ministers reflect the position likely to be adopted by the ALP in the lead up to the election in a number of significant

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People + Culture Strategies

People + Culture Strategies
Level 9 NAB House
255 George Street
Sydney NSW 2000

Phone: +61 02 8094 3100
Fax: +61 02 8094 3149

Email: info@peopleculture.com.au
Web: www.peopleculture.com.au

A message from our Managing Principal

With an election date now confirmed for 7 September 2013, and pressure mounting (particularly from business) for there to be significant IR reform, the debate around workplace reform promises to be lively in the upcoming weeks.

As a firm, we will continue to keep you informed and, more importantly, will continue to participate in this debate through the various media opportunities that are presented to us. Importantly, I expect many of my fortnightly interviews on Sky Business Channel (every second Thursday at 6.20 am) will be dedicated to this subject.

PCS is now in its fourth year and our value proposition continues to be rock-solid. We remain grateful for the continued support of our loyal clients and, just as importantly, to the countless individuals who refer work to our firm. We welcome any feedback on what we are doing well and what we need to do better as part of our firm's commitment to continuous improvement and excellence in the provision of holistic workplace relations solutions.

Indeed, the reality of our firm being a "solutions-provider" rather than just a law firm, consulting business or training organisation has never been more apparent than in the last year. Increasingly, our clients are coming to us with a broad but crucial brief of "solving the people problem" that is causing organisational angst or disruption. PCS will identify the solution and you have the benefit of knowing that our ideas bring to the table not just legal compliance and best practice but also creativity and innovation. We understand the need to manage business realities, complex PR challenges as well as your own values footprint.

Regardless of the outcome of the election, the imperative for organisations to have a reliable business partner in this space will remain as critical as ever.

Joydeep Hor, Managing Principal

Election 2013: What Does the Future Hold for Workplace Relations? *(Continued)*

ALISON SPIVEY, SENIOR ASSOCIATE

policy areas.

The Coalition's policy with respect to workplace relations under a government led by Tony Abbott was released in May 2013 in the form of '*The Coalition's Policy to Improve Fair Work Laws*'.

The Legislative Framework

The Fair Work legislative framework is unlikely to be subject to wholesale changes under a Labor or Coalition government following the 2013 federal election.

It is more likely that the ALP under a Rudd Government will continue with the recent process of incremental change in response to the prevailing social, political and economic circumstances.

By way of illustration, the second tranche of reforms passed by Parliament in late June 2013 involved amendments to the ***Fair Work Act 2009*** (Cth) ("**FW Act**"), amongst other things:

- to provide early intervention where employees may seek assistance from the Fair Work Commission ("**FWC**") if they believe that they are being bullied at work;
- to extend the right to request flexible working arrangements;
- to require '*genuine consultation*' with employees regarding changes to work hours and rosters;
- to permit the use of lunchrooms for union discussions with employees if there is no agreement with the employer with respect to the venue for those discussions; and
- to establish common time limits for filing unfair dismissal and general protections claims (21 days).

There is also support in the form of recent comments by Prime Minister Rudd that the FW Act represents a '*reasonable balance for the future*', and is looking to a more collaborative approach between the Government, business and unions to make more effective use of the current legislative regime.[1]

The Coalition has also confirmed that it will retain the current legislative framework, but '*work to improve*' the operation of those laws, including by adopting some of the outstanding recommendations from the Fair Work Review Panel.

Other Coalition policy initiatives that may result in amendments to the FW Act include:

- further '*improvement*' of the FWC, including (potentially) the creation of an independent appeal jurisdiction;
- changes to right of entry laws to limit union access to the workplace;
- re-establishing the Fair Work Building Commission / abolishing Fair Work Building Construction;
- removal of the current restrictions on Individual Flexibility Agreements under the FW Act, and otherwise not introducing Australian Workplace Agreements;
- broadly supporting the FW Act changes in relation to workplace bullying, with the possibility of further change which will require employees to first seek assistance and impartial advice from an independent regulatory agency, and to expand the coverage of the anti-bullying provisions so as to include the conduct of union officials towards workers and employers; and

[1] *Prime Minister Kevin Rudd, "The Australian Economy in Transition: Building a New National Competitiveness Agenda", Speech to the National Press Club, Canberra, 11 July 2013.*

- changes to the FW Act with respect to protected industrial action, including allowing such action to occur only after there have been '*genuine and meaningful*' talks between employees and employers, as opposed to the '*strike first, talk later*' approach currently provided for under the Act.

Productivity

The issue of productivity, and specifically how productivity may be improved through the workplace relations system, is central to the workplace relations policies of the ALP and the Coalition.

It has been suggested in a number of fora that the FW Act operates to hamper productivity and/or that the issue of productivity was not sufficiently prevalent in the terms of reference for assessing the operation and impact of the FW Act during the Fair Work Act Review.

Prime Minister Rudd recently defended the FW Act in the context of discussion about Australia's competitiveness and potential rigidities in the labour market, saying that:

- some businesses may not be making the '*most effective use of the FW Act to drive the productivity outcomes they need for the future of their businesses*'; and
- discussions have occurred between the Government, business and unions regarding '*how we can harness a greater spirit and practice of industrial cooperation to produce better outcomes for us all*'.[2]

The Coalition, on the other hand, claims that productivity has declined under the FW Act when compared with that under WorkChoices, and has proposed that a further review of the FW Act be conducted by the Productivity Commission '*to ensure that Australians have the benefit of an objective, comprehensive and factual assessment*' of the Act's operation and impact.

Paid Parental Leave

One of the key initiatives introduced by the Labor Government since it returned to power in 2007 is the Paid Parental Leave Scheme. That scheme currently provides up to 18 weeks' pay for eligible working parents at the rate of the National Minimum Wage (currently $622.10 per week).

The Coalition has proposed as part of its policy platform a paid parental leave scheme providing mothers with 26 weeks' paid leave at full replacement wage or the National Minimum Wage (whichever is greater), plus superannuation.

The Rudd Government has stated in response to this proposal that it is inequitable and, because of the social insurance schemes of many European OECD countries on which the Coalition's scheme is modelled, may ultimately be unsuitable as they are not like the family payments and income support systems adopted in Australia.[3]

Greenfields Agreements

For some time parties have raised concerns about the negotiation of greenfields agreements for new business ventures and projects under the FW Act, and the threat posed to future investment in major projects in Australia, particularly by intractable bargaining disputes.

The concerns were recognised by the Fair Work Review Panel. The Panel recommended amendments to the FW Act to provide that, where negotiations for greenfields agreements reach an impasse, a specified time period has expired and conciliation through the FWC has failed, '*that the Commission may, on its own motion or on application by a party, conduct a limited form of arbitration, including 'last offer' arbitration, to determine the content of the agreement*'.[4]

In the face of opposition from employer groups, the Government has, to date, unsuccessfully sought to pass its proposed amendments to the FW Act to give effect to this recommendation of the Fair Work Review Panel. However, recent comments by Prime Minister Rudd reflect that if returned to power, the Rudd Government will continue to seek changes in this regard.[5]

The Coalition have proposed a different approach to greenfields agreements, requiring negotiations for greenfields agreements to be completed within three months, with the FWC to be given powers to make and approve greenfields agreements after this time so long as the agreement provides conditions consistent with prevailing industry standards.

Further Policy Initiatives Proposed by the Coalition

The Coalition also proposes to:

- provide '*practical assistance to small businesses*' through compliance and education initiatives, and potential immunity from pecuniary penalty prosecutions in specific circumstances;
- change the Registered Organisation Rules and legislation to adopt similar standards for the organisations and their officials to those applying to corporations and their directors, improving financial disclosure rules, and creating a new 'watchdog', the Registered Organisations Commission; and
- review the future of the Road Safety Remuneration Tribunal.

Conclusion

Workplace relations is likely to feature heavily in the policy debate between the major parties in the lead up to the 2013 federal election. Through that debate the policies of each of the parties will be refined and increasingly well-defined. We will continue to monitor the debate with great interest as it is set to shape the workplace relations landscape into the foreseeable future. ●

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[2] *Prime Minister Kevin Rudd, "The Australian Economy in Transition: Building a New National Competitiveness Agenda", Speech to the National Press Club, Canberra, 11 July 2013.*

[3] *Minister for Families, Housing, Community Services and Indigenous Affairs Jenny Macklin, Speech at the Fifth International Community, Family and Work Conference, 17 July 2013.*

[4] *Fair Work Review Panel, "Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation", June 2012, Recommendation 30.*

[5] *Prime Minister Kevin Rudd, "The Australian Economy in Transition: Building a New National Competitiveness Agenda", Speech to the National Press Club, Canberra, 11 July 2013.*

Equality and Diversity: What is Australia Doing to Recognise These Values?

MARGARET CHAN, ASSOCIATE

With all the recent changes to bullying complaints, superannuation and parental leave, one could almost be forgiven for not noticing the passage through Parliament of the Sex Discrimination Amendment (*Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* (Cth) (the "SD Amendment Bill") and its amendments to the *Sex Discrimination Act 1984* (Cth) (the "SD Act").

Background

Introduced in March 2013, the SD Amendment Bill stemmed from recommendations and proposed reforms by the Senate Legal and Constitutional Affairs Committee's inquiry into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) (the "**HRAD Bill**") - which was announced last year and subsequently put on hold in March this year. HRAD followed a 2010 report by the Australian Human Rights Commission on discrimination experienced by members of the lesbian, gay, bisexual, transgender and intersex community and recommendations by the Senate Legal and Constitutional Affairs Committee in 2008 reflecting the need to reform the SD Act.

The changes under the SD Amendment Bill have commenced as of 1 August 2013 so employers need to be aware of their new obligations and ensure that workplace policies are up-to-date and compliant with the changes introduced by the amendments.

Snapshot of the Changes

- Discrimination on the grounds of sexual orientation, gender identity and intersex status are now prohibited under the SD Act just as discrimination on these grounds are prohibited in employment, education, accommodation and the provision of goods and services.[1]
- Prohibition of discrimination on the ground of 'martial status' will be extended to 'marital or relationship status' thus offering protection to same-sex de facto couples.
- Introduction of new exemptions, meaning that prohibitions on discrimination will not:
  - apply to anything done in compliance with the *Marriage Act 1961* (Cth) or other prescribed law; or
  - be contravened merely because a request for information or record-keeping does not provide for a person to be identified as being neither male nor female (however, this may be subject to reconsideration in the future).

Key Changes

The three new grounds of sexual orientation, gender identity and intersex status will be introduced by the insertion of sections 5A to 5C into the SD Act. These sections will set out the tests for direct and indirect discrimination, which are similar to the current tests for other grounds of discrimination.

Direct discrimination will usually involve discrimination on the basis of:

- the person's sexual orientation/ gender identity/intersex status;
- characteristics that relate to or are associated with persons who have the same sexual orientation/ gender identity/intersex status as the aggrieved person; or
- characteristics generally imputed to persons who have the same sexual orientation/gender identity/intersex status as the aggrieved person.

Indirect discrimination will usually involve the imposition of, or proposal to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation/gender identity/intersex status as the aggrieved person. However, indirect discrimination on the new grounds will still remain subject to the reasonableness test currently imposed by section 7B as well as the special measures exception found in section 7D.

Aside from the introduction of these new grounds, a number of other definitional and semantic changes have been made to broaden protections offered by the SD Act to a more diverse groups of individuals– such as the broad definition of gender identity[2] and the amendment of the term "opposite sex" to "different sex" in the definition of "sex discrimination" under section 5(1) – in recognition that a person may not be, or may not identify as strictly male or female.

It is also worth noting that going forward, the terms 'man' and 'woman' as they appear in the SD Act will adopt their ordinary meaning and their current SD Act definitions will be repealed. Again, this subtle change has taken place so as to ensure that transgender individuals are not excluded from the protections offered by the SD Act on the basis of other attributes. For instance, it would now also be discriminatory (and indeed, unlawful) to ask a transgender individual who identifies as female whether she intends to become pregnant in connection with determining whether to offer employment.[3]

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[1] *Most of the current exemptions for voluntary bodies, religious organisations and competitive sports will apply to the new protected grounds - however religious organisations will not be exempt from unlawful discrimination on the ground of intersex status.*

[2] *Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), 12.*

[3] *Ibid, 13.*

The New Grounds Defined...

Gender Identity – the gender-related identity, appearance, or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

Intersex Status – the status of having physical, hormonal or genetic features that are:

- neither wholly female nor wholly male;
- a combination of female and male; or
- neither male nor female.

Sexual Orientation – a person's orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex.

Gender Equality Reforms

In a similar vein, the changes introduced by the *Workplace Gender Equality Act 2012* (Cth) (the "**WGE Act**") are now in full swing and many employers will have completed and submitted their first public report under the WGE Act in May.

As a reminder to employers, the WGE Act also requires employers to inform employees, shareholders (as soon as possible) and employee organisations (within 7 days) that the public report has been lodged. Employers are also obliged to make the report available to these parties and to inform them that comments on the report will be received by it or the Workplace Gender Equality Agency (the "**Agency**").

While reporting requirements were simplified in the 2012/13 reporting year and only involved the provision of a workplace profile, reporting requirements from 2013/14 (the current reporting year) are set to increase slightly and employers will be required to report against a set of six Gender Equality Indicators ("**GEIs**") prescribed by the *Workplace Gender Equality (Matters in relation to Gender Equality Indicators) Instrument* (Cth) (the "**Instrument**"). The GEIs may change from year to year and will be set out in the Instrument prior to the commencement of the reporting year (e.g. GEIs for the 2013/14 reporting year are set out prior to 1 April 2013).

Timeline For This Research

August 2013	National online survey conducted to assess the prevalence, nature and consequences of discrimination relating to pregnancy at work and return to work after parental leave
October 2013	Interim report released based on results of August survey
October 2013 – January 2014	Consultation and roundtable to take place nationally
May 2014	Final report containing recommendations to be delivered

The six GEIs for 2013/14 are:

1. the gender composition of the workforce;
2. the gender composition of an employer's governing bodies (e.g. the Board);
3. equal remuneration between women and men;
4. availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities;
5. consultation with employees on issues concerning gender equality in the workplace; and
6. sex-based harassment and discrimination.

From the 2014/15 reporting year onwards, minimum standards will also begin to apply to employers in relation to workplace gender outcomes. The standards will be set by the Minister for the Status of Women following consultation with the Agency. Where employers fail to meet minimum standards and are not able to improve against it by the end of two further reporting periods, the employer will be deemed non-compliant.

Possible Upcoming Changes

We may also see further changes in the sex discrimination arena with respect to pregnancy in the not too distant future, with the Australian Human Rights Commission announcing on 22 June 2013 that Sex Discrimination Commissioner, Elizabeth Broderick, would be commencing an 11 month research project into the "prevalence of experiences of discrimination relating to pregnancy at work and return to work after parental leave". It is expected that data will be collected from individuals in a range of family circumstances – including single parents and separating households.[4]

This research is being conducted following data released by the Australian Bureau of Statistics last year which indicated that some 67,000 women had experienced some form of discrimination following becoming pregnant, in addition to significant anecdotal evidence of demotions, dismissals or having their roles unfavourably 'restructured' while they were on or returning from parental leave.[5]

Next Steps

Given the number of changes in this area, it is important for employers to be reviewing their Discrimination and/or Equal Opportunity policies to ensure that they are up-to-date and capture the changes to the SD Act, especially the introduction of the new and amended grounds of discrimination. It will also be important for employers to examine their practices around workplace gender equality and consider how they may seek to improve these going forward. ●

For more advice around any of the topics covered in this article or if you are unsure whether your organisation is complaint, please contact PCS by emailing info@peopleculture.com.au or calling (02) 8094 3100.

[4] *Australian Human Rights Commission, Terms of Reference (22 June 2013), Australian Human Rights Commission <https://www.humanrights.gov.au/pregnancy-discrimination> accessed 24 June 2013.*

[5] *Department of Attorney-General, 'Inquiry Into Parental Leave Discrimination: Fairer Workplace Practices to Benefit Families and the Economy' (Press Release, 22 June 2013), 1.*

It's a Numbers Game: Are You Aware of These Changes?

ROY YU,
ASSOCIATE

Employers will be required to account for workplace changes which took effect on 1 July 2013.

Superannuation

From 1 July 2013, the superannuation guarantee levy will be 9.25%, which is an increase of 0.25% from the previous year.

This means that:

(a) if an employer had originally agreed to paying an employee's salary or wages *inclusive* of superannuation (in other words, a fixed sum), then the superannuation component of the employee's total package would increase by 0.25%. The total amount paid by the employer however, would remain the same; and

(b) if an employer had originally agreed to paying an employee's salary or wages *exclusive* of superannuation (in other words, 'plus' superannuation), then the employer would need to make an increased payment for superannuation. In this instance, the total amount paid by the employer would increase by 0.25% of the non-superannuation component.

The increase is in annual increments and follows the scale set out below. This schedule may change depending on the outcome of this year's election.

Financial Year	SGC %
1 July 2013 – 30 June 2014	9.25%
1 July 2014 – 30 June 2015	9. 50%
1 July 2015 – 30 June 2016	10.00%
1 July 2016 – 30 June 2017	10.50%
1 July 2017 – 30 June 2018	11.00%
1 July 2018 – 30 June 2019	11.50%
1 July 2019 – 30 June 2020	12.00%

Additionally, from 1 July 2013, fund providers will be permitted to set up a new type of account called "MySuper" which will have low fees and simple features and will replace current default accounts chosen by employers. From 1 January 2014, employers will be required to make contributions into a fund that offers a MySuper account where an employee has not completed a Standard Choice form.

Another superannuation change which commenced on 1 July 2013 is that employers must now make superannuation guarantee payments for employees over 70 years of age.

Wages

A 2.6% increase to all modern award rates applies from 1 July 2013. As a result of this decision of the Minimum Wage Panel of the Fair Work Commission, the national minimum wage for the 2013/14 financial year is $16.37 per hour, or $622.20 per week for a 38 hour week. This represents an increase of $15.80 to the minimum weekly wage.

Separately, the default casual loading for employees not under any award or agreement increased from 23% to 24%. Employees covered under award arrangements continue on the standard 25% loading.

Employers must ensure that these increases are duly passed onto all employees.

Unfair Dismissal Remuneration Cap

From 1 July 2013, employees who earn in excess of $129,300 p.a. are prevented from bringing unfair dismissal applications unless they are covered by an enterprise agreement or modern award. The maximum compensation for unfair dismissal claims is half the amount of the high income threshold, being $64,650 (up from $61,650 in 2012).

Taxation of Genuine Redundancy Payments and Employee Termination Payments

In the 2012/2013 financial year, a genuine redundancy payment was tax-free up to a $8,806 base amount plus a $4,404 service amount multiplied by the number of years of service. For the 2013/14 Financial Year, these amounts become $9,246 and $4,624 respectively.

For Employment Termination Payments ('**ETPs**') more generally, if a person has reached "preservation age" in the income year their employment is terminated, the maximum tax rate is 16.5% (including Medicare levy) up to a cap. If a person has not reached "preservation age", the maximum tax

rate is 31.5% (including Medicare levy) up to a cap amount.

The concessional tax treatment is limited to the smaller of the "ETP cap" ($180,000 for 2013/14, indexed annually) and the "whole of income" cap ($180,000 and not indexed). The cap is reduced by other taxable payments an employee receives in the income year, such as salary. ETP amounts paid in excess of these caps are taxed at the top marginal rate (plus Medicare levy) of 46.5%.

Fair Work Amendment Bill 2013

This legislation was passed on 28 June 2013 and implements some further recommendations of the Fair Work Act Review Panel's report from 2012. Some key amendments include:

Anti-Bullying

Workers who are bullied at work will, as of 1 January 2014, be able to apply to the Fair Work Commission ("**FWC**") for an order to stop the bullying. Notably, the FWC is required to start dealing with such an application within 14 days of the application being made. The FWC will be entrusted with powers to make a wide range of orders to prevent the bullying from continuing – but this does not include orders for compensation or reinstatement.

Flexibility for Working Families

There have been a number of changes introduced to the Fair Work Act concerning employees with family and caring responsibilities. These changes regarding special maternity leave, parental leave and right to flexible work commenced on 1 July 2013. Employers will need to ensure that special maternity leave taken will not reduce an employee's entitlements to unpaid parental leave. The right to request flexible working arrangements has also been extended to a number of other employee categories including employees who are parents or carers, aged over 55 years, or have a disability. Effective as of 1 January 2014, employers will need to consult with their employees about the impact of changes to regular rosters or hours of work.

When employees have family and caring responsibilities, employers are also required to consult with them about the impact of changes to their regular roster or hours of work.

Union Right of Entry

As of 1 January 2014, unions will be able to meet with employees in the lunch rooms of their employers to conduct interviews or hold discussions in accordance with conditions of their entry permit. If there are disputes concerning this, the FWC now has the capacity to deal with this (and regulate the frequency of visits for such discussions).

Where the parties cannot reach agreement on transport and accommodation arrangements for permit holders in remote areas, the FWC may also now facilitate resolution of these disputes. ●

Breakfast Briefing Summary

Personal Liability and Workplace Laws

KATHRYN DENT,
DIRECTOR

On a fine winter's morning in June 2013 set against the iconic Sydney harbour backdrop, some of PCS' valued clients and supporters to attended our latest Breakfast Briefing, interested to learn more about the personal risks inherent in managing people.

PCS Directors Kathryn Dent and Nichola Constant shared the stage and exchanged their experiences and extrapolated workplace scenarios where there was, or could be, exposure to personal as well as organisational liability. The practical examples given and experiences recalled highlighted to the attendees the need for vigilance in managing people not only to protect their organisations from legal action, but also themselves, and how they might effectively achieve this.

Section 550 of the Fair Work Act 2009 (Cth)

An exploration of this section was a recurring theme throughout the morning given that it imposes liability on individuals where they are "involved in" breaches of the *Fair Work Act 2009* (Cth) (the "**FW Act**"). Both Directors explained throughout the morning that the phrase "involved in" was broad and covered the acts of aiding, abetting, counselling, procuring, inducing, directly or indirectly (being) knowingly concerned in or party to, or conspiring. As a consequence, members of the audience were encouraged, in order to avoid a charge under section 550, to take such action as required (given the circumstances of the issue) to demonstrate no involvement in any breach or better still, to show attempts at compliance with the FW Act.

Independent Contractors

This was logically the first area reviewed during the Briefing given that prior to the commencement of any working relationship employers (and their internal advisors such as HR Managers) have to decide whether to engage or employ a worker, that is, decide whether the worker is being contracted as an independent contractor or an employee. Kathryn highlighted that sections 357-359 of the FW Act were an incentive to ensure correct characterisation as these sections make it an offence to engage in "sham contracting". Also, because of the operation of section 550, individuals who are part of that decision-making process may be personally liable, as was demonstrated in several cases discussed including *Fair Work Building Inspectorate v Supernova Contractors Pty Ltd & Anor*; *Australian Building & Construction Commissioner v Inner Strength Steel Fixing Pty Ltd [2012]*).[1]

Similar provisions imposing personal liability could arise in this area if it was determined that the scheme was for tax avoidance purposes.

In addition to the defence of "not being involved" in the offence, specifically with sham contracting, an individual who could demonstrate other relevant defences, including that they did not know or were not reckless to the character of the contract, might escape liability, such as occurred in *Fenwick v World of Maths.*[2] Establishing this defence would require the individual to understand the indicia of employees and independent contractors and to characterise and enter into the relationship on this basis.

Recruitment and Selection

Concurrent with the characterisation process is the recruitment and selection process of the individual who will be physically performing the work. That of itself leads to another area of exposure to personal liability, with Nichola traversing the laws that govern what employers, and individuals acting on their behalf (as employees or agents such as recruiters) should and should not say to these workers, including representations which could be the subject of misleading and deceptive conduct allegations under the *Competition and Consumer Act 2010* (Cth).

Pay Records and Benefits

If an organisation, following the above process, decided to employ an employee, as opposed to an independent contractor, then the employer is obliged to issue payslips, keep employment records and comply with a minimum set of terms and conditions derived from a modern

[1] *[2012] FMCA 935; [2012] FCA 499.*
[2] *[2012] FMCA 131.*

award, an enterprise agreement, or the National Employment Standards all of which are governed by the FW Act (the "**FW Act minima**"), and other legislation, including long service leave obligations under State and Territory legislation. Kathryn indicated that a breach of any of the FW Act minima could trigger a civil penalty and by virtue of section 550, liability would extend to any involvement by an individual in these breaches. Common examples given of these breaches were underpayment of award rates of pay and penalty rates and failure to issue payslips and maintain employee records as was demonstrated in *Fair Work Ombudsman v Nicole Patrice Dawe.*[3]

While privacy obligations were discussed, given the exemption for "employee records", the extent to which an individual within an organisation dealing with workplace matters could be held liable for a breach of the *Privacy Act 1988* (Cth) was not clear.

Enterprise Bargaining

Not only does the breach of an enterprise agreement potentially implicate individuals but so may the process of entering into one. Nichola highlighted the various obligations required during the process of making an enterprise agreement and where individuals may be liable.

Culture

The discussion then turned to a very topical issue, that of "workplace culture" and more specifically in the context of individual liability, behaviours that negatively impact on it, for example, harassment, discrimination and bullying. Kathryn reminded the audience that the laws prohibiting discrimination apply not only during recruitment and selection but throughout the relationship and on termination.

Discrimination

Kathryn discussed the provisions within the *Anti Discrimination Act 1977* (NSW) (the "**AD Act**") that make it unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of the AD Act.

Additionally the AD Act and the *Sex Discrimination Act 1984* (Cth), both directly impose personal liability by making it unlawful for individuals (for example an employee, a contract worker or a "workplace participant") to engage in sexual harassment and two cases were discussed where individuals were held liable.[4]

The acts of inciting, assisting or promoting were highlighted as giving rise to individual liability under the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth) as was any discriminatory conduct under section 550 through a breach of section 351 (which is in the general protections provisions of the FW Act).

Bullying

At the time of the Briefing, the *Fair Work Amendment Act 2013* (the "**FW Amendment Act**"), had not yet been passed by Parliament but was discussed and given it is now law, the reality (as foreshadowed) is that after 1 January 2014, if an anti-bullying order is made by the Fair Work Commission a breach of it may implicate individuals if they have the requisite degree of "involvement" to attract section 550.

Bullying can also result in prosecutions under work health and safety laws. These laws themselves impose obligations on organisations and all individuals from Board level to "worker" so there is plenty of scope for an individual to be prosecuted, at some level, where the work health and safety risk emanates from bullying behaviour. This occurred in *Inspector Gregory Maddaford v Graham Gerard Coleman & Anor.*[5]

Work Health and Safety

Nichola then proceeded to highlight more generally individuals' liabilities for work health and safety. Individuals under the Work Health and Safety Act 2011 (NSW) ranges from "officers" who must exercise "due diligence" to "workers" who must exercise "reasonable care". The concept of personal liability in this area is not new.

Termination

In addition to discrimination and adverse action considerations, individuals' liabilities in a termination situation could also arise in relation to the giving of notice under the National Employment Standards (or the applicable industrial instrument) and also in the payments that must be made in relation to accrued annual leave, and if applicable, redundancy. Any involvement in relation to these entitlements could trigger section 550 but Kathryn described how an individual's lack of involvement (for which evidence must be adduced) would exonerate them as occurred in *Guirguis v Ten Twelve Pty Ltd & Anor.*[6]

Restraints of Trade

While not specifically an area in which individuals were likely to be prosecuted, Nichola discussed this "last stage" of the work relationship to bring the Briefing full circle as the enforcement of any contractual restraints in relation to activity and relationships post-termination depend on the reasonableness of the restraint which was determined at the beginning of the relationship. It was a timely reminder to individuals that such clauses being held to be unenforceable by virtue of being uncertain or unreasonable whilst not rendering them liable for prosecution could leave them open to criticism if they did not seek advice and/or properly consider and draft such a clause.

Conclusion

The journey through the work relationship demonstrated that at each significant step an individual's actions, be it in characterising a worker, hiring them, being responsible for their terms and conditions including environment and payment or terminating their employment, could result in that individual being prosecuted for various breaches, usually where the organisation was also liable. As a result of drawing these matters to our guests' attention, PCS trusts that its clients and supporters are now forearmed having been forewarned. ●

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[3] *[2013] FMCA 191.*
[4] *Lee v Smith & Ors (No.2) (2007) EOC 93-465; Kraus v Menzie [2012] FCA FC 144. 5*
[5] *(2005) EOC 93-366.*
[6] *[2012] FMCA 307.*

Significant Changes to Sponsoring Employees

Under the Temporary Work (Skilled) (Subclass 457) Visa Program

BY ROLA HIJWEL,
HIJWEL MIGRATION LAWYERS

Comprehensive changes were passed by the Australian Parliament to introduce new and tougher standards for the Temporary Work (Skilled) (subclass 457) visa program, with most measures effective as of 1 July 2013.

The subclass 457 visa program is widely used across all industries and business sizes, enabling the employment of skilled workers for up to 4 years. The Subclass 457 visa program consists of three steps. Firstly, the employer is required to obtain standard business sponsorship status. Secondly, the nomination of the role which needs to be filled is ascertained and finally the subclass 457 visa application is completed, pertaining to the employee and how they meet the skills and experience nominated.

The purpose of the visa program is to address the genuine skills shortage in Australia, providing a pathway for businesses to fill a skilled position where they have not been able to find an appropriately skilled Australian citizen or permanent resident for the role. The employer is required to ensure that the working conditions of the sponsored employee are no less favourable than those provided to Australians, and that the overseas worker(s) are not exploited.

At the end of the 2011-2012 fiscal year, a new record of 68,313 subclass 457 visas were granted.[1] With the increasing use of the visa program and the current economic landscape, the Government sought to review the program and pass measures to ensure the central principals of the Temporary Work (Skilled) (subclass 457) visa program were strengthened. Importantly, the Department of Immigration and Citizenship was provided with the capacity to identify and prevent employer practices that are not in keeping with the fundamental tenets of the subclass 457 visa through increased compliance program and monitoring mechanisms.

About Rola Hijwel BA LLB, ACC. SPEC. (IMMIG) MARN 0429581

Recognised as an Accredited Specialist in Immigration Law by the New South Wales Law Society. Rola is admitted as a solicitor in the Supreme Court of New South Wales and the High Court of Australia, with over 12 years experience in immigration law, previously working with an international immigration law firm.

Practising exclusively in immigration law, she represents global and local clients in a raft of industries, including Information Technology, Pharmaceuticals, Communication, Defence, Finance, Recruitment and Education.

Rola's experience in the field of immigration is extensive, from employer-sponsored work visas, Sponsorship audit and compliance, business and investment visas, skilled visas, partner and family migration, through to appeal matters on both merit or judicial review.

With a strong passion and commitment to providing an in-depth understanding of the complexities of immigration and administrative law, she also ensures there is a strong focus on each client's best interest.

Rola is also involved with the NSW Law Society - Young Lawyers and is currently the CLE Representative for the International law committee. Rola often provides presentations and training in the area of immigration law for legal practitioners and professionals.

Changes to the Subclass 457 Visa Program, as at 1 July 2013

Changes have been introduced to the requirements of each component of the visa program, extending to the compliance and monitoring of the business sponsorship obligations, which provide stronger enforcement provisions. Brief summaries of the significant changes are outlined below.

Mandatory Skills Assessment for Generalist Occupations

Certain nominated occupations have been identified, such as Program and Project Administrators and Specialist Managers, as occupations that were used inappropriately in the past to nominate less qualified workers for these positions. Due to the general nature of the occupation classification requirements, employers were previously able to use these generic occupation classifications as an alternative.

As a result, in order to nominate these occupations, a formal skills assessment is now mandatory as a component of the visa application. This measure is aimed at preventing these generic occupations being used at times of genuine skills shortages.

Mandatory English Language Requirement

Occupation-based exemptions for English language requirements have been removed. Therefore all visa applicants are required to complete an English Language Test for the purpose of a visa application.

[1] *Ministerial advisory council on skilled migration (macsm), Discussion paper - Strengthening the integrity of the subclass 457 program, presented 14 January 2013.*

Exemptions, however, do remain for the following applicants:

- where the visa holder will be remunerated above a specified threshold (the English Language Salary Exemption Threshold), currently set at $96,400; or
- for holders of a passport from Canada, United States of America, United Kingdom, Republic of Ireland or New Zealand; or
- where the visa holder has completed at least 5 consecutive years of full-time study in a secondary or higher education institution where lectures have been delivered in English.

This will have an impact on the lead-time to lodge a visa application, as applicants will be required to undertake a language test in the event that they are not exempt.

Commencement of Work on Arrival

Amendments to the visa condition 8107 has imposed that subclass 457 visa holders are required to commence work with their sponsoring business within 90 days of arrival in Australia. This will assist the Department of Immigration and Citizenship with its task of monitoring visa cancellations in instances where the visa holder has not commenced work with their employer.

Enforceable Sponsorship Undertakings

Sponsorship undertakings have been strengthened so as to enhance compliance enforcement mechanisms. Undertakings will now be court enforceable between the Minister of Immigration and Citizenship and the sponsor. This measure will reinforce the existing administrative sanctions, infringement notices and civil penalties. This is designed to provide a direct and cost efficient method of ensuring that sponsors are held accountable for any contraventions of their obligations.

Enforceable Ongoing Training Obligation

Prior to the 1 July 2013 amendments, sponsoring businesses were only required to commit to maintain a certain level of expenditure in training. As at 1 July 2013, sponsoring businesses are now required to demonstrate ongoing compliance with their training obligations through retaining all training records.

This is a tougher requirement and the onus is on sponsoring businesses to demonstrate compliance, as they are no longer merely required to commit to comply, but are required to accomplish and meet the required training protocols.

Monitoring Power Through the Fair Work Inspectors

Greater access to enforcement recourses has been legislated so as to allow the use of Fair Work inspectors in conjunction with immigration compliance officers to monitor and investigate immigration compliance matters under the subclass 457 visa program.

Ensuring employees have the correct visa to work, are undertaking the nominated role and are receiving the appropriate remuneration according to their visa application, monitoring provides for a larger force of inspectors that are able to enforce sponsorship obligations and employment conditions.

Extension of Grace Period After Termination of Employment

The period allowed for a Subclass 457 visa holder after the termination of employment with their current sponsor, has been extended from 28 consecutive days to 90 consecutive days. Employers need to be aware of this change and ensure they maintain accurate records upon termination, in line with their obligations.

Labour Market Testing

In addition to the changes implemented as of 1 July 2013, a significant change to come into effect over the next 4-6 months, will be the requirement on sponsors to demonstrate that they are unable to recruit a qualified and experienced Australian worker to fill the nominated position under the visa program and are forced to look abroad, unless an exemption applies.

The purpose of labour market testing is to ensure that the 457 visa program is only addressing genuine skills shortages and is not having an impact on employment opportunities for Australian residents or citizens.

Sponsors will be required to demonstrate that they have made all efforts to find a suitably qualified and experienced Australian for the nominated position within six months before submitting a nomination application. The nature of evidence of a compliance search could range from research released in the previous four months relating to labour market trends for the nominated role, to expenditure on recruitment efforts, such as advisements in the local market.

Where a sponsor or an associated entity has retrenched Australian citizens or permanent residents within four months leading up to the nomination, the sponsor must show that its recruitment attempts are following the downsizing and provide information with respect to all workforce reductions in the nominated occupation in the previous four months.

The Minister for Immigration and Citizenship will have the authority to exempt certain occupations from the labour market testing requirements, whereas other occupations will still be required to comply with Australia's commitments under international trade agreements.

Another possible exemption may extend to specific nominated occupations which feature a designated qualification level and require a certain number of relevant years of experience. Details relating to this exemption will be released closer to the implementation of the labour market testing requirement.

With this increasing focus on compliance and enforcement it is vital for sponsors to have in place a system to ensure they are meeting, recording and tracking their on-going sponsorship obligations, especially considering that the punitive penalties are high for both the business and individuals.

For further information or questions about the changes or the up coming requirements, please do not hesitate to contact Rola Hijwel, the principal solicitor and migration agent (0429581) at Hijwel Migration Lawyers via email at rola@hml.net.au ●

Re-defining the Fair Work Act Ahead of the Upcoming Federal Election

DIMI BARAMILI,
ASSOCIATE

In what has been a tumultuous period in federal politics ahead of the upcoming election, it is no surprise that workplace relations reform has taken centrestage, with the Coalition announcing its policy and the Government introducing a raft of reforms to the *Fair Work Act 2009* (Cth) (the "FW Act") through the *Fair Work Amendment Bill 2013* (the "FW Bill"), the latter of which is aimed at addressing the concerns of specific groups.

The FW Bill was passed in the last sitting week of parliament, receiving assent on 28 June 2013, although some parts are not due to come into force until 1 January 2014.

The Government has indicated that these reforms are aimed at "*strengthening the Fair Work system to provide a comprehensive safety net to protect the most vulnerable in our workforce as well as the flexibility that working parents and carers need*"[1] They are also the result of the independent Fair Work Act Review, with the Government noting that they "reflect recommendation 1...to include in the functions of the FWC that it should promote cooperative and productive workplace relations."[2]

Specifically the reforms target:

- flexible working and family friendly initiatives;
- penalty rates;

- right of entry;
- amendments to the role of the Fair Work Commission ("FWC"); and
- the ability to take bullying claims to the FWC.

What are the Changes?

(a) Flexible Work Arrangements + Other Family Friendly Initiatives (commenced 1 July 2013)

Although section 65 of the FW Act currently provides scope for individuals who are either a parent or have the responsibility of caring for a child (if they are under school age or under 18 with a disability) to request flexible working arrangements in certain circumstances, this right to request flexible working arrangements will now be extended to include employees with carer's responsibilities, parents or guardians of children that are school age or younger, employees with a disability, employees 55 years or older, and employees experiencing or supporting a family or household member who is experiencing family violence.

Currently, a flexible work request can be refused on 'reasonable business grounds'. This term is not defined under the FW Act. However, the reforms now provide some guidance through a non-exhaustive list of 'reasonable business grounds' which include:

- the new working arrangements being too costly;
- there being no capacity to change the working arrangements of other employees to accommodate the request;
- it being impractical to change the working arrangements of other employees, or recruit new employees to accommodate the request;
- the new working arrangements would likely result in a significant loss in efficiency and productivity; and
- the new working arrangements would likely have a significant negative impact on customer service.

[1] *Hon Bill Shorten MP Press Release dated 28 June 2013.*

[2] *Hon Bill Shorten MP Fair Work Amendment Bill 2013 – Summing-up speech, House of Representatives dated 6 June 2013.*

Other changes concerning pregnancy and related leave which commenced 1 July 2013 include:

- transfer to a safe job now extended to all employees not just those who have at least 12 months service;
- increasing the period of concurrent parental leave from 3 weeks to 8 weeks; and
- special maternity leave taken will no longer detract from the amount of unpaid parental leave available to an individual.

(b) Legislated Consideration of Penalty Rates (commencing 1 January 2014)

This has occurred through the insertion of an additional consideration within the modern awards objective via section 134(1)(da) which requires consideration of the need to provide additional remuneration for employees working overtime, shifts, or outside regular working hours (such as on weekends). This has not had an impact on current rates, rather it has been deemed a relevant consideration for the FWC at the next modern awards review.

(c) Right of Entry (commencing 1 January 2014)

These reforms are described in the Explanatory Memorandum to the FW Bill as being designed to appropriately balance the rights of organisations and employees in respect of the entry of permit holders to premises for the purposes of investigations and discussions. The reforms will allow meetings to be held in an area agreed between the parties, and if no agreement is reached, then lunch rooms may be used. The powers of FWC will also be extended so as to allow it to address disputes which concern the frequency of visits, as well as transport and accommodation arrangements, and to enforce appropriate behaviour from permit holders. Amendments will also be made concerning transport and accommodation arrangements for permit holders.

(d) Amendments to the Role of the FWC (Arbitration by Consent Commencing 1 January 2014)

Other amendments to the roles and functions of the FWC will be made, including providing the power to promote cooperative and productive workplace relations and preventing disputes, clarifying their powers during conferences and, most notably, allowing the FWC to arbitrate, by consent, general protections and unlawful termination disputes.

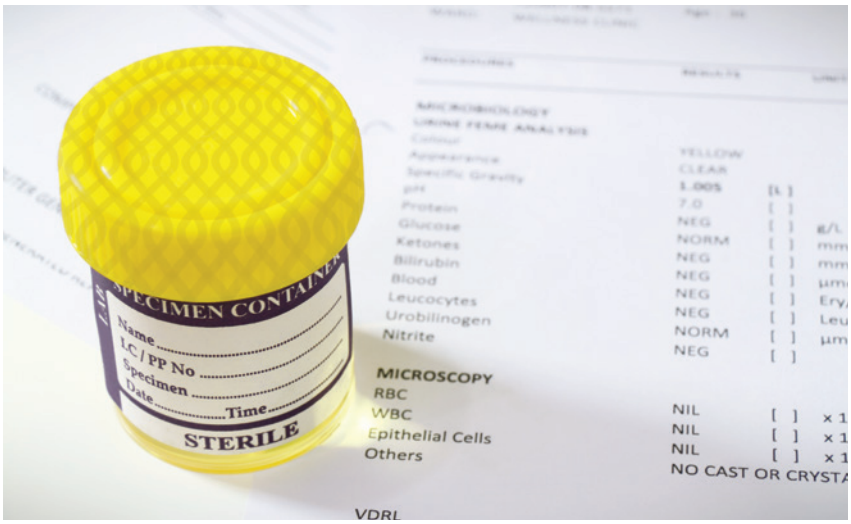
(e) Bullying Reforms (Commencing 1 January 2014)

As we reported in our last edition of Strateg-eyes, the FW Bill will put in place the workplace bullying reforms which emerged from the House of Representatives Standing Committee on Education and Employments' report 'Workplace Bullying "We Just Want It To Stop"'. This will mean that a worker within a constitutionally-covered business can apply to the FWC for a remedy in respect of workplace bullying, with the FWC required to deal with the application within 14 days of it being made. In dealing with a complaint, the FWC can generally make any type of order it deems appropriate in respect of the conduct (however it cannot order reinstatement or the payment of compensation). An order will only be made where the FWC is satisfied that the worker has been bullied and that there is a risk that the worker will continue to be bullied. The FWC can also refer the matter to the relevant WHS regulator if appropriate as this remedy will not replace or be a substitute for claims and penalties under WHS legislation.

These reforms have been criticised by many employer groups as swinging the balance further in favour of employees under the FW Act, in particular the amendments to the right of entry provisions, the extension of those employees eligible to request flexible working arrangements and the workplace bullying reforms. Although the Coalition has released its Industrial Relations policy with a comparison of this policy against that of the current government it does not appear to make many changes to this policy. The impact of these reforms remains to be seen, and in particular, whether we will see a significant increase in the amount of claims utilising the FWC bullying jurisdiction. ●

Lessons from the Bench

ERIN LYNCH,
SENIOR ASSOCIATE



Private Behaviour vs Safe Working Environment

The subject of workplace drug testing is a controversial one. There are the competing arguments around whether urine testing or saliva testing is more accurate and also the fine line between scrutinising employees' private behaviour and the need for a safe working environment.

Since at least 1998 it has been accepted by industrial tribunals that drug and alcohol testing, whether it be random or targeted, is a reasonable and legitimate response to the risk to safety posed by employee drug use, even it involves some interference with employee privacy.

There is however, no agreement by the tribunals as to what the most appropriate method of drug and alcohol testing is.

In a recent decision, *Briggs v AWH Pty Ltd [2013] FWCFB 3316)*, the Fair Work Commission Full Bench dismissed the appeal of an employee who refused to provide a urine sample for a drug test, because he argued that a saliva sample (which he was willing to give) was more appropriate.

Mr Briggs was dismissed by AWH Pty Ltd ("**AWH**") for repeatedly refusing to comply with a direction to undergo a drug trust involving a urine sample. Mr Briggs' contract of employment expressly required him to comply with AWH's policies. In addition, Mr Briggs was given a number of opportunities to comply with the direction over a five day period and was warned about the consequences of continued non-compliance, which included dismissal.

Mr Briggs argued that there was no valid reason for his dismissal, and that his dismissal was unfair, because the direction to take the urine test, whilst lawful, was not reasonable and therefore did not require compliance.

Mr Briggs conceded that AWH could use urine testing if its policy objective was to detect drug use in order for it to be able to manage the risk of such use, rather than to test for functional impairment. Mr Briggs argued that AWH's policy only provided for testing for impairment while at work and a urine test was not reasonable because it was not a test for impairment.

The initial decision found that:

- Mr Briggs' repeated refusal to comply with the direction to undertake a urine test constituted a valid reason for dismissal;
- the direction was a lawful and reasonable one; and
- there was no other circumstances which rendered the dismissal unfair.

On appeal, Mr Briggs' challenged the conclusion that the direction was reasonable.

The Full Bench found that:

- AWH's policy was consistent with standard practice;
- a number of AWH's clients had imposed contractual requirements concerning drug and alcohol testing;
- AWH had conducted a blanket urine test each year since 2006 (when the policy was introduced), except for 2011; and
- there was no evidence that any employee other than Mr Briggs had ever complained about the mode of testing.

It was held that the direction to Mr Briggs was both lawful and reasonable. It was specifically authorised by the policy, with which Mr Briggs was contractually bound to comply, was consistent with common practice and was reasonably adapted to the nature of Mr Briggs' employment.

Failure to exercise the requisite standard of care

In *Swan v Monash Law Book Co-operative [2013] VSC 326*, Ms Swan was employed as an assistant at a law book co-operative within Monash University from 2002 to October 2008. Ms Swan alleged that another permanent team member, Mr Cowell (Ms Swan's Manager), was responsible for bullying, harassing and intimidating conduct towards her.

Psychological assessments were carried out and expert evidence given at trial. Both experts pointed to a lack of

appropriate action taken by the Board of the employer, particularly after becoming aware of the issue as early as 2003. This included failing to investigate and take appropriate intervention steps/actions.

The Court accepted that the incidents described by Ms Swan had the effect of intimidating her, increasing her anxiety and causing her to moderate her own behavior. It was held that Mr Cowell did engage in workplace bullying and that it imposed substantial and significant emotional stress and distress on Ms Swan- damaging her mental health and wellbeing during her employment.

The Court held that Monash Law Book Co-operative did not exercise the standard of care reasonably expected of an employer in the circumstances. In determining the failure, the Court articulated that the following behaviour fell short of the requisite reasonable steps/behaviour:

- failure to define relations between it and its employees, and between employees- such as through employment contacts, job descriptions and workplace behaviour policies;
- a lack of job descriptions, contracts and policies was contributing to the issues and still they failed to implement them- this "inexcusable and unjustified conduct breached its duty of care to the Ms Swan";
- repeated misrepresentations to Ms Swan that the introduction of contracts, job descriptions and policies was imminent;
- a failure to introduce defined procedures for complaints or to appropriately train employees to deal with complaints;
- it was inappropriate to rely on employees' responses as to what action should be taken in response to the complaint;
- a failure to give directions to Mr Cowell as to his dealings with the plaintiff- which allowed his behaviour to develop and continue further;
- a failure to follow through with an assessment of Mr Cowell that included consideration of appropriate workplace conduct;
- a failure to investigate what was occurring directly and intervene appropriately;
- there was no formal system of enabling employees to seek the assistance of their employer when bullying occurred;
- the Board did not arrange or conduct a risk assessment in response to the complaints;
- there were inadequate responses to the complaints perpetuated by lack of formal policies and procedures; and
- there were no safe return to work procedure in place.

It did not matter that in between complaints, Ms Swan did not wish to escalate her complaints further. Ms Swan agreed not to escalate in reliance on the Board's undertaking and support at the relevant time as they told her they would implement policies etc, (which they never did).

Ms Swan was awarded $300,000 damages for pain and suffering and loss of enjoyment of life. Pecuniary loss was assessed to be $292,554.38.

A valid reason for termination but the dismissal was unfair on procedural grounds

In the recent decision of *Haigh v Bradken Resources Pty Ltd (2013) FWCFB 2918*, the Full Bench of the Fair Work Commission overturned a decision that a boilermaker was fairly dismissed.

Mr Haigh had been employed with Bradken Resources Pty Ltd ("**Bradken**") for nine years and was involved in an incident involving cutting a large steel plate. Bradken asserted that Mr Haigh had undertaken or caused to be undertaken that function in an unsafe manner.

At first instance Commissioner Williams found that:

- Mr Haigh's actions in setting up the job were inconsistent with his obligations in respect to safety;
- there was a valid reason for the dismissal;
- Mr Haigh was notified of the reasons when Bradken was considering dismissal; and
- Mr Haigh was given an opportunity to respond to the reasons.

On appeal, the Full Bench found that the Commissioner fell into error in finding that Mr Haigh was given an adequate opportunity to respond to the allegations regarding his conduct.

The sequence of events was as follows:

- there was a meeting on 13 December 2011 regarding the incident;
- at that meeting, the allegations were raised with Mr Haigh and the substance of these was explained to him;
- Mr Haigh disputed the allegations; and
- a show cause letter was sent to Mr Haigh.

The Full Bench held that it was clear at the meeting on 13 December 2011 that Mr Haigh disputed the allegations and he was in an agitated state. It went on to find that the show cause letter was poorly drafted and although Mr Haigh responded to the show cause letter his employment was terminated without any further discussion or involvement.

On the basis of the above sequence of events, the Full Bench decided that it did not constitute an adequate opportunity to respond given the particular circumstances. The Full Bench also decided that Mr Haigh was not given a proper explanation of what he was accused of and the accusations that were made were ambiguous.

Also relevant for the Full Bench was that Bradken had re-enacted the incident without Mr Haigh's knowledge or involvement.

This case emphasises the need for employers to ensure that along with a valid reason for termination, there must be a procedure whereby the employee is given an adequate opportunity to respond to the allegations against him or her. Similarly, employers must ensure that they properly particularise their concerns to the employee. ●

PCS' Legal Team

Joydeep Hor
Managing Principal
Direct: +61 (2) 8094 3101
joydeep.hor@peopleculture.com.au

Kathryn Dent
Director
Direct: +61 (2) 8094 3107
kathryn.dent@peopleculture.com.au

Nichola Constant
Director
Direct: +61 (2) 8094 3102
nichola.constant@peopleculture.com.au

Michelle Cooper
Director
Direct: +61 (2) 8094 3103
michelle.cooper@peopleculture.com.au

Professor Joellen Riley
Consultant
Direct: +61 (2) 8094 3100
joellen.riley@peopleculture.com.au

Greg Harrison
Consultant
Direct: +61 (2) 8094 3118
greg.harrison@peopleculture.com.au

Margaret Chan
Associate
Direct: +61 (2) 8094 3116
margaret.chan@peopleculture.com.au

Roy Yu
Associate
Direct: + 61 (2) 8094 3120
roy.yu@peopleculture.com.au

Cara Seymour
Senior Associate
Direct: +61 (2) 8094 3104
cara.seymour@peopleculture.com.au

Alison Spivey
Senior Associate
Direct: + 61 (2) 8094 3105
alison.spivey@peopleculture.com.au

Kirryn James
Senior Associate
Direct: +61 (2) 8094 3105
kirryn.james@peopleculture.com.au

Erin Lynch
Senior Associate
Direct: +61 (2) 8094 3115
erin.lynch@peopleculture.com.au

Elizabeth Magill
Senior Associate
+ 61 (2) 8094 3119
elizabeth.magill@peopleculture.com.au

Dimi Baramili
Associate
Direct: +61 (2) 8094 3106
dimi.baramili@peopleculture.com.au

Misa Han
Associate
Direct: +61 (2) 8094 3108
misa.han@peopleculture.com.au

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