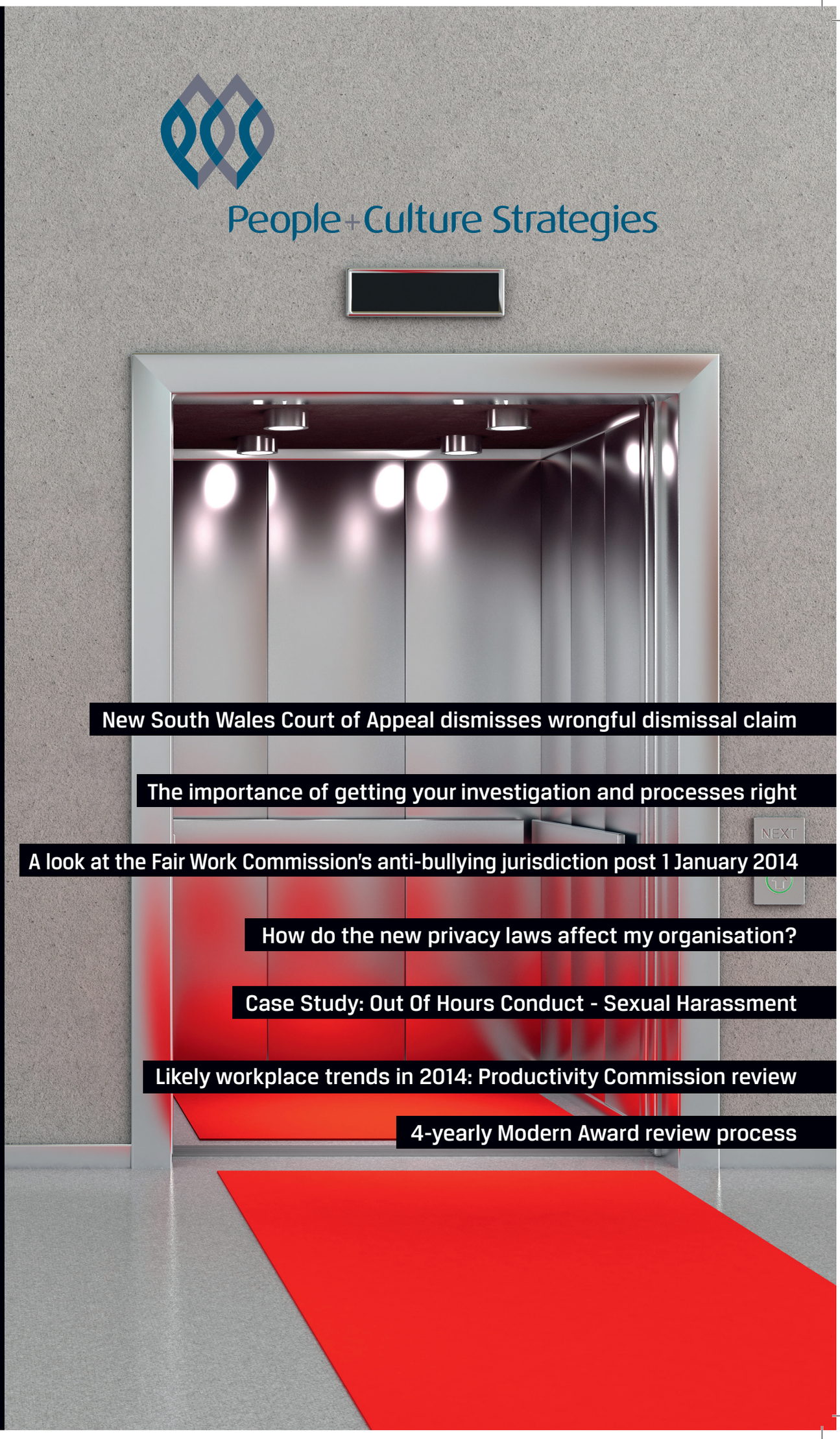
STRATEG-EYES

workplace perspectives

#12

ISSUE: MAY 2014

People + Culture Strategies



New South Wales Court of Appeal dismisses wrongful dismissal claim

The importance of getting your investigation and processes right

A look at the Fair Work Commission's anti-bullying jurisdiction post 1 January 2014

How do the new privacy laws affect my organisation?

Case Study: Out Of Hours Conduct - Sexual Harassment

Likely workplace trends in 2014: Productivity Commission review

4-yearly Modern Award review process

>> MESSAGE:

From the Managing Principal

WELCOME TO OUR LATEST EDITION OF STRATEG-EYES: WORKPLACE PERSPECTIVES, PRESENTED TO YOU IN A FRESH NEW FORMAT!

At PCS, we have as our first core value a commitment to innovation. Much thought has gone in to the presentation of this, our flagship publication, so that it is true to our promise of being a genuinely thought-leading publication. In addition to the format, I trust you will appreciate the breadth of topics covered in what is a mammoth issue.

2014 has got off to a very successful start for our firm. We were so pleased to maintain our firm's undefeated record in litigation with the NSW Court of Appeal's decision in Bibby Financial Services v Ashley Sharma where the Court upheld our successful prosecution of Mr Sharma's case. While we are very clear about our value proposition as a firm that we can add the most value to our clients where we are engaged at the front end of decision-making, our record in litigation confirms our status as a top-tier firm in all aspects of workplace relations law.

This year will once again see PCS sponsor Key Media's HR Summits in Melbourne, Perth and Brisbane and a range of other premier HR events, with the Sydney HR Summit a massive success. These commitments augment the extensive schedule of events that we will once again be hosting throughout this year. As is now tradition, that program will be capped off with our signature event "The Hypothetical" in November.

Finally, it is a pleasure to share with you all that our firm's status as a unique provider of workplace relations legal and strategic advice was confirmed at the recent International Bar Association Employment Law Conference held in Cape Town. A significant number of attendees from around the world fed back to me their high regard for what we as a firm are seeking to achieve and noted their own attempts at replicating some of our initiatives.

I look forward to seeing you at one of our upcoming events.

Joydeep Hor
Managing Principal

A LOOK INSIDE:

People + Culture Strategies

People + Culture Strategies reinvigorates its brand

PCS was established in 2010 and has very quickly become a pre-eminent Australian and global workplace law firm. Recognised for innovation and its remarkable growth (being Australia's fastest growing law firm in 2012 and fastest growing workplace relations law firm in 2013 according to ALB Magazine and BRW) the PCS logo symbolises partnership, with the firm's acronym spread across the interlock that reflects the relationship our firm has with its clients.

As will be seen from this edition of Strateg-Eyes and the numerous events we are hosting or sponsoring in upcoming months, our new colour palette reflects a bold and sophisticated approach to the provision of our services. Uncompromising credibility as a law firm and unquestionable commitment to innovative service provision remain front and centre of our values and have been integral to our growth and success.

GET IN TOUCH:

Sydney
Level 9, NAB House,
255 George Street,
Sydney NSW, 2000
T +61 2 8094 3100
F +61 2 8094 3149

Melbourne
Level 27,
101 Collins Street,
Melbourne VIC, 3000
T +61 3 9221 6129
F +61 2 8094 3149

E info@peopleculture.com.au
www.peopleculture.com.au

NOTE: In this edition, unless otherwise specified: the Act means the *Fair Work Act 2009* (Cth); and FWC means the Fair Work Commission.

GETTING IT RIGHT: investigations + justified claims

Elizabeth Magill Senior Associate

The New South Wales (NSW) Court of Appeal recently handed down its decision in *Bibby Financial Services Australia Pty Limited v Sharma (2014) NSWCA 37* confirming Mr Sharma's entitlement to the payment of a "special bonus" following the termination of his employment.

PCS successfully acted for Mr Sharma in both his proceedings before the Supreme Court of New South Wales and the recent appeal proceedings brought by his former employer, Bibby Financial Services Australia ("Bibby"), in the NSW Court of Appeal. Both decisions highlight the critical importance of undertaking workplace investigations and ensuring that any subsequent decisions made with respect to employees are based on a sound and justifiable decision making process.

SHARMA v BIBBY FINANCIAL SERVICES

THE FACTS

Proceedings commenced in the Supreme Court arose from the termination of Mr Ashley Sharma's employment on the grounds of serious misconduct. Mr Sharma was employed as a Sales Director of Bibby from 2002 to 2009. Shortly before Bibby terminated Mr Sharma's employment allegations were made that Mr Sharma had engaged in sexual harassment including inappropriate touching, inappropriate comments and unwelcome attention. As a result of the allegations Bibby commenced an investigation. The NSW Supreme Court found that a number of features of Bibby's investigation were remarkable and demonstrated that the investigation was seriously and fatally deficient.

Despite Bibby concluding that Mr Sharma had engaged in conduct that was "unbecoming of a director", none of the witnesses corroborated the allegations, only one witness gave "some small support" to the allegations and most remarkably, Mr Sharma was not interviewed, the allegations were not put to him and at no time prior to the termination of his employment was he given an opportunity to respond. The Court also noted Bibby's failure to follow it's own grievance procedure as a further feature of the investigation that demonstrated its inadequacy.

> **"critical importance of undertaking workplace investigations"**

Despite the lack of evidence supporting the allegations, Mr Sharma was called into a meeting on 4 February 2009 and advised that his employment was to be terminated on notice. Mr Sharma was invited to consider resigning and sent a deed of release with an offer of notice and a pro-rata amount of his "special bonus" valued at $1.4 million, which was due to be paid shortly after the termination of his employment. Following discussions regarding Mr Sharma's termination, which ultimately broke down, Bibby then purported to terminate Mr Sharma's employment for serious misconduct and Mr Sharma was not paid notice or his special bonus.

THE COURT'S VIEW

At first instance, and reaffirmed on appeal, Bibby was held to have elected to terminate Mr Sharma's employment with immediate effect at the meeting on 4 February 2009 and therefore, could not later elect to terminate Mr Sharma's employment for serious misconduct. The Court held that Bibby terminated Mr Sharma's employment in full knowledge of the allegations yet choose not to rely on them, preferring to terminate Mr Sharma's employment on notice to "save some unpleasantness". As a result, Mr Sharma was entitled to six months' notice (his contractual notice period) and payment of the special bonus. The Court of Appeal upheld this finding concluding that the effective date of termination was 4 February 2009 and:

> "*...what occurred after 4 February 2009 is that Bibby became impatient with Mr Sharma's failure to accept the offer contained in the draft Deed of Release, which provided for substantial payments to be made by Bibby to Mr Sharma, and then engaged in a purported cl13.5 process in an attempt to disqualify Mr Sharma from any entitlement to the Special Bonus or payment in lieu of notice.*"

With respect to Bibby's argument that regardless of a finding that Mr Sharma was terminated on notice, Bibby was entitled to rely on Mr Sharma's conduct as constituting serious misconduct justifying termination for cause, this argument was rejected. On appeal the Court held Bibby did not have a valid right of termination. The Court held that Mr Sharma was entitled to procedural fairness before any decision was made by Bibby to terminate his employment for cause, relying upon the allegations of serious misconduct. The Court further held that Bibby was "....obliged to make its final decision in good faith taking into account the factual material before it....", including Mr Sharma's response. After considering the specific allegations against Mr Sharma the Court held that two of the allegations had not been proved and the remaining three, even if proved "....did not amount to serious misconduct that would warrant dismissal."

TAKE AWAY

The Sharma case is a compelling message to employers about the importance of conducting a proper, full and impartial investigation, and highlights the necessity of ensuring:

- procedural fairness, interviewing all relevant witnesses and putting allegations to the respondent with a sufficient opportunity to respond;
- that employers follow their own policies with respect to investigations and disciplinary matters;
- that there is sufficient evidence to substantiate any allegations made, particularly if they are to be relied upon to justify disciplinary action; and
- that disciplinary decisions are a fair and proportionate response to the conduct and based on a sound decision making process that considers all the evidence.

With employers increasingly called upon to justify disciplinary decision, the case highlights the need for employers to have evidence and a clear and cogent decision making process that will withstand scrutiny.

BULLYING:
A new + different look

Congratulations on your promotion to the role of National HR Manager of The Company! It's your first day on the job and the morning has been a busy one. Suddenly, an email in your inbox from the FWC catches your eye. It's an anti-bullying application lodged by an employee of one of The Company's contractors (the "Applicant") against a number of The Company's employees in relation to bullying and harassing conduct between July and November 2013. The email says The Company has seven days to respond. You know that the FWC's new anti-bullying jurisdiction commenced in January 2014 but must admit that you're not across all the details. What does all this mean for The Company and what do you do now?

Margaret Chan Associate + **Roy Yu** Associate

WHY ARE WE GETTING SERVED WITH THE APPLICATION IF THE APPLICANT ISN'T AN EMPLOYEE?

The fact that the Applicant is not an employee does not mean that they cannot bring an anti-bullying application before the FWC. Specifically, the anti-bullying laws apply to any 'workers' of a constitutionally-covered business. The definition of worker is considerably broad, extending beyond the employer-employee relationship and capturing a number of different ways that modern work relationships are organised.

For the purposes of the provisions, a worker is expressed to include:

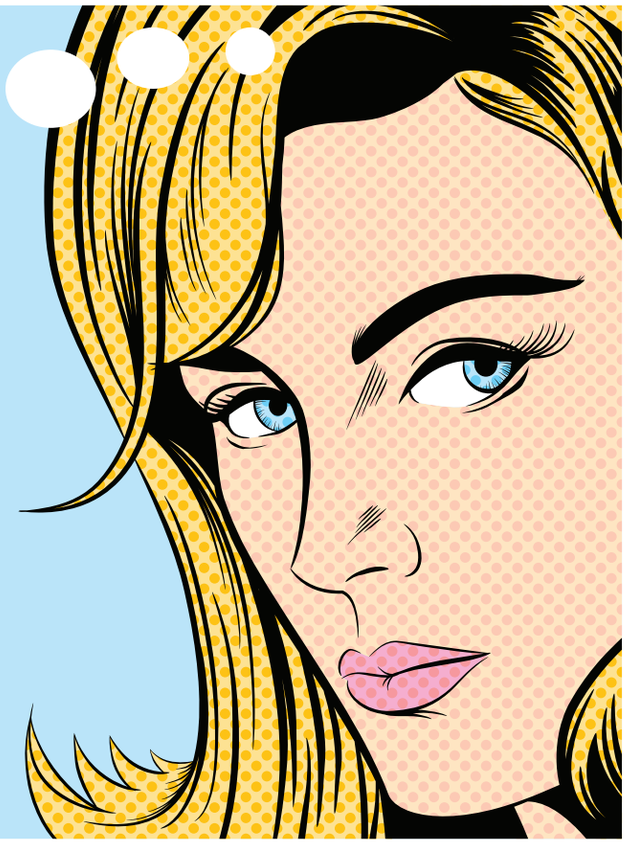
- employees;
- contractors or subcontractors;
- employees of a contractor or subcontractor;
- employees of a labour hire company assigned to work for a particular business or organisation;
- outworkers;
- apprentices or trainees;
- students gaining work experience; and
- volunteers.

Since the definition of worker is so broad, the FWC's anti-bullying case management model not only provides that a copy of an anti-bullying application lodged with them will be served on the worker's employer/principal and the person and/or people who the worker alleges is bullying them, but also that a copy may be served on the person or business who employs or engages the person the worker alleges is bullying them (if different to their employer/principal). Responses to the application may be sought from all these parties, if the FWC believes that this is necessary. In this case, this includes The Company as the employer of the employees who have participated in the alleged bullying conduct.

USE OF INTERNAL GRIEVANCE PROCEDURES

While the FWC recommends and encourages the use of internal grievance and dispute resolution procedures at a workplace level through workers raising issues with their supervisor/manager, health and safety representative or the human resources department, there is also recognition that in some circumstances this will not be possible. Under the legislation, there is no requirement that an Applicant

- The Applicant isn't one of our employees – so why are we getting served with this application?
- This is the first I've heard of any issues in that team – can the FWC be involved already?
- Is the alleged conduct really bullying at work?
- The 'bullying' conduct was in July 2013, but the FWC's anti-bullying jurisdiction didn't start until 1 January 2014 – can they still deal with the matter?
- What happens after The Company files its response?
- How has the FWC been dealing with these claims since the new jurisdiction commenced?
- What are the risks for The Company and how do I mitigate these?



Hypothetical scenario:

Section 789FD of Fair Work Act 2009 (Cth) ("FW Act") defines bullying as being when:

"A person or a group of people repeatedly behave unreasonably towards a worker or a group of workers and that behaviour creates a risk to health and safety."

needs to have utilised internal grievance procedures before making an application to the FWC. So despite this being the first time you or The Company has heard of the complaint, the Applicant is not prevented from going straight to the FWC to seek a remedy.

IS THE CONDUCT REALLY BULLYING?

The application states the conduct complained of includes:

- the employees' repeated use an offensive 'nickname' when referring to the Applicant;
- some employees refusing to give information required for efficient delivery on a non-urgent project;
- the Applicant being excluded from social events on a regular basis by the group;
- a decision by the head of the work area to set an 'ambitious' time-frame for delivery of the project; and
- a decision by the head of the work area to reduce the duties of the contractor and reallocate them to another team member after hearing management comment about the contractor 'slacking off'.

Section 789FD of the *Fair Work Act 2009* (Cth) defines bullying as being when:

> *"A person or a group of people repeatedly behave unreasonably towards a worker or a group of workers and that behaviour creates a risk to health and safety."*

However, it does not include reasonable management action carried out in a reasonable manner. It should be noted that "reasonable management action" for the purposes of the Act is broader than under other regimes (such as Workplace Health and Safety) and the explanatory memorandum appears to suggest that everyday actions to effectively direct and control the way work is carried out – such as the allocation of work and the giving of fair and constructive

feedback on performance, is also intended to be covered by this exclusion.

On the facts, there are a number of behaviours that the Applicant has complained of that are likely to be considered bullying (e.g. name calling and ostracisation), while a number fall within the grey area between reasonable management action carried out in a reasonable manner and bullying, depending on the extent of such conduct.

CONDUCT BEFORE 1 JANUARY 2014

On 6 March 2014, the Full Bench of the FWC handed down a decision in ***Ms Kathleen McInnes*** [2014] FWCFB 1440, which held that it is not prevented from considering behaviour that occurred before the start of the new bullying jurisdiction on 1 January 2014. Although it had been argued that the threshold test, which requires that the worker "is at work" in a constitutionally-covered business at the time of making their application, implies that a worker can only be bullied at work from a point in time when the legal definition of 'bullying' for the purposes of the Act was in force, this argument was rejected by the Full Bench.

Specifically, Justice Ross, Vice-President Hatcher and Commissioner Hampton found this referred to the requirement for the worker to still be party to some form of work relationship (i.e. that they had not been terminated) and that while the legislation did not have retrospective operation, there was a distinction between legislation which has an effect on past events, and legislation which bases future action on past events. It was held that the FWC's jurisdiction to make anti-bullying orders fell within the latter category, and therefore there was no issue of "retrospective application" of the anti-bullying laws.

Therefore, provided that the Applicant is still undertaking work for The Company, they are entitled to bring this claim seeking anti-bullying orders against their employer, The Company and its employees.

WHAT HAPPENS AFTER THE RESPONSE IS FILED?

After you have submitted your response to the application, a report is prepared for the Panel Head of the Anti-bullying Panel (currently Commissioner Peter Hampton), who determines whether to assign the application to mediation, a preliminary conference, a directions hearing or directly to a hearing.

Mediation before the FWC is an informal, voluntary, private and generally confidential process facilitated by a FWC Member or by one of the FWC's anti-bullying mediators. As the process is voluntary, there is no obligation to participate. However, it may be an ideal opportunity to understand the nature and detail of the Applicant's complaint, particularly if a complaint was not raised internally and the anti-bullying application is the first time the behaviour has been drawn to The Company's attention. This is also an ideal opportunity for the parties to confidentially come to an agreement on possible options for resolution.

In light of the aim of the jurisdiction to stop bullying and return parties to a functional working relationship, it has been indicated by the FWC that it will not promote or recommend the resolution of these applications on the basis of monetary payments.

If the matter is not suitable for mediation, or the matter cannot be resolved by the parties through this means, then a conference or hearing may be held - a conference is generally conducted in private, while a hearing is generally open to the public.

Should the matter still fail to be settled after a hearing has been convened, then the FWC may make a binding decision and/or order designed to stop the workplace bullying. Such orders are designed to be binding on any party to a bullying claim (including

employers and individuals). Parties are required to comply with these orders or risk the imposition of substantial civil penalties of up to 60 penalty units ($10,200 for an individual or $51,000 for a body corporate).

Other than an order for monetary compensation, the FWC may make any order appropriate to stop the bullying, including but not limited to:

- requiring the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer or principal;
- compliance with an employer's or principal's bullying policy;
- the provision of information, additional support and training to workers; and
- review of the employer's or principal's bullying policy.

However, in making an order, the FWC is required to take into account:

- any outcomes arising out of an investigation into the alleged bullying conducted by another person or body (this may include internal investigations, or investigations by third parties such as WorkCover); and
- any procedures available to the worker to resolve the alleged bullying and any outcomes arising from those procedures (including internal complaint mechanisms).

As the FWC is a no cost jurisdiction, parties to a workplace bullying application will usually have to pay their own legal costs, unless it can be shown that a party has acted vexatiously or without reasonable cause, or it should have been apparent that the application or response had no reasonable prospect of success.

DEVELOPMENTS IN THE JURISDICTION SO FAR...

As at mid-February 2014, the FWC had received 66 anti-bullying applications since the commencement of the jurisdiction on 1 January 2014. Most of these claims were brought by workers, alleging that they had been bullied by a supervisor or manager or by a group of employees. It will likely come as no surprise to most HR managers and practitioners that the majority of these claims have been in relation to disciplinary action.

Of these 66 applications, nine were withdrawn at a preliminary stage. It is also interesting to note that two of the 66 applications were by supervisors who claimed subordinates were bullying them, while one was by an employee who claimed to be bullied by the manager and staff of another business.

RISKS AND RISK MANAGEMENT

Since the introduction of the ***Fair Work Amendment Bill 2013*** **(Cth)** and the intention to introduce the anti-bullying jurisdiction, bullying is a topic that has received considerable media interest. Accordingly, one of the biggest risks associated with an anti-bullying application for your organisation will be reputational.

While applications, mediations and preliminary conferences are confidential between the parties, formal hearings are open to the public and any subsequent decision or order made by the FWC is required by law to be published. As such, your organisation's greatest public exposure is at this stage of the matter.

Although applications to the FWC can be made under section 593(3) or 594 of the Act to supress details and names or for a private hearing, prevention and early intervention remains the best form of risk management for your company against a bullying application.

> **there was a distinction between legislation which has an effect on past events, and legislation which bases future action on past events.**

This may involve:

- educating staff about what is expected of them from a behavioural and cultural perspective;
- ensuring that you have in place policies and procedures around bullying and harassment;
- advertising the processes and mechanisms that your company has in place to deal with issues such as bullying and harassment;
- encouraging workers to come forward with their complaints and grievances about bullying and harassment; and
- dealing with these matters appropriately by undertaking substantively and procedurally fair investigations of any complaints.

In addition to assisting employers in responding to anti-bullying applications, PCS has capabilities and resources to assist you to protect yourself and your organisation.

NEWFLASH: FWC'S FIRST ANTI-BULLYING ORDERS

Handed down on 21 March 2014, the FWC's first set of orders, as agreed between the parties, requires the employee the subject of the complaint to:

1. complete any exercise at the employer's premises before 8:00am (while the employee who made the application should not arrive at work before 8:15 am);
2. have no contact with the Applicant alone;
3. make no comment about the Applicant's clothing or appearance;
4. not send any emails or texts to the Applicant except in emergency circumstances; and
5. not raise any work issues without notifying the Chief Operating Officer of the employer (which was joined as a respondent), or his subordinate, beforehand.

Although specific orders were not made against the employer in this instance, these orders highlight the breadth of orders that the FWC can make around regulating the degree and type of communication between individuals, the nature of contact between individuals and specific conduct both at, and outside of, work in order to prevent bullying behaviour from continuing. While it remains to be seen whether the scope of any subsequent anti-bullying orders will follow this trend, HR and line managers are advised to adopt a proactive approach to preventing and resolving bullying disputes at the workplace, through increased training and education of employees about avenues of resolution available at the workplace and their potential personal liability if they are found to have engaged in bullying behaviour.

JOIN US:

key speaking

Given the wealth of experience members of the PCS Senior Legal Team have, we consider it critically important to maintain our status as thought leaders in the people management space through cutting edge events. In addition to the numerous events hosted by our firm, some of the more significant events at which one or more of our lawyers are presenting appear below.

upcoming events

20 May 2014 – Public Sector Human Resources Leadership Forum - PCS Director, Nichola Constant presenting on 'New Anti-Bullying Laws – What this Means To Your Organisation' (11:15am-12:15pm), Crowne Plaza, Canberra, ACT.

21-22 May 2014 – HR Summit Perth - PCS Director, Kathryn Dent presenting on 'Workplace Bullying: Navigating the New Landscape' (1:45pm-2:30pm), Four Points by Sheraton, Perth, WA.

30-31 July 2014 – HR Summit Melbourne - PCS Managing Principal, Joydeep Hor is presenting at The Langham Hotel, Melbourne, VIC. (12:15pm-1:00pm)

20-21 August 2014 – HR Summit Brisbane - PCS Managing Principal, Joydeep Hor is presenting at The Stamford Hotel, Brisbane, QLD. (12:15pm-1:00pm)

21-22 August 2014 – 2nd Managing Partners Forum - Boutique & Small Firms, PCS Managing Principal, Joydeep Hor is presenting at The Grand Stamford, Glenelg, Adelaide.

15 September 2014 - Workplace Relations Essentials training seminar – PCS Director, Kathryn Dent presenting on anti-bullying, privacy, surveillance, social media, terminations and restraints,Sydney (Venue TBC)

16-17 September 2014 – HR Leaders Summit Perth - PCS Managing Principal, Joydeep Hor is presenting at Joondalup Resort, Perth, WA.

19 September 2014 - Workplace Relations Essentials training seminar – PCS Director, Kathryn Dent presenting on anti-bullying, privacy, surveillance, social media, terminations and restraints, Melbourne (Venue TBC)

22 September 2014 - Workplace Relations Essentials training seminar – PCS Director, Kathryn Dent presenting on anti-bullying, privacy, surveillance, social media, terminations and restraints, Perth (Venue TBC)

26 September 2014 - Workplace Relations Essentials training seminar – PCS Director, Kathryn Dent presenting on anti-bullying, privacy, surveillance, social media, terminations and restraints, Brisbane (Venue TBC)

13-14 November 2014 – Not-For-Profit Conference - PCS Managing Principal, Joydeep Hor is presenting at Rydges, Carlton, VIC.

SENIOR LEGAL TEAM

JOYDEEP HOR
Managing Principal

KATHRYN DENT
Director

NICHOLA CONSTANT
Director

MICHELLE COOPER
Director

ALISON SPIVEY
Senior Associate

ERIN LYNCH
Senior Associate

ELIZABETH MAGILL
Senior Associate

2014 Workplace Trends:

THE FAIR WORK AMENDMENT BILL 2014 & THE PRODUCTIVITY COMMISSION REVIEW OF THE FAIR WORK ACT

In line with its 2013 election policy platform, the Coalition Government has set the wheels in motion for reform, with the introduction of the *Fair Work Amendment Bill 2014* (the "FW Bill") as well as the Productivity Commission review (the "PC Review") of the *Fair Work Act 2009* (Cth).

Dimi Baramili Associate

WHAT IS THE COALITION GOVERNMENT'S POLICY FOR WORKPLACE RELATIONS?

In an earlier edition of Strateg-Eyes we reported that the Coalition proposed various improvements to the Act with the overriding aim of providing stability and fairness, whilst at the same time protecting the pay and conditions of workers to "restore the balance back to the sensible centre." The proposed reforms were detailed in the Policy to Improve the Fair Work Laws, released in May 2013 (the "Policy").The reforms espoused as part of the Policy platform include: improving the Fair Work laws (through changes to greenfields agreements, right of entry, workplace bullying and paid parental leave), the re-establishment of the Australian Building and Construction Commission (ABCC), tightening the rules around registered organisations to hold them to a standard similar to that of corporations, review of the Remuneration Tribunal and implementing recommendations made by the 2012 Fair Work Review Panel report. One major part of this policy platform was also to commission an independent review of workplace laws through the PC Review.

THE FAIR WORK AMENDMENT BILL 2014

On 27 February 2014 the Government introduced the FW Bill into Parliament. The Coalition Government put forward the FW Bill to implement the more pressing workplace relations reforms explicitly raised during their election campaign. The FW Bill is currently subject to second reading debate within the House of Representatives, and is described as implementing elements of the Policy and recommendations from the 2012 Fair Work Review Panel. The First Reading Speech and Explanatory Memorandum accompanying the FW Bill have also been released, providing insight into the nature and scope of the proposed reforms.

FW BILL REFOMS IN RESPONSE TO RECOMMENDATIONS MADE BY THE FAIR WORK REVIEW PANEL

- employer not to refuse extended unpaid parental leave request unless reasonable opportunity given to discuss the request;
- annual leave to be paid out on termination in accordance with the terms of the relevant instrument such as an enterprise agreement;
- employee's absent from work receiving workers' compensation payments will not be able to accrue leave under the Act;
- amendments to individual flexibility terms to ensure:
  - unilateral termination with 13 weeks' notice;
  - terms in enterprise agreements to deal with when work performed, overtime, penalties, allowances and loadings;
  - benefits other than payment of money to be considered in determining if an employee is better off overall;
  - defence for employers if they reasonably believe the terms have been complied with;
- a transfer of business situation will not arise where an employee is employed by an associated entity of their former employer where the employee seeks the role on their own initiative;
- restricting the ability to make a protected action ballot order until bargaining has commenced; and
- not requiring the FWC, in certain circumstances, to hold a hearing or conference to determine an unfair dismissal claim.

OTHER PROPOSED REFORMS IN THE FW BILL CONSISTENT WITH THE POLICY

- creating a more efficient process for the negotiation of greenfields agreements by:
  - applying good faith bargaining principles to these negotiations;
  - introducing a negotiable three month time period with parties able to approach the Fair Work Commission to resolve the dispute if no agreement reached;
- right of entry reforms including:
  - repealing amendments put in force last year which require an employer to fund transport and accommodation arrangements in remote areas;
  - new eligibility criteria for premises entry for holding discussions or running interviews;
  - repealing amendments made last year and returning to the former position concerning default interview locations;
  - extending the scope of the FWC's powers in dealing with disputes about frequency of visits; and
  - ensuring the Fair Work Ombudsman pays interest on any unclaimed monies.

>> wheels in motion:

THE PC REVIEW

As outlined in the Policy, the PC Review is aimed at reviewing the current Fair Work laws and the impact on the economy, employment and productivity. The Coalition acknowledges these questions as crucial given that workplace relations is central to national interest. Further, it is seen to be a response to the 'weak' reforms made to the Act by the Labour Government last year in response to the recommendations made by the 2012 Fair Work Review Panel, which in their view was too narrow and did not consider all relevant issues. Rather, the approach favoured by the Coalition is an extensive review after which it will be open to debate by various stakeholders to ensure a viable solution for all. The Coalition has indicated on various occasions that it does not intend to make further changes to workplace relations laws, save for the fact that it will consider any recommendations made by the PC Review.

The PC Review panel will be independent and its composition is yet to be confirmed. It will be tasked with providing recommendations for change whilst balancing the protection of workers against efficient business operations.

Currently, the draft terms of reference for the PC Review are under review and a formal set of terms is yet to be released. However, at the date of writing, the terms of reference for the review had been leaked. It was reported through various media outlets that the review terms concern:

- economic factors- the impact on employment levels, productivity, responses to economic conditions and investment;
- impact of strike action on employer's businesses in terms of work days lost;
- scope of bargaining around working hours;
- impacts of the laws on small business; and
- procedural matters.

The guiding parameters for the PC Review as per the draft terms were also noted by media sources to "maintain fair and equitable pay and conditions for employees, including the maintenance of a relevant safety net".[2]

Senator Abetz, Employment Minister, responded to media reports of the leaked draft terms of reference by noting that the PC Review will be consistent with the Policy and will constitute a comprehensive and thorough analysis. Further, he stated the Productivity Commission is the best body for this review given it has a reputation for "social sensitivity and economic robustness".[3]

WHAT'S NEXT?

A deadline of April 2015 has been flagged for the PC Review report which will mean that it will be sometime before we see any potential reforms implemented, with suggestions by Senator Abetz that they will form part of the Coalition government's platform for the next federal election which is not scheduled until mid-2016. Until then we will await the passage of the FW Bill within parliament and any ensuing debate. We will keep you up-to-date on the progress of the FW Bill and the PC Review over the coming months.

[1] 'The Coalition's Policy to Improve the Fair Work Laws', May 2013.
[2] 'Workplace review to examine penalties', James Massola, Sydney Morning Herald, 7 March 2014.
[3] 'Sweeping inquiry into Fair Work Act', AM with Chris Ulman, 7 March 2014

people management handbook

investigations kit

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WHS audit checklist

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Tool kits now available

People + Culture Strategies now offers various tool kits to assist you and your organisation.
Contact us for further details.

FOUR YEARLY MODERN AWARD REVIEW

Deja-vu abounds in 2014 in our Federal workplace relations system.

Kathryn Dent Director

WHAT DOES THIS MEAN FOR YOUR BUSINESS?

Only two years ago, at the same time as a parliamentary review into the Act was being conducted, the Fair Work Commission ("FWC") was undertaking its inaugural ("transitional") review of modern awards as required under the Act ("two yearly review"). Fast forward two years and barely has the ink dried on a variety of judgments issued as part of finalising the two yearly review, and the next modern award review has begun ("four yearly review") with another legislative review looming and overlapping this process. This modern award review, mandated by the Act (s.156) and which must be conducted every four years in the future, carries with it a greater expectation of change, predominantly due to the FWC's pronouncements in the 2 yearly review "deferring" major changes to the 4 yearly review.

Given that most workplaces will have a proportion of employees covered by modern awards, there will be widespread interest in what types of changes employers can expect as a result of the process and perhaps even how, during the process, they influence the changes they need or desire.

Industries/Occupations with higher percentage of award coverage

- **Accommodation and food services 44%**
- **Administrative and support services 29%**
- **Retail trade 25.6%**

WHAT HAS HAPPENED TO DATE?

Some of the more important aspects of the 4 yearly review are described below but are reminiscent of the process adopted for the 2 yearly review (with the exception of penalty rates which have been relegated from a common issue to an award-by-award issue, noting the enshrined protection of this condition in the Act is a development since the last 2 yearly review with the Act having been amended to provide for this):

- interested parties have filed submissions which are available on the FWC website which has a section devoted to the 4 yearly review;
- on 5 February 2014 the initial stage of the 4 yearly review commenced with a Conference during which the legislative framework under which the 4 yearly review would be undertaken was considered and the scope of the 4 yearly review determined;
- on 26 February 2014 at a FWC conference initial "common issues" were agreed by the parties present (and are almost identical to the 2 yearly review common issues);
- the FWC has released the initial list of common issues which represent proposals for significant variation or change across the award system, (whilst indicating it is capable of being amended) and they are:
  - annual leave (1st half 2014)
  - transitional/sunsetting provisions relating to accident pay, redundancy and district allowances (2nd half 2014 (commencing July);
  - casual employment (second half 2014 (commencing September);
  - part-time employment (second half 2014 (commencing September);
  - award flexibility/facilitative provisions (first half of 2015); and
  - public holidays

In a decision dated 17 March 2014, the FWC set the jurisdictional basis of the review and thus the parameters in which it will operate which will, in turn, manage employers' expectations of changes. While the FWC has agreed the 4 yearly review will be broader in scope than the 2 yearly review, nevertheless it has implied that awards will not be extensively changed by alluding to the restraints on its discretion. The reason for enforcing such restraints is that the FWC must ensure a 'stable' modern award system which the FWC feels implies a need for "a merit argument in support of the proposed variation". This echoes several FWC decisions in the 2 yearly review, which the FWC has recently referred to in the context of this review, reminding parties of the need for "cogent and probative evidence" in support of an application to vary a modern award.

In this decision the FWC also noted that during the review process:

- the modern awards objective, being to provide a fair and relevant minimum safety net of terms and conditions (with the National Employment Standards) and taking into account various factors, will be applied;
- the modern awards objective dictates that only those variations necessary to achieve it should be made; and
- past contested decisions will be considered.

While this decision does not pre-empt the outcome of the 4 yearly review, it does suggest that the changes will not be as far reaching as some parties would have hoped, including the Federal Government, which has expressed an expectation of significant changes to awards and hopes that they would be simplified.

WHAT IS HAPPENING NEXT?

- The common issues will be dealt with each on a "stand alone" basis with a review of the process to be conducted in October 2014, including ascertaining any further common issues.
- The scope of the annual leave common issue will shortly be determined (submissions were due 20 March 2014, an issues paper will be released 25 March 2014, a conference will be held 27 March 2014, and a Statement on Scope will be released 2 April 2014).

- The FWC is giving priority to transitional provisions and there will be a further conference on this issue in the week commencing 2 June 2014 preceded by a draft background document to be released in May 2014.
- Each award (minus the common issues) will be reviewed including consideration of its historical context and this will be the phase where penalty rates are dealt with.
- The awards will be reviewed in four sequential stages of 30 each (these have been published) with further information about this likely to be published in April 2014 and a conference on 13 March 2014.
- The consideration of award coverage has been deferred to at the beginning of each award phase.

WHAT DO YOU NEED TO DO?

If you consider that your business is significantly adversely affected by the provisions of a modern award you should consider directly or indirectly participating in the 4 yearly review (if necessary with PCS' advice or representation for you as a sole entity or as part of a broader representative group).

At the very least, if you are not participating in the 4 yearly review, you will need to keep abreast of any changes to the modern awards covering your employees and comply with those remembering that a breach of a modern award will not only attract a heavy penalty to the company but to any individuals involved in the breach, and this may include you.

DID YOU KNOW...

122 modern awards are in place

16.1% employees are covered by modern awards (2012)

Grouping of Modern Awards

(these are a truncated lists based on the more common awards that cover our clients)

Group 1 (30 awards)

Code	Title
MA000022	Cleaning Services Award 2010
MA000010	Manufacturing & Associated Industries & Occupations Award 2010
MA000011	Mining Industry Award 2010
MA000069	Pharmaceutical Industry Award 2010
MA000016	Security Services Industry Award 2010
MA000017	Textile, Clothing, Footwear & Associated Industries Award 2010
MA000071	Timber Industry Award 2010
MA000089	Vehicle Manufacturing, Repair, Services & Retail Award 2010

Group 2 (19 awards)

Code	Title
MA000118	Animal Care & Veterinary Services Award 2010
MA000026	Graphic Arts Award 2010
MA000027	Health Professionals & Support Services Award 2010
MA000031	Medical Practitioners Award 2010
MA000034	Nurses Award 2010
MA000063	Passenger Vehicle Transportation Award 2010
MA000012	Pharmacy Industry Award 2010
MA000068	Seafood Processing Award 2010
MA000084	Storage Services & Wholesale Award 2010
MA000042	Transport (Cash in Transit) Award 2010
MA000043	Waste Management Award 2010

Group 3 (33 awards)

Code	Title
MA000019	Banking, Finance and Insurance Award 2010
MA000021	Business Equipment Award 2010
MA000002	Clerks–Private Sector Award 2010
MA000083	Commercial Sales Award 2010
MA000023	Contract Call Centres Award 2010
MA000075	Educational Services (Post-Secondary Education) Award 2010
MA000076	Educational Services (Schools) General Staff Award 2010
MA000088	Electrical Power Industry Award 2010
MA000094	Fitness Industry Award 2010
MA000101	Gardening & Landscaping Services Award 2010
MA000006	Higher Education–Academic Staff–Award 2010
MA000007	Higher Education–General Staff–Award 2010
MA000116	Legal Services Award 2010
MA000030	Market and Social Research Award 2010
MA000104	Miscellaneous Award 2010
MA000033	Nursery Award 2010
MA000035	Pastoral Award 2010
MA000106	Real Estate Industry Award 2010
MA000087	Sugar Industry Award 2010
MA000041	Telecommunications Services Award 2010
MA000090	Wine Industry Award 2010

Group 4 (40 awards)

Code	Title
MA000018	Aged Care Award 2010
MA000046	Air Pilots Award 2010
MA000047	Aircraft Cabin Crew Award 2010
MA000048	Airline Operations—Ground Staff Award 2010
MA000049	Airport Employees Award 2010
MA000080	Amusement, Events & Recreation Award 2010
MA000079	Architects Award 2010
MA000091	Broadcasting & Recorded Entertainment Award 2010
MA000020	Building & Construction General On-site Award 2010
MA000095	Car Parking Award 2010
MA000070	Cemetery Industry Award 2010
MA000120	Children's Services Award 2010
MA000096	Dry Cleaning & Laundry Industry Award 2010
MA000025	Electrical, Electronic & Communications Contracting Award 2010
MA000077	Educational Services (Teachers) Award 2010
MA000003	Fast Food Industry Award 2010
MA000073	Food, Beverage & Tobacco Manufacturing Award 2010
MA000105	Funeral Industry Award 2010
MA000004	General Retail Industry Award 2010
MA000005	Hair &Beauty Industry Award 2010
MA000009	Hospitality Industry (General) Award 2010
MA000029	Joinery & Building Trades Award 2010
MA000067	Journalists Published Media Award 2010
MA000081	Live Performance Award 2010
MA000117	Mannequins and Models Award 2010
MA000032	Mobile Crane Hiring Award 2010
MA000065	Professional Employees Award 2010
MA000058	Registered & Licensed Clubs Award 2010
MA000119	Restaurant Industry Award 2010
MA000103	Supported Employment Services Award 2010
MA000066	Surveying Award 2010
MA000100	Social, Community, Home Care and Disability Services Industry Award 2010

>> PRIVACY:

Are you compliant with the new laws?

Recent changes to the privacy legislation means it has become more consistent with Australia's trading partners, and it enhances protection for individuals, but is your organisation ready?

Beverley Triegaardt Graduate Associate

On 12 March 2014 the *Privacy Act 1988* (Cth) (the "Act") was amended so that Australia's privacy laws will be consistent with its major trading partners. The new laws aim to enhance the protection of personal information in this age of rapid social and technological advances.

In this article we will address the changes and what steps can be taken to comply with the laws from an employment perspective. The new laws can have profound impacts on the business processes of an organisation – so having systems, a policy and training staff on their obligations will be key to ensuring their compliance with the amendments.

The most notable change to the Act is the introduction of the 13 Australian Privacy Principles ("APPs") which govern the use, collection and disclosure of personal information by an "APP entity". The APPs consolidate and replace the Information Privacy Principles ("IPPs") that formerly applied to government agencies and the National Privacy Principles ("NPPs") that regulated private organisations. Both IPP and NPP entities are now referred to as "APP entities".

THE AUSTRALIAN PRIVACY PRINCIPLES

The APPs have expanded on the content of the IPPs and NPPs. The 13 APPs have been spilt amongst 5 parts that highlight the objectives of the amendments to the Act.

Part 1 calls for openness and transparency in the collection and use of personal information;

Part 2 creates new obligations for entities that collect unsolicited information;

Part 3 introduces higher levels of accountability for entities using and disclosing personal information to offshore entities. It also regulates the use of government identifiers like Tax File Numbers ("TFNs");

Part 4 aims to ensure the integrity, quality and security of personal information is maintained; and

Part 5 contains the APPs that grant individuals rights to access and correct their personal information.

WHAT ABOUT THE EMPLOYEE RECORDS EXEMPTION?

In spite of the new changes, employers can be reassured that the "employee records exemption" will remain in force so that the personal information of current or former employees relating directly to the employment relationship will be exempt from complying with the APPs.

It is crucial to realise that this exemption does not cover prospective employees, contractors or employees of other companies. That means APP entities must be mindful of the notes and records made and kept about unsuccessful job candidates, labour hire employees or employees of a subsidiary.

APP entities should also be aware of associated legislation that operates in their state (e.g. employee health records are not exempted from the *Privacy Act* in Victoria or the Australian Capital Territory where as they are in New South Wales).

WHAT NEEDS TO BE IN AN UPDATED PRIVACY POLICY?

It is important that an updated privacy policy is widely circulated amongst all stakeholders that an APP entity impacts upon. A privacy policy should:

- be made freely available via an APP entity's website;
- be a working document that is regularly updated;
- clearly state what information will be collected and how it will be obtained;
- specify how individuals can access their records and amend them;
- set out processes for handling complaints and an individual's ability to report breaches;

Overview

There have been major updates to Australian privacy laws including:

- the addition of 13 Australian Privacy Principles ("APPs") that regulate the collection, use and disclosure of personal information; and
- expanded powers of enforcement for the Information Commissioner.

Who does it impact?

- Primarily agencies and organisations with annual turnover greater than $3 million or those trading in personal information and all private health service providers ("APP entities"), must comply with the privacy laws.

What information is covered?

"Personal information" has been updated to mean "information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual". This differs to the old definition which referred to "an individual whose identity is apparent, or can reasonably be ascertained".

The new definition is aimed at bringing the definition in line with international standards, as well as ensuring that the definition remains sufficiently flexible and technology-neutral. It does not significantly change the scope of what was already considered to be personal information.

"Sensitive information" is considered a subset of personal information and its definition has also been amended to include genetic information, biometric information and biometric templates. This would include information like finger prints or facial recognition data.

Actions for employers

Review:

- privacy policies, induction materials and staff training modules;
- standard contracts; and
- methods of surveillance.

Ensure:

- there are systems in place for the open and transparent management of personal information.

What if I don't take action?

Failure to observe the new laws may find an employer facing penalties of up to $1.7 million for serious or repeated breaches of privacy.

- make methods of data collection known to individuals where it is not solicited directly from them; and
- if applicable, inform individuals that their personal information may be shared overseas and where reasonable, the locations it will be disclosed to.

TRAINING FOR EMPLOYEES

It is crucial that employees are given the appropriate training to help them understand the context of the updated privacy policy. Training should be specific to their roles as different positions, teams and departments in an organisation will use, collect and disclose the personal information of individuals in different ways. Consider updating induction materials that are given to new employees and arrange privacy training for them at the outset of their employment.

Additional measures that can be employed to demonstrate a commitment to compliance include:

- appointing a staff member to the role of "Privacy Officer" and training them accordingly. This will allow enquiries and complaints in relation to personal information to be handled centrally and in a consistent manner;
- consider the creation of a generic email address such as privacyofficer@yourorganisation.com. This way the contact will not be disturbed if the privacy officer role is taken on by someone new; and
- develop a script for the members of staff that handle business enquiries. For example, the script might inform individuals that they will be sent a copy of the privacy policy with their quote.

UPDATING STANDARD CONTRACTS

As the new privacy laws require APP entities to take reasonable steps to safeguard against the misuse of personal information, particular care should be taken where outsourcing arrangements are used or cross border disclosure of information is likely.

It is wise to include a binding clause in contracts with suppliers that compel them to abide by privacy standards.

The employee records exemption will apply to payroll information that is likely to be disclosed to your external payroll manager, however, personal information of employees that is disclosed to an external service provider obligates that external service provider to handle the employee's information in accordance with the APPs.

Employers are encouraged to use best practice when managing the personal information of employees. This means they are encouraged, where possible, to abide by the APPs despite there being no legal obligation to so.

Section 6(1) of the Privacy Act 1988 (Cth) defines 'personal information' as:

> **"information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual"**

For example, it would be best practice for employers to:

- inform employees that an external payroll manager is engaged by your organisation;
- obtain the consent of employees before collecting and disclosing information that will be handled by an external service provider; and
- act as a conduit for any enquiries that an employee might have about their records with the external payroll manager.

METHODS OF SURVEILLANCE

Despite employee records being exempt from the APPs, engaging in email surveillance of employees could amount to collection of personal information. If an organisation obtains email conversations that discuss the personal information of individuals outside the organisation, the APPs will apply. The relevant APPs would be those regulating use and disclosure, openness and access to information.

It may be possible to defend surveillance activities as "being necessary for the employer's activities" which might include the protection of computer systems or disciplining employees that are in breach of a company policy.

>> OUT OF HOURS CONDUCT:

Just how far do an employer's responsibilities for sexual harassment extend?

Case Study Review: *Ewin v Vergara*

Alison Spivey Senior Associate

The Federal Court recently awarded a complainant $476,163 in damages after it was found that she had been sexually harassed in the workplace within the meaning of the *Sex Discrimination Act 1984* (Cth) as a result of conduct that occurred outside the physical confines of her employer's premises and outside of working hours.

The Court's broad interpretation of the term "workplace" has potentially significant implications for employers and how they seek to manage sexual harassment in the workplace, in circumstances where traditional workplace arrangements are being challenged by increasing numbers of employees working late, working from home and working in jobs that require travel.

The decision of the Federal Court in *Ewin v Vergara (No 3)* [2013] FCA 1311 related to claims by Jemma Ewin that on a number of occasions she was verbally and physically sexually harassed by Claudio Vergara in the workplace within the meaning of the *Sex Discrimination Act 1984* (Cth) ("the SD Act").

Specifically, Ms Ewin complained of four incidents involving Mr Vergara in or about April and May 2009, whereby Mr Vergara was alleged to have engaged in making continuous and increasingly explicit comments to Ms Ewin not only while at the employer's premises, but also in the building in which the employer's premises was located, a taxi and a hotel.

At the time of the alleged incidents, Ms Ewin and Mr Vergara were both accountants working in the business of Living and Leisure Australia Limited ("LLA"). Ms Ewin was employed by LLA whereas Mr Vergara was employed by an external third party agency and was contracted to work for LLA.

Ms Ewin made the sexual harassment complaint after she was sexually assaulted by Mr Vergara in the corridor outside the LLA offices following a work function.

Mr Vergara successfully argued that he and Ms Ewin were not "fellow employees" within the meaning of section 28B(2) of the SD Act since they both had different employers.

As such, Ms Ewin relied on section 28B(6)of the SD Act in support of her claim, which makes it unlawful for a *"workplace participant to sexually harass another workplace participant at a place that is a workplace of both of those persons".*

WHAT IS A "WORKPLACE" FOR THE PURPOSES OF THE ACT?

"Workplace" is defined under the SD Act as "a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant".

In defending the claim, Mr Vergara argued that section 28B(6) of the SD Act does not extend to conduct which does not occur during working hours whilst workplace participants are gathered at the workplace for the purpose of undertaking the work and the term "workplace" only extends to premises exclusively occupied and utilised by workplace participants, and not to common areas shared by workplace participants.

In finding that "workplace" under the SD Act does extend to areas such as common areas in the building in which the employer's premises are located, a taxi and a hotel, the Court recognised that:

"the workplace is not confined to the place of work of the participants but extends to a place at which the participants work or carry out work-like functions in connection with being a workplace participant".

There was no contention that Ms Ewin and/or Mr Vergara were not "workplace participants" for the purposes of the SD Act, as this term encompasses employees and contractors.

Further, of the four incidents involving Mr Vergara complained of by Ms Ewin, the Court found three of those incidents to be "sexual harassment" within the meaning of the SD Act.

The central question for the Court to determine was whether conduct that occurred not in the physical confines of the employer's premises, but in the building in which the employer's premises was located, a taxi and a hotel, could be said to have occurred in the "workplace".

The Court rejected Mr Vergara's arguments, particularly his argument that a corridor between the front door of the LLA office and nearby lifts was not a "workplace", saying that "the objective of eliminating sexual harassment in the workplace would be significantly undermined if, associated common areas such as entrances, lifts, corridors, kitchens and toilets were construed as falling beyond the geographical scope" of the legislation.

The Court awarded Ms Ewin damages in the amount of $476,163, after taking account of the post traumatic stress disorder and other psychiatric injuries Ms Ewin suffered as a consequence of the conduct of Mr Vergara. However, the damages Mr Vergara was ultimately ordered to pay were reduced to $210,563 to account for other payments Ms Ewin received in connection with her claim.

Section 28B of the Sex Discrimination Act 1984 (Cth) defines "workplace" as

> **A place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant.**

WHAT SHOULD EMPLOYERS DO IN LIGHT OF THIS DECISION?

While the Court was not required to consider the vicarious liability of an employer in *Ewin v Vergara*, the case provides a number of important lessons for employers regarding the potential scope of the protections for sexual harassment afforded by the SD Act and the potential consequences of not appropriately or effectively managing sexual harassment in the workplace.

There are a number of steps that employers may take to reduce their risk profile in relation to sexual harassment claims. These include:

- developing or reviewing their sexual harassment policies to ensure that the policies are appropriate for their workplace;
- ensuring that the policies apply to conduct that occurs outside of the employer's premises and outside of work hours that has sufficient connection to the workplace;
- ensuring that employees and managers are trained (or have refresher training) in respect of those sexual harassment policies and the conduct to which they apply; and
- ensuring that allegations of sexual harassment in the workplace are treated seriously and investigated as thoroughly and expeditiously as is appropriate in the circumstances.

These steps can build awareness of the importance of reporting and managing allegations of sexual harassment and assist in building a culture within your organisation where all workplace participants feel supported in making complaints about sexual harassment in the workplace.

>> CONTACT US:

Our Legal Team

JOYDEEP HOR
Managing Principal

KATHRYN DENT
Director

NICHOLA CONSTANT
Director

MICHELLE COOPER
Director

THERESE MACDERMOTT
Consultant

ALISON SPIVEY
Senior Associate

ERIN LYNCH
Senior Associate

ELIZABETH MAGILL
Senior Associate

ROY YU
Associate

DIMI BARAMILI
Associate

MARGARET CHAN
Associate

BEVERLEY TRIEGAARDT
Graduate Associate

People+Culture Strategies

Sydney
Level 9 NAB House 255 George Street
Sydney NSW 2000
T +61 2 8094 3100
F +61 2 8094 3149

Melbourne
Level 27 101 Collins Street
Melbourne VIC 3000
T +61 3 9221 6129
F +61 2 8094 3149

E info@peopleculture.com.au
www.peopleculture.com.au