Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

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2014: What will the New Year bring?

ALISON SPIVEY,
SENIOR ASSOCIATE

In this article we look forward to what are likely to be the significant employment law and workplace relations issues in 2014.

With the new Coalition Government taking steps to implement its policy agenda, new anti-bullying laws and other legislative changes due to start early in the new year, and a further review of the *Fair Work Act 2009* (Cth) (the "**FW Act**"), it appears that 2014 will be as, if not more, eventful than 2013 in the employment law and workplace relations space.

In this article we examine issues and events which will impact on employment law and workplace relations in 2014. We will provide further updates on these issues and events, and any new developments in this area, through our various publications, seminars and webinars throughout the coming year.

New anti-bullying laws

Bullying will continue to dominate the employment law and workplace relations landscape in 2014, with the commencement of the new anti-bullying laws on 1 January 2014 (see our separate article on the anti-bullying laws in this edition of *Strateg-Eyes*).

It is expected that a large number of applications will be made to the Fair Work Commission (the "**Commission**") in the first year of the new anti-bullying laws, and we anticipate that the law in this area will develop quickly, providing further guidance on the meaning and operation of these laws. As noted above, we will keep you updated on these developments throughout 2014.

Privacy

From 12 March 2014, changes to the *Privacy Act 1988* (Cth) (the "**Privacy Act**") will see the introduction of the Australian Privacy Principles (which will replace the current National Privacy Principles), changes around privacy policies and notices and further regulation around cross-border data disclosure. The changes largely relate to increased transparency in the management of information.

The impact of these changes in the context of collection, use and disclosure of employee information and records will vary from business to business. Please contact PCS if you have any questions about the impact of these changes on your business.

Productivity Commission Review

The Coalition Government has confirmed that the Productivity Commission Review of the FW Act will commence in or about March 2014. The terms of reference for that review have not yet been released.

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A message from our Managing Principal

As yet another year draws to a close, it seems that once again we find ourselves facing yet another significant year in workplace relations reforms.

While much of the attention has, quite rightly, been on the unprecedented new anti-bullying laws that will be in effect from 1 January 2014, it is important to keep in mind that 2014 will also see significant change in the areas of privacy regulation, flexible working arrangements and, we expect, the regulation of industrial organisations.

Those of you who attended our very successful Hypothetical event on 21 November 2013 would have heard me discuss the global significance of the Fair Work Act amendments that will allow workers to bring a claim in the Fair Work Commission if they feel that they have been bullied at work. The highly subjective definition utilised and the ongoing pandemic nature of the utilisation of the term "bullying" across most Australian workplaces is bound to mean that the estimated number of complaints will be grossly understated. I was privileged to have attended the International Bar Association conference in Boston in October to discuss these changes and confirm their novelty in an international context.

PCS has been at the forefront of commentary, advocacy and education around the bullying reforms and will continue to work closely with you as our valued clients to ensure that we are strengthening your organisation as it faces a period of some uncertainty. Those of you who have engaged me or one of my colleagues to brief your leaders on these changes should be commended for your proactivity.

As a firm we have had another stellar year, highlighted by numerous new clients, consolidation of the strength of our existing client relationships, a seminal thought-leadership program throughout the year, a significant move to much larger and comfortable premises at NAB House and the addition of some outstanding senior associates and Consultants. As is always the case with this business, we move onwards to an even better year in 2014.

On behalf of all of us, I wish you and your loved ones a joyous festive season and thank you for your support of our firm. May 2014 be a successful year for all of us.

Joydeep Hor, Managing Principal ●

2014: What will the New Year bring?

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In terms of the likely impact of the Review, the Coalition has previously stated that any recommendations arising from the review will form part of their policy platform for the next federal election (due in 2016).

As such, it is unclear to what extent there will be any further changes to the FW Act during 2014, other than in the areas previously nominated.

Minimum Wage Review 2014

For the first time in 2014 the Commission will introduce an early consultation process into the annual Minimum Wage Review, allowing for the hearing of witness evidence. Subject to sufficient interest from the parties in that process (expressions of interest close 6 February 2014), the consultation process will commence in March 2014 and be finalised prior to the end of May 2014.

Consultation terms in awards

From 1 January 2014, amendments to the FW Act will change the consultation terms in awards and enterprise agreements to provide for consultation in relation to change in rosters or working hours that do not otherwise amount to a "major workplace change".

The changes will require the employer to provide the employer with information about the proposed changes to their rosters or working hours, provide the employees with the opportunity to comment on the proposed changes, and consider the employees' comments before a decision is made whether to implement the changes.

Unlawful termination claims

From 1 January 2014, the timeframe for making an unlawful termination claim under the FW Act will be reduced from 60 days to 21 days, to make the timeframe consistent with those for unfair dismissal claims and general protections claims involving dismissal. ●

Hypothetical 2013 – The Most Difficult Dismissal of All...

MARGARET CHAN,
ASSOCIATE

PCS' second annual Hypothetical event, held this year at the Australian National Maritime Museum in Darling Harbour, was a spectacular evening.

While a number of workplace relations issues have been the focus of much attention in 2013, this year's hypothetical was about one issue that is never far from the minds of most human resources and employment law practitioners: termination of employment and best practice dismissals.

This year, PCS was privileged to have SKY NEWS Business channel presenter, Brooke Corte (pictured on page 5), as our MC for the evening. Attended by over 120 friends and clients of PCS, this year's Hypothetical was also televised on SKY Business' Australian Public Affairs Channel on Monday, 25 November 2013.

The scenario

A captivated audience watched a video written, produced and directed by none other than PCS' founder and Managing Principal, Joydeep Hor unfold on the big screen. The video depicted the different perspectives, tensions, conflicts and sense of betrayal caused by the highly public and rather sudden termination of the CEO of "the Company", Garry, by the Board – who was represented by its Chairman, Frank.

The video showed Garry and Frank discussing their views on Garry's termination – highlighting underlying issues and reasons such as the poor financial performance of the Company, Garry's lack of accountability about the Company's financial performance, the lack of performance management, the risqué client entertainment of the Company's high value clients involving escorts and pole dancing aboard Garry's yacht, the amount of notice given to Garry when he was terminated and the non-compete restraint in his unsigned employment contract. The issues of stress, depression and bullying were also alluded to by Garry.

Our expert panel

Following the video, it was over to the Expert Panel, who were required to think on their feet and respond to the questions posed by Joydeep as Facilitator.

On the expert panel for the first time this year were:

- Michele Grow, CEO of Davidson Trahaire Corpsych, playing the role of newly-appointed Non-Executive Director;
- Tim Donaghey, Barrister-at-Law, providing input on the legal issues facing Frank and the Board; and
- John Dakin, Director of Career Management firm Directioneering, acting as Garry's career management advisor.

Previous panellists:

- Robyn Sefiani from Sefiani Communications Group; and
- Hannah Low of the Australian Financial Review

also reprised their roles on our expert panel this year to provide their perspective on the media and public relations implications of this high-profile termination.

Issues at play

Our expert panel this year was treated to a smorgasbord of issues to pick their way through – including a series of complex legal, management and psychological issues such as:

- whether high level executives (such as CEOs) should be subjected to formal performance management processes if and when they are underperforming;
- the implications of an investigation into Garry's inappropriate conduct in allowing the risqué client entertainment event (dubbed the "Love Boat" by Tim) and his subsequent high-profile termination;

- Garry's allegations of bullying against the Board – by "ambushing" him and tabling "reports prepared behind (his) back";
- whether the payment provided by the Company in lieu of notice was sufficient;
- personal liability issues for the Board of Directors;
- Garry's depression and mental health issues; and
- whether a non-compete restraint could be enforceable where there was no signed contract, and even if there had been one, (or deemed acceptance of the terms by Garry), whether it would be enforceable by the Company.

Expert analysis

Our experts then broke into an energetic and, at times, playful discussion about the various factors that would influence them and the thoughts that were going through their heads as the Hypothetical scenario unfolded before them.

Michele Grow spoke in her capacity as a hypothetical Board member, discussing the duties of a Director from a corporate governance perspective and the necessity of obtaining further clarity around the timeline, process and reasons for Garry's termination. In response to Garry's claims about feeling stressed and depressed, Michele highlighted the obligations of the Board to ensure that it was taking appropriate "care and protection" of the workforce - touching upon some of the officers duties under work health and safety legislation.

Michele then donned an organisational psychology cap and offered her insight into Garry's revelation that he had depression. Although it should come as no surprise, Michele revealed that 45% of all adults will suffer from some form of mental illness at some point in their lifetime and that many individuals are able to function at quite a high level during this time despite their illness. Accordingly, while mental health should be treated with care in the work place, it should not necessarily be treated as an impairment or be used to excuse underperformance (particularly in circumstances where it is unclear whether there has been an actual diagnosis of depression – as was in Garry's case). However, Michele indicated that in the circumstances, given his particularly stressful termination, it would be necessary to ensure that Garry was seeking appropriate support for his condition.

Tim Donaghey, as a legal representative on the panel, was responsible for unpacking many of the legal issues around Garry's termination. Tim examined the implications of Garry's unsigned contract and whether he may still be bound to its terms, the notice payment of 3 months that was provided to Garry and whether this could be open to challenge given his seniority, as well as potential breach of contract issues by the Company.

Tim also suggested that Garry could potentially bring a General Protections claim under the FW Act on the basis of discrimination following the disclosure of his depression – although this would be dependent on whether Garry could establish that there was a causative relationship between his mental illness and termination. Tim then went on to discuss whether there was an obligation on the Company to undertake a performance management process with Garry, as well as the issue of personal liability of CEOs and Board members in these types of termination situations.

John Dakin walked attendees through what this termination meant for Garry from a personal perspective and the issues he would work through with Garry as his career management advisor. John explained the types of emotional and psychological issues that Garry may have – particularly given the long tenure Garry had with The Company and his meteoric rise through the ranks. John also addressed the importance of personal branding (particularly at the executive level) and the importance of seeking advice around communications - particularly where legal proceedings are on foot.

John then raised the very pertinent question of whether Garry had received the necessary training that he needed before being appointed to the CEO role and whether this could have been a contributing factor to his underperformance in the role.

Hannah Low also took to the stage to reveal what would spark a journalist's interest in the scenario and the types of issues on which a journalist might choose to focus. In addition to the yacht incident, the size of the organisation, the alleged bullying at the highest levels of the Company, the culture of the Company and whether Garry was performance managed out of his role were all deemed to be factors which would make the scenario an attractive one for journalists.

Hannah also highlighted that while Garry's mental health issues would not, of itself, necessarily be newsworthy, any suggestion that the mental health issues had arisen as a result of his role - particularly when tied in with the issues of executive and corporate bullying, would certainly make Garry's story a more interesting one for readers.

Robyn Sefiani explained to attendees how she would approach managing the publicity that would flow from these events and how to minimise reputational damage to the Company, as well as to members of the Board – particularly given Gary's allegations that policies had been applied inconsistently. Robyn suggested that any damage control that she would undertake would be both internal and external and would largely depend on whether the Company's actions aligned with what it publicised as being its values. Her advice also included a suggestion that the Board would need to investigate to discover how deeply-rooted and prevalent the "ends justifies the means" culture was in the organisation and whether the risqué yacht incident was a one-off incident attributable to its former-CEO, or whether more systematic issues lie dormant within the organisation which could create future reputational risk.

In response to a question from Joydeep about whether Frank should accept interviews from Hannah (or another journalist), Robyn also outlined the various strategies that could be adopted and which of these would be most appropriate in various circumstances.

Holistic, best practice processes

The combination of minds on the Panel were illustrative of the many stakeholders that are common to a high-profile termination scenario and also reinforced the importance of having a holistic approach to people management matters, underpinned by a solid and pragmatic legal strategy. However, one key takeaway from the night is that "every termination of employment needs to be treated as the most difficult termination of all" – regardless of who is being terminated and why.

Many in attendance on the night commented afterwards that this year's Hypothetical confirmed much of the best practice processes around termination which they were aware of, but the added dimension of dealing with aspects of the termination which were not usually associated with primary HR functions – such as the reputational and public relations

implications and strategies in these circumstances – were "food for thought" and fertile ground for further discussions with their teams.

We hope that all our guests at the event walked away feeling better prepared to make sure their businesses are well informed about dealing with dismissals.

Once again, the PCS team would like to take the opportunity to thank everyone who attended its signature event. ●

2014 Schedule of Events

PCS has a proud history of thought-leadership in workplace relations. 2014 will be the third year that our firm will deliver to clients a comprehensive range of webinars, education and training sessions and key briefings designed to span the areas that our clients consider to be of most relevance. Our 2014 program includes:

Monthly Webinars: featuring highly topical issues for discussion each month, including the new anti-bullying laws and for the first time we look at how to create a "high performance culture". Other important webinars not to be missed include discussions on how to protect your organisation through effective restraints of trade and how to manage workplace investigations.

CLE for In-House Counsel: a tailored program dedicated to building key awareness of critical issues in employment law and Regulation 176. This session is timed to assist in-house counsel with gaining points towards their mandatory learning.

Legal Basics for Emerging HR Professionals: ideal for junior HR professionals and line managers, this four part series introduces core legal principles across all facets of employment law.

Key Briefings: these are our twice-yearly invitation only events. Our June key briefing looks at why sexual harassment "won't go away" and our hugely successful Hypothetical series returns for a third year in November 2014. Facebook, and social media in general, will be the focus of the 2014 Hypothetical.

For more information or to register please visit our website – www.peopleculture.com.au

New anti-bullying laws: is your organisation ready?

ALISON SPIVEY,
SENIOR ASSOCIATE

From 1 January 2014 new and unprecedented anti-bullying laws will give rise to additional challenges for employers in managing what is an already complex and pervasive issue in the workplace. Here we examine the key features of the new anti-bullying laws, how applications are likely to be managed under the new laws, and provide tips for assessing whether your organisation is ready to meet these challenges.

Changes to the FW Act have conferred a new anti-bullying jurisdiction on the Commission that will take effect from 1 January 2014.

Significant concern and uncertainty about the potential impact of the new anti-bullying laws exists in the face of (possibly conservative) estimates that more than 3,500 applications may be made to the Commission in the first year of the new laws alone.

It is unlikely that much of this uncertainty will be resolved until the new laws have been operating for some time. However, some guidance has recently been provided for parties in lodging or responding to anti-bullying applications made under the new anti-bullying laws, by way of the Commission releasing:

- a summary of the case management model it intends to apply in the new anti-bullying jurisdiction ("**Case Management Model**"); and
- for public consultation, a draft Anti-Bullying Benchbook.

The Case Management Model and draft Anti-Bullying Benchbook are examined below, together with guidance for assessing whether your organisation is ready to respond to the challenges of the anti-bullying laws.

Key features of the anti-bullying laws

The key features of the anti-bullying laws may be summarised as follows:

- From 1 January 2014 a ***worker*** in a ***constitutionally-covered business*** who ***reasonably believes*** that he/she has been ***bullied at work,*** may apply to the Commission for an order to stop the bullying.
- 'Reasonable management action taken in a reasonable way' is not bullying.
- The Commission must 'start to deal with' an application within 14 days of it being made. This does not require that an application be listed for conference or hearing within this timeframe - it may mean the Commission starts informing itself about the application through its own enquiries or requiring that information be provided by other parties.
- The Commission may make any order it considers appropriate (except orders requiring the payment of a pecuniary penalty) provided that a worker has made an application and the Commission is satisfied that:
  - the worker has been bullied at work by an individual or by a group of individuals (including contractors or visitors to the workplace); and
  - there is a risk that the worker will continue to be bullied at work by the individual or group.
- When making an order, the Commission must also take into account:
  - the final or interim outcomes of an investigation that is being, or has been, undertaken by another person or body;
  - the procedures that are available to the affected worker to resolve grievances or disputes; and
  - the final or interim outcomes arising out of any procedure available to the affected worker to resolve grievances or disputes.
- Examples of the orders that the Commission may make are:
  - that an individual or group stop specified behaviour;
  - regular monitoring of behaviour by an employer;
  - compliance with an employer's workplace bullying policy; and/or
  - support and training, or review of an employer's workplace bullying policy.
- An order may be directed to the employer or principal of the affected worker, the employer or principal of an alleged bully and an alleged bully and/or co-workers of the affected worker.
- A breach of an order will attract a civil penalty but will not constitute an offence.
- Applicants remain able to make multiple applications under the FW Act or other legislation, such as work health and safety legislation, in relation to the circumstances the subject of the application.

Case Management Model

The summary of the Case Management Model recently released by the Commission provides an overview of the Commission's jurisdiction under the new-anti bullying laws, and sets out the key steps in the Case Management Model (see Figure 1).

Overall, the Case Management Model reflects a focus on ensuring the system for dealing with anti-bullying applications is sufficiently flexible to manage:

- the "*multiple and sometimes complex legal and practical relationships*" between the parties to those applications; and
- the spectrum of circumstances and behaviours that the Commission may face in dealing with applications, including unrepresented parties and "challenging" behaviours from the parties.

The Case Management Model also acknowledges the need for the Commission to balance its competing objectives of:

- performing its powers and functions in an open and transparent manner; and
- maintaining appropriate confidentiality for the parties due to the potential reputational damage attaching to anti-bullying applications.

In order to manage these competing objectives, the Case Management Model provides that the Commission will:

- alert parties to the availability of orders prohibiting or restricting publication of evidence, identity of parties and/or decisions (or parts thereof);
- unless determined otherwise, conduct mediations and conferences in private (and the identities of parties will not be disclosed in public listings); and
- unless orders are made for a private hearing, conduct hearings in public.

The Case Management Model also requires that Commission members and staff receive training specific to their roles and functions to assist in dealing with anti-bullying applications.

In addition to the overview of the jurisdiction and the key steps in the Case Management Model, the summary includes observations on the nature of the jurisdiction conferred on the Commission by the anti-bullying laws and the implications of that jurisdiction for the Case Management Model and the Commission's role.

Of particular note in relation to the proposed operation of the anti-bullying laws are the Commission's observations that:

- prevention and resolution of alleged bullying within the workplace should be encouraged where appropriate;
- priority must be given to applications where there is a significant risk to parties or the employment relationship; and
- applications that appear to be beyond the Commission's jurisdiction should be isolated and jurisdictional issues dealt with first.

Anti-Bullying Benchbook

In addition to the summary of the Case Management Model, the Commission has also released an Anti-Bullying Benchbook for public consultation.

The notes on the draft Anti-Bullying Benchbook confirm that as the anti-bullying laws have not commenced, and there are as yet no decisions of the Commission or any relevant court providing "*definitive guidance as to the meaning and operation*" of those laws, the Benchbook will be "*updated and modified as appropriate*" as relevant decisions are issued.

That aside, the Anti-Bullying Benchbook nonetheless sets out a range of case examples on bullying in the workplace derived from a number of legal contexts and cases heard in other jurisdictions, and provides that the following behaviours may be considered bullying:

- aggressive and intimidating conduct;
- belittling or humiliating comments;
- victimisation;
- spreading malicious rumours;
- practical jokes or initiation;
- exclusion from work-related events;
- pressure to behave in an inappropriate manner; and
- unreasonable work expectations.

Public consultation on the draft Anti-Bullying Benchbook closes on 27 December 2013. Please contact PCS if you would like assistance in making a submission in respect of the draft Anti-Bullying Benchbook.

In addition, in November 2013, Safe Work Australia released its "*Guide for Preventing and Responding to Workplace Bullying*", to assist persons conducting a business or undertaking in meeting their obligations under the model work health and safety laws.

Preparing your organisation for the new anti-bullying laws

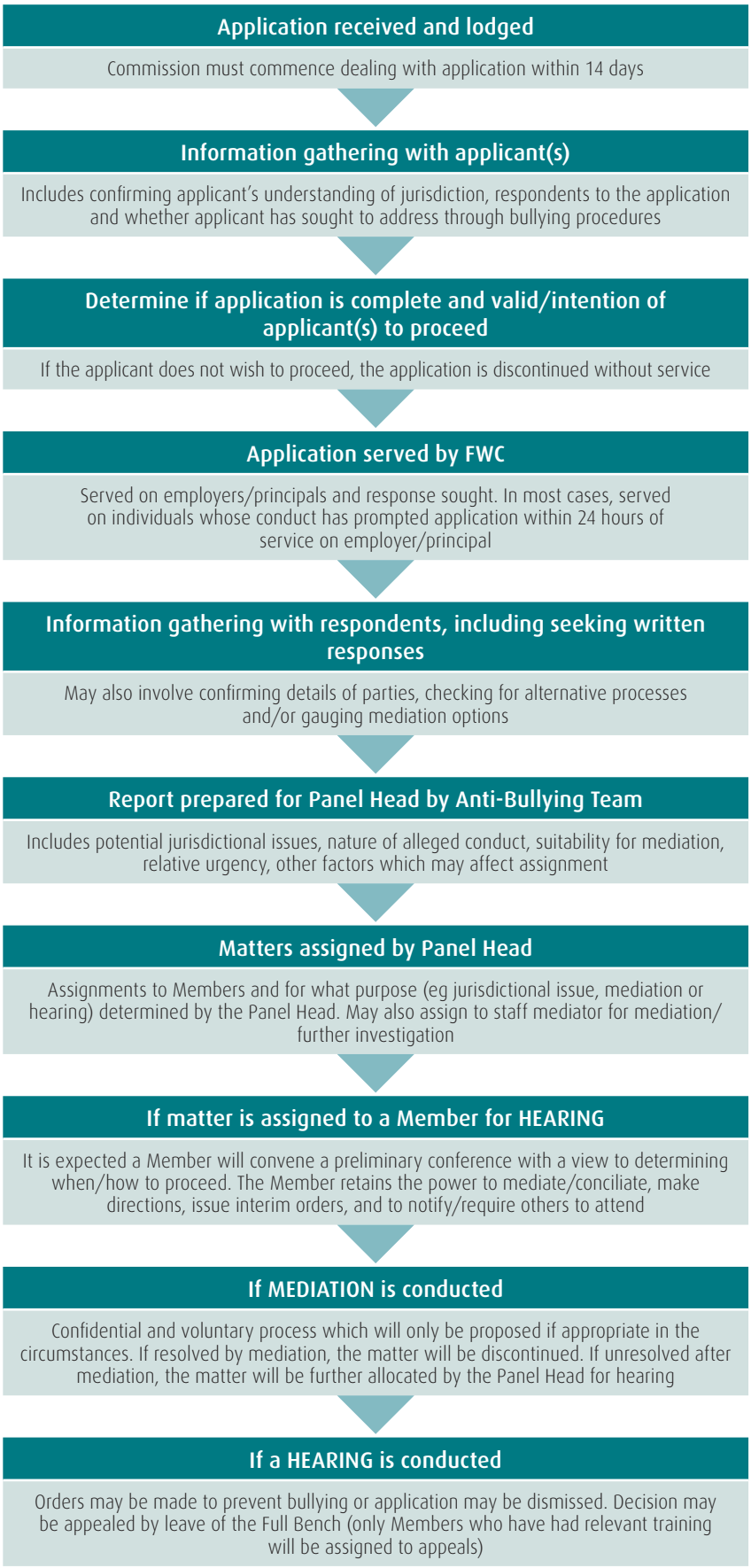
PCS has previously published a critical measures table against which your organisation's readiness for the anti-bullying laws could be measured, and against which we could assist your organisation to strengthen its capacity to defend any claims of bullying.

This table is replicated on the following page.

Table of Critical Measures

Base-Line
• Ensure your organisation has appropriate policies in place
• Training on policies at least every 2 years (face to face training recommended – be aware of the limitations of online training)
• Include framework for handling grievances in policies
• Ensure those with responsibilities in dealing with grievances are aware of those responsibilities
Medium-Complexity
• Ensure behaviour and culture feature regularly on Leadership Team and Board agendas
• "Measure" the extent to which bullying may be occurring and going unreported
• Build capability around performance management
• Engage with third parties (eg unions) about initiatives
Sophisticated
• Establish an external "whistleblowing" scheme
• Understand the problem of "labelling" certain behaviours and seek to effect a paradigm shiL
• Ensure that senior managers "walk the talk"
• Incentivise/measure leadership around capacity /capability of addressing workplace behaviours
• Talk openly within the organisation about its achievements in meeting "best practice"

Figure 1. Key Steps in the Case Management Model



Work's out for the summer: shutdown periods, requirement to take leave, unpaid leave and excess leave

MISA HAN,
ASSOCIATE

DIMI BARAMILI,
ASSOCIATE

The beginning of summer and the festive season means most employers and employees consider their leave arrangements.

With the summer and the festive season just around the corner, it is timely for organisations to review current leave arrangements and be prepared to deal with any associated issues that may arise. These issues include shutdown periods, requiring employees to take leave, employees who are seeking to take unpaid leave and dealing with those who have excessive leave balances. We have addressed some of the common questions employers operating in the federal system may have relating to leave to help manage leave arrangements to suit your organisation's unique needs and circumstances.

Q. My business is generally quiet over Christmas. Can I shut down my business over this period and force all employees to take leave?

A. Yes, provided you satisfy the requirements of the FW Act. Under the FW Act, you can direct your employees to take annual leave during your business shut down period if the modern award or enterprise agreement that your employees are covered by allows you to do so. For example, many modern awards allow businesses to require employees to take annual leave as part of its shut down by providing one month's notice.

If your employees are not covered by any modern award or enterprise agreement, the FW Act provides that you can require the employees to take leave if such requirement is reasonable. Generally, it will be reasonable to require employees to take annual leave during the Christmas and New Year shutdown period.

Q. I do not want to shut down my entire business, however, I would like to force certain individuals or parts of the business to take leave. Can I do this?

A. Your first point of reference should be any relevant modern award, enterprise agreement, contract of employment or policy for guidance on whether there are any provisions concerning forced leave. If there is no instrument which provides for a part business shut down you will need to comply with the FW Act, which requires a request to be reasonable.

In any situation where an organisation is making a decision that involves treating groups or individuals differently to others, there is a risk that individuals may make a claim on the grounds of discrimination and/or adverse action under the general protections provisions of the FW Act. You should always bear these considerations in mind when implementing changes that target specific individuals or groups within the business.

Q. An employee has approached me asking whether they can take unpaid leave during this period. Do I have to say yes?

A. Generally, you can say no to a request for unpaid leave as there is no statutory right to unpaid leave in Australia. However, employers should check any relevant employment contract, policies, modern award and enterprise agreement to see if the employee is entitled to unpaid leave.

In addition, under the FW Act, certain employees can request flexible working arrangements. If such an employee requests unpaid leave as a form of a flexible working arrangement, you must give a written response to the employee within 21 days. You must not refuse such request for unpaid leave except on reasonable business grounds. If you refuse, you must provide the reasons for the refusal in the written response to the employee.

Q. One of my employees has accrued a substantial amount of leave and is not planning to take any leave over this period. How can I encourage them to reduce their leave balance?

A. Excess leave is a widespread problem in certain workplaces. It can lead to fatigue, loss of productivity and low employee morale and can contribute to work health and safety issues. Furthermore, in the event of termination of employment, excess leave can add to the cost of any payments due on termination.

If you have an employee with a substantial amount of leave, you can alert them to the fact that they have an excessive amount of leave accrued and that you would be happy for them to take leave during the Christmas period or another mutually convenient times.

If the employee still does not reduce their leave balance, you should check any relevant contract, enterprise agreement, award or internal policy. Some modern awards allow employers to require employees to take annual leave if they have accrued substantial leave. If an employee is not covered by any modern award or enterprise agreement, you can direct the employee to take the annual leave if such a requirement is reasonable. While such a requirement will most likely be deemed reasonable in situations where employees have accrued excessive leave, employers should try to give as much notice as possible and schedule the leave around mutually convenient times.

Failing that, there may also be scope for the employee to 'cash-out' their annual leave in certain circumstances. The FW Act allows an employee to cash out their annual leave if it is permitted under a modern award or enterprise agreement or, if the employee is award or agreement free, an agreement is made between both parties in accordance with the FW Act. In both scenarios, cashing out can not lead to an employee's annual leave balance falling below four weeks. However, when cashing out annual leave, employers should be mindful of the impact that the lack of a break can have on the employee's physical and emotional well-being.

The employer may also have grounds to direct the employee to take excessive accrued leave to ensure an appropriate break from work so as to discharge its duty of care under work health and safety legislation.

CONCLUSION

Annual leave provides an invaluable opportunity for employees to take a break and re-charge. Employers are advised to plan ahead and manage leave proactively to ensure that their business needs are met and the personal needs of employees are addressed. ●

CASE STUDY: – *United Voice v Valspar (WPC) Pty Ltd [2013] FCCA 1437*

Wattyl sought to reduce work levels in its manufacturing business by requiring employees to take a combination of annual leave and rostered days off to reduce their nine day fortnight to an eight day fortnight. Wattyl was also proposing further shutdown periods over Christmas. This decision was in response to an excess of paint stock levels which were set to reach maximum capacity. It was noted that if this option was not pursued, they may need to look at other options such as redundancy.

The employees did not wish to take their leave in this manner as they preferred to take larger blocks of leave.

There was a dispute as to whether the provisions governing annual leave under the FW Act (which require agreement) or the applicable enterprise agreement (which gave Wattyl the power to direct annual leave where all or part of the business is closed) prevailed in this situation. It was ultimately held that Wattyl was acting in accordance with the power provided to it under the enterprise agreement and was permitted to direct part of the business to take annual leave.

TIPS FOR YOUR ORGANISATION IN MANAGING LEAVE

- Be open and transparent with employees throughout the process and allow them an opportunity to provide input.
- Encourage employees to pursue a work life balance by taking annual leave.
- Be open and flexible to other leave arrangements that may suit an employee.
- Consider your current arrangements and obligations within the applicable policies, contracts, awards and/or enterprise agreements.
- Seek advice if you are not certain about your employees' rights and obligations to avoid the risk of a legal claim.

Tweeting or twerking after hours: employers should always be alert

ERIN LYNCH, ASSOCIATE

Employers are now all too aware of the extent to which not only their employees' conduct but also their employees' social media publications of conduct at work, at a staff Christmas event, or in an employee's own time, can damage the employer's brand and lead to legal ramifications.

Why should you regulate after-hours behaviour?

While many employers probably do not wish to involve themselves in employees' out-of-work conduct, the legislative obligations which exist for employers as well as individuals (officers and employees alike) under both work health and safety and anti-discrimination legislation effectively require employers to regulate conduct that is connected with the workplace or with other workers.

The *Sex Discrimination Act 1984* (Cth) (the "**SD Act**")makes it unlawful for employees and other "workplace participants" to sexually harass each other at the workplace as well as for an employer to sexually harass an employee. The SD Act provides a broad definition of the "workplace" as "a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant". In circumstances where an employee is found to have sexually harassed another workplace participant, an employer who has prohibited unacceptable workplace behaviour at after hours events and has taken all reasonable steps to ensure this prohibition is understood and enforced will have a defence to a claim that the employer is vicariously liable for the acts of the employee.

Similarly, employers' obligations to ensure, to the extent reasonably practicable, the health and safety of workers under work health and safety ("**WHS**") legislation will apply if the after-hours event involves workers being "at work in the business or undertaking". This duty also extends to ensuring that the "health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking". If the after-hours conduct triggers this duty, then officers and "workers" (employees and a range of others) are also implicated as they have a duty to either, in the case of officers, exercise due diligence to ensure the employer complies with its duties or in the case of workers "(w)hile at work", to take reasonable care of their own health and safety and to ensure their acts or omissions do not endanger the health or safety of others (and also to comply with policies and instructions). If an employer and/or an individual manager takes all reasonable steps to prohibit inappropriate out of hours conduct but is faced with a WHS investigation and/or prosecution arising out of another employee's misbehaviour it will be well placed to defend any prosecution.

As observed in a Commission decision, it is "becoming common for employees to express displeasure about their employers or co-workers on Facebook and other social networking sites and what might previously have been a grumble about their employer over a coffee or drinks with friends has turned into a posting on a website that, in some cases, may be seen by an unlimited number of people".[1]

Social media

According to PCS consultant Greg Harrison (former Commissioner of what is now the Commission) "to regulate the use of social media outside the work context effectively, it is appropriate to implement and maintain a social media policy that sets out clear boundaries".

The effectiveness of a well-thought-out and well-drafted social media policy is demonstrated in a case involving the ACT Department of Education and Training[2]. The case involved a school teacher who allegedly breached the Department's

[1] *Fitzgerald v Dianna Smith T/A Escape Hair Design [2010] FWA 7358*

[2] *Applicant v ACT Department of Education and Training [2012] FWA 2562*

Directions on the use of social networking sites and the Teacher's Code of Practice, by allowing students to be "Facebook friends" and then being untruthful when questioned about her Facebook account.

It was found that the applicant accepted a number of students as friends on her Facebook account, the applicant was aware that they were students and further, was aware that her actions were contrary to the Code of Practice and the Department's Directions. The decision confirmed that the reduction of the applicant's salary by one increment and the reiteration of a final warning should stand.

PCS recommends employers assess the ways that their employees use social media, particularly as we enter the "silly season" and review social media policies currently in place and, in particular, how broadly these policies extend.

How can you regulate the behaviour?

The regulation of appropriate, or inappropriate, after-hours workplace behaviour may be contained within any workplace behaviour policy or policy on social media (as discussed above), sexual harassment, discrimination or bullying because whether it occurs during or after work hours, the types of unacceptable behaviour will be the same and should be treated accordingly.

Key steps

- Analyse your organisation's current on-line presence and the ways in which your employees use social media both in and outside of the workplace.
- Review any social media policies currently in place and consider how far these policies extend. Ensure that any social media policy is robust and reinforces other policies, particularly in relation to sexual harassment, discrimination, bullying and WH&S.
- Ensure that the policy is explained to employees, preferably with an acknowledgement by them that they have read and understood the terms of the policy and are familiar with it.
- Staff should also receive training regarding the policy – this should include education and awareness about social media as it is a constantly evolving area.
- Regularly update the policy so that it remains relevant and make sure employees are aware of any changes.
- Ensure that inappropriate use of social media by employees does not go unaddressed. ●

The Annual Wage Review explained

ELIZABETH MAGILL,
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Each year, the Fair Work Commission is tasked with the job of reviewing and setting minimum rates of pay for modern awards and the national minimum wage. This is referred to as the 'annual wage review'. The minimum wage plays an important role in providing pay equality and adequate income to low income households. The rates set through this process often have the greatest impact on small to medium businesses as they are required to adapt operations and staffing levels to meet their budgets. In this article, we consider how the minimum rates and wages are determined and likely trends for the next annual wage review.

Since the 1907 Harvester decision and the introduction of the minimum wage into the Australian workplace system, it has been a key function of the Commission (and its predecessor national workplace relations tribunals) to review and set the minimum wage for both employees covered by an award and award free employees. In June 2013, the Commission delivered its fourth annual wage review under the FW Act. As a result of this review, minimum wage entitlements increased to $16.37 an hour from 1 July 2013 – which was a modest increase of 2.6% or $15.80 per week (based on a standard 38 hour week) and lower than determined in last year's review.

How the minimum wage is determined

In conducting the annual wage review the Commission is required to convene an Expert Panel (comprising the President, three full-time members and three part-time members) (the "**Panel**"). The Panel considers written submissions from interested organisations and individuals (33 interested businesses, governments and industry groups made submissions to the Commission this year), consultations before the Panel and any research which it commissioned as part of the annual wage review. Determining the minimum rates of pay and the national minimum wage is in accordance with the minimum wages objective and:

- the performance and competitiveness of the national

economy, including productivity, business competitiveness and viability, inflation and employment growth;

- promoting social inclusion through increased workforce participation;
- the relative living standards and the needs of the low paid;
- the principle of equal remuneration for work of equal or comparable value; and
- providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

The 2013 Decision

As one would expect, economic considerations featured highly in the Commission's reasoning and subsequent decision to award a moderate increase "which will result in a small improvement in the real value of modern award minimum wages in 2013-14".[1] Notwithstanding reasonably strong economic conditions over the financial year 2012/2013 and the economic outlook remaining favorable for the financial year ahead, the Commission relied on an expected ease in growth of the GDP, an expected increase in the unemployment rate, modest inflation and the increase to the superannuation guarantee rate to account for its decision.

With respect to social considerations and the assessment of relative living standards and the needs of the low paid, including the extent to which low-paid workers are able to achieve a decent standard of living and to engage in community life, the Commission noted that award rates of pay have fallen relative to average earnings, with earnings of award-reliant workers falling behind the rest of the workforce.[2] The 2012-13 figures are consistent with an ongoing trend which is resulting in a decline in the relative living standards of award-reliant employees. The Commission also noted the decrease in award-reliant employees and the corresponding increase in employees on collective agreements. While these social considerations did not result in a significant improvement in the minimum rates of pay, the Commission has flagged that it will be addressing the decline in the relative living standards of award-reliant employees in the annual wage review schedule for 2014.

What does this mean for Australian Workers and Employers?

As is typically the case following the annual wage review, the decision has not been without controversy and as noted by the Commission itself "there is often a degree of tension between the economic and the social considerations which we must take into account."[3]

It is believed that the annual wage review will affect up to 2.3 million people across Australia (including directly affecting over 1.5 million employees who are award reliant), as according to a range of surveys, between 4 and 10 per cent of Australian adults are currently paid at or around the minimum wage. Minimum wage employment is most common in occupations such as food preparation, process workers, sales, hospitality and in agriculture and related occupations. It is also most common amongst younger and older workers, those with low levels of education and across small firms and businesses.

While unions argue that the increase does not go far enough, failing to close the gap between minimum wage earners and the rest of the workforce, employer groups across Australia have labelled the increase a "blow for the small end of town".[4] Australian Chamber of Commerce and Industry CEO Peter Anderson says the increased wages will "have to be funded by Australia's small and medium business community"[5], affecting job security and containable labour cost structures as businesses seek to try to reduce working hours in order to maintain employment. These arguments are reflective of the deeply controversial policy considerations at the heart of annual wage reviews.

The Year Ahead

The process has now commenced for the minimum wage review 2014, with submissions due by 28 March 2014 and consultations scheduled to occur in mid May 2014. For the first time, the Commission is introducing an early consultation process allowing for the hearing of any witness evidence, which is due to occur in Feb/March 2014 (which may be subject to cancellation if there is no interest).

As identified during the 2013 annual wage review and subsequent decision, it is expected the Commission will be addressing the growing earning inequality in real wages compared to non-award covered employees and the associated decline in the relative living standards of award-reliant employees.

The Australian Government Treasury reports the outlook for the economy is favourable, "with solid growth, low unemployment and well contained inflation"[6]. The Australian economy is expected to continue to outperform most other advanced economies over the year ahead and in terms of employment conditions it is forecast that there will be continuing low levels of unemployment and high levels of labour force participation. Despite this, it is predicted that wage growth is expected to be subdued. The predictions for wage growth are largely based on a slight easing of GDP growth, slight increase in unemployment and the below-trend outlook for employment growth. Looking at the year ahead, while the Commission has stated that it will be looking to address the living standards of award-reliant employees, it is likely the current economic forecasts may restrict the Commission from awarding anything more than another modest increase. ●

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[1] *Annual Wage Review [2013] FWCFB 4000 at 44.*

[2] *ibid 32.*

[3] *ibid 10.*

[4] *ABC News On-Line 'Fair Work Commission recommends $15.80 per week rise in minimum wage' accessed at http://www.abc.net.au/news/2013-06-03/fair-work-commission-recommends-26-per-cent-rise-in-minimum-wa/4729464 on 29 November 2013.*

[5] *id.*

[6] *Australian Government Treasury, Budget Paper No 1, accessed at http://www.budget.gov.au/2013-14/content/bp1/html/bp1_bst2-01.htm on 3 December 2013.*

2013: a year in review

ALISON SPIVEY,
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As 2013 draws to a close, we review the significant legal developments in employment law and workplace relations over the previous 12 months.

There have been a number of significant developments in and touching on employment law and workplace relations in the previous 12 months. These developments include further legislative change (introducing unprecedented anti-bullying laws), a change in the Federal Government, together with landmark judicial decisions and further initiatives to prevent and manage workplace issues such as harassment and discrimination.

In this article we summarise and review these developments and their potential impact for your organisation.

Bullying

2013 saw a significant development in relation to workplace bullying, with changes to the FW Act establishing a new anti-bullying jurisdiction from 1 January 2014, which is to be overseen by the Commission. The new laws will provide workers who reasonably believe that they are being bullied at work with a further avenue of redress, by applying to the Commission for orders to stop that bullying.

The new anti-bullying laws, (including the guidance material recently published by the Commission about the management of anti-bullying applications), are the subject of a separate article in this edition of *Strateg-Eyes*.

Change in government

The Coalition Government was elected into power in September 2013. In terms of the potential impact of the change in government from an employment law and workplace relations perspective:

- the Coalition's workplace relations policy platform heading into the election was reflected in the "*The Coalition's Policy to Improve the Fair Work Laws*" released in May 2013 ("**Policy**");
- the Policy reflected an intention not to enact wholesale changes to the current legislative framework, but instead retain the changes made by the Labor Government except as otherwise set out in the Policy; and
- the primary areas in which amendments will be sought to be made will be paid parental leave, reestablishing the Australian Building and Construction Commission ("**ABCC**"), and the rules relating to financial disclosure and conduct of registered organisations and officials (including the introduction of the Registered Organisations Commission to oversee these matters).

The Coalition also flagged its intention to have the Productivity Commission undertake a review of the operation of the FW Act in the Policy.

The Coalition Government tabled legislation seeking to reinstate the ABCC and to enact the changes in relation to registered organisations in the first sitting of the new Parliament in November 2013.

Implied duty of trust and confidence: *Barker v Commonwealth Bank of Australia* [2013] FCAFC 83

The landmark decision of the Full Federal Court in *Barker* involved the employer's failure to consult over the redundancy of a longstanding employee's position in accordance with the terms of the employee's employment contract and the employer's policies and procedures.

The decision:

- confirmed the implied duty of trust and confidence forms part of Australian law. (The basic premise of this duty is that an employer, will not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee);
- serves as a timely reminder not only of the need to comply with the obligations imposed on your organisation when entering into

contracts of employment, but also, particularly in larger organisations, to ensure that your processes are as seamless and coordinated as possible, or you may otherwise face significant consequences.

Unfair dismissal

Throughout 2013 the number of unfair dismissal claims continued to grow, and a large proportion of those claims (approximately 80% in FY2012/13) were settled before or at the conciliation stage.

Where matters have proceeded to hearing, the key cases have continued to be in areas such as employee misconduct, out of hours conduct, use of social media, performance management and drug and alcohol testing, with the Commission continuing to focus on ensuring that employers have complied with their legislative obligations, including having a valid reason for termination and affording an employee procedural fairness.

The decision in *Thomas v Newland Food Company Pty Ltd* [2013] FWC 8220 demonstrates there may be other areas of an employee's conduct that were not relied on in making the termination decision that will impact on the remedial action taken where a dismissal is found to have been unfair.

In this matter, the employee secretly recorded discussions at meetings between himself and representatives of his employer regarding his workers' compensation claim. Despite numerous failures of the employer in the termination process, the Commission determined that the employee's actions had "destroyed" the trust and confidence in the employment relationship, and ordered compensation in place of reinstatement.

General protections claims

Similar to unfair dismissal claims, general protections claims under the FW Act have also continued to increase year on year, with in excess of 2,800 general protections applications made in FY2012-13.

2013 has seen the further development of precedent in the general protections space, and in particular an increasing understanding of what does, or does not, constitute a "workplace right". A number of cases during this period have also attracted significant penalties of up to hundreds of thousands of dollars in the most serious of matters.

Further, cases such as *United Motor Search & Anor v Hanson Construction Materials & Anor* [2013] FCA 1104 serve as a timely reminder of:

- the scope of the general protections provisions (that is, that they are not confined only to the employer-employee relationship, but also extend to contractors and prospective employees); and
- the availability of alternative remedies such as injunctive relief, and the potential impact that these alternative remedies can have pending resolution of the claim.

Discrimination and harassment

Developments in discrimination and harassment in 2013 included:

- the referral of the *Human Rights and Anti-Discrimination Bill 2012* (the legislation which was intended to consolidate federal anti-discrimination legislation) back to the Attorney-General's Department in February 2013 following parliamentary review;
- changes to the SD Act to outlaw discrimination on the basis of sexual orientation, gender identity and intersex status. These changes came into effect on 1 August 2013; and
- the Federal Government announcing in June 2013 an enquiry into the prevalence of discrimination in the workplace of women who are pregnant or who are returning to work after a period of parental leave. Consultation closes shortly, and the final report from the enquiry is due to be released in June 2014.

In addition, a significant development from the courts in the area of discrimination and harassment was the decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102. In that matter, the employer was found to be vicariously liable for sexual harassment by one of its employees after the Court found that the employer's policy was "*inadequate*" because it did not state that sexual harassment was against the law.

The decision demonstrates the importance of ensuring the terms of your organisation's policies and procedures are appropriate and reflect the potential consequences for an employee of any improper conduct on their part, so that your organisation can defend itself in the face of unlawful conduct, such as sexual harassment, by its employees.

Common time limits

1 January 2013 saw the commencement of a common time limit of 21 days from the date of dismissal for the making of unfair dismissal claims and general protections claims involving dismissal under the FW Act. Previously, eligible employees had 14 days from the date of dismissal to make an unfair dismissal claim, and 60 days from the date of dismissal to make a general protections claim involving dismissal.

Requests for flexible working arrangements

From 1 July 2013, amendments to the FW Act extended the right to request flexible working arrangements to employees:

- with caring responsibilities (including those with school age children);
- who are 55-plus years old; or
- who are experiencing, or supporting a member of their household or immediately family who is experiencing, domestic violence.

The amendments to the FW Act also clarify "reasonable business grounds" upon which an employer may refuse a request for flexible working arrangements.

Superannuation

From 1 July 2013, the minimum superannuation guarantee increased to 9.25%, and is set to increase incrementally to 12% by 2019. ●

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