STRATEG-EYES:

Workplace Perspectives

ISSUE 13 AUGUST 2014

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MESSAGE: from the Managing Principal

As many of you are aware, in May of this year I commenced my participation at Harvard Business School's Owner-President Management Program (the "MBA-in-a-box" developed for business owners and entrepreneurs some 20 years ago). The residential program, which is run in three three-week instalments over a 20 month period deals with critical subjects/ skills such as Strategy, Innovation, and Negotiation. Notwithstanding the intense nature of the program, the exposure both to content and members of Faculty that I would not otherwise have had has been (and will continue to be) enormously beneficial.

It was particularly insightful for me to observe that across my 179 colleagues from 41 countries around the world, the subject of Talent Management was without a doubt the subject with which they struggled the most. Even highly successful business people need assistance with understanding the basics of people management, let alone the strategic opportunities in people management.

As Australia's most innovative workplace relations law firm, we continue to provide a highly diversified and holistic service offering to our clients that goes well above and beyond the reactionary model that has characterised lawyers in this space.

Our focus as a firm remains on the creation of value for you, our clients. That value is created primarily through the mindset we bring to our work which involves identifying not merely solutions to problems but also strategies to ensure those problems do not arise in the first place or the creation of infrastructure to allow for better management of those problems.

Joydeep Hor
Managing Principal

A LOOK INSIDE:

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

SEXUAL HARASSMENT

Why it doesn't go away

THERESE MACDERMOTT CONSULTANT

Sexual harassment has been the subject of legal regulation for a number of decades, but surveys of employees and other research confirms that it remains a significant problem in Australian workplaces. While we may be making some headway on broader issues of breaking down gender segregation in the workforce and in recognising the need to address the culture of workplaces, harassment at work remains prevalent and under-reported. In this article we explore the introduction of a new campaign sponsored by the Australian Human Rights Commission, a major employer organisation (ACCI) and the trade union movement to tackle the problem, aptly called *Know where the line is*, and what this tells us about the nature of the problem. We will then look at the issue of employer responsibility, and how we determine "where the line is" for employers, using the recent Oracle appeal to illustrate this point.

A NEW AWARENESS STRATEGY – *"KNOW WHERE THE LINE IS"*

The *Know where the line is* awareness strategy was launched by the Australian Human Rights Commission, the ACTU and ACCI in May 2014. The campaign hopes to empower employees to recognise where behaviour of a sexual nature is unacceptable or inappropriate. The research that the campaign draws on shows that employees do not always identify what has happened to them as being sexual harassment, but what they describe clearly comes within the legal definition of what constitutes sexual harassment. It also shows that employees experience unwelcome and inappropriate conduct of a sexual nature that they find offensive, but that they often do not feel that they are in a position to do anything about it. Even if employees do know that the behaviour in question is not acceptable, at times they do not regard it as serious enough or don't report it because of fear of consequences for them in terms of their employment and backlash from their colleagues.

What this awareness campaign has highlighted is that the problem of sexual harassment is there in workplaces - notwithstanding it is not always identified or formally pursued as a complaint. This means it may be a potential liability for an employer waiting to be crystalized in a formal complaint. As a consequence employers should not be complacent about a lack of complaints as under-reporting is a problem in itself. Even where an employer has a clear policy, it still needs to overcome a lack of reporting, otherwise an employer is not fully appraised of what is going on in its own workplace, and can not position itself strategically to respond to the problem. What contributes to this is the fact that in many workplaces a certain degree of inappropriate conduct is tolerated.

WHAT CONSTITUTES SEXUAL HARASSMENT?

Legally sexual harassment it is one area of discrimination law where the legislation is relatively straightforward and establishing the three core elements (unwelcome; conduct of a sexual nature; and the reasonable person test) is not usually difficult, although the facts of what actually went on can be very much in dispute. It is also important to remember that the "reasonable person" test takes the target of the conduct as the reference point, not the person who is said to have engaged in the harassment. Therefore an employer should be careful not to dismiss the response of the particular employee as over-sensitive or out of keeping with what everyone else in that group thinks.

So the problem is not necessarily with the legislative framework itself, but in the recognition of the application of the law to certain conduct and the way in which employers respond.

THE EMPLOYER'S RESPONSE

Employers need to be alive to the possibility that sexual harassment may be occurring in their workplaces. There is no point saying that you did not know what was going on or that it is only the aberrant conduct of certain individuals. And where there is an enquiry or compliant made it must be treated seriously without minimisation from the outset, the employer needs to be seen to be responding to the problem at the earliest opportunity, and it is made clear that the organisation does not tolerate such conduct. Because the fact that the person has raised an issue of sexual harassment means it has gone past a point where most employees will simply put up with the conduct. It may be the first time the employer has heard about the issue, but in all likelihood has been building for some time.

Employers also need to be proactive in looking for other indicators that there may be a problem; for example patterns of absence, or use of sick leave and annual leave; an overly close-knit work group; or the avoidance of working with certain staff and shift choices. It is also a mistake not to deal with the initial allegations through a full investigation – preferably an external provider to reinforce the impartiality of the process. This offers an early opportunity to get an effective resolution for all parties concerned. And if an investigation is inconclusive an employer shouldn't wash their hands of the matter, but consider whether there is a need for some form of mediated resolution between individuals or within a workgroup to resolve the underlining issues.
The goal of mediation would not be to rehash the events alleged to have occurred but to focus on how to move forward, minimise the risk of repetition, clear up any misunderstandings and avoid further conflict. This is also an opportune time for an employer to review their policies and procedures and consider reinforcing the lack of tolerance for such conduct through training and development.

However in some circumstances, despite what actions an employer may have taken, in terms of its polices and procedures and efforts to provide a clear message that these are taken seriously and will be enforced, an employer can find itself having to defend its actions in legal proceedings, on the basis that it should not be vicariously liable for any harassment that occurred in its workplace as it took all reasonable steps to prevent the harassing conduct.

> **Employers need to be alive to the possibility that sexual harassment may be occurring in their workplaces.**

THE ORACLE LITIGATION

The most authoritative decision on the establishment of an employer's vicarious liability is at present the Oracle case. The first instance decision examined the global online training package rolled out by the employer, but found it wanting:

> *...advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated. I take the same view about advice that an employer might also be liable for sexual harassment by an employee. That is an additional element emphasising the lively and real interest that an employer will have in scrupulous adherence to its warnings.* ***These elements were absent from Oracle's global online training package****. (emphasis added)*

However the recent appeal of this decision determined on 15 July 2014 adds a further dimension, as it significantly increased the damages awarded in this case. Until this point most litigated outcomes had lead to relatively modest damages awards ranging from about $12,000 to $20,000, except for circumstances where features of aggravation, such as psychological trauma and resulting incapacity for work, were present. From an original determination of damages of $18,000, the Oracle appeal increased the general damages awarded to $100,000 and added $30,000 for her economic loss. This could be viewed as part of a broader trend to valuing more accurately the harm caused to individuals who experience harassment and could serve as a timely reminder that the monetary costs of harassment can be significant, in addition to the brand and reputational damage.

CONCLUSION

The core message in this context is that employers must bring home to employees that the employer's policies and procedures on sexual harassment will be enforced, and exhibit sustained efforts to build enduring employee familiarity with these policies and procedures. In addition, the culture of the organisation must clearly be consistent with this message, with breaches of the policy not tolerated or left unaddressed. Moreover the long term damage resulting from harassment can be limited by an early and thorough investigation and an appropriate employer response, but otherwise may lead to a substantial damages award.

WORKPLACE Investigations

PCS partners with its clients to provide effective workplace investigation services that are undertaken with integrity are delivered expeditiously and that analyse and make conclusions about the factual circumstances to enable our clients to achieve resolution.

Our team's investigation expertise ranges from responding to informal complaints to undertaking complex formal investigations in a wide range of areas across the employment and workplace spectrum including:

- sexual harassment;
- bullying;
- discrimination and harassment;
- employee misconduct;
- corruption & fraud;
- work, health & safety;
- misuse of authority; and
- inappropriate use of social media and IT resources.

Engaging an external investigator provides our clients with the peace of mind that investigations are independent, impartial and rigorous and that findings are compliant with the law and are designed to withstand scrutiny if tested in a court or industrial tribunal. It also enables our clients to focus on other business unburdened by the impact on resources especially time that investigations of a reputable and professional standard require. In investigations involving senior personnel, particularly sensitive allegations, or where there is a potential for litigation, engaging legal professionals to provide legal advice in undertaking the investigation reassures our clients that the investigation process will be protected by legal professional privilege.

In addition to providing full service investigations, PCS also works with its clients to provide an assisted investigation service whereby we provide advice and support to in-house investigators. We also partner with our clients to deliver coaching and training services to enable our clients to develop their own internal investigation competencies.

PCS workplace investigations go beyond the investigation to look to any broader underlying causes of the behaviour, for example, cultural issues, management practices and insufficient training and we partner with our clients to develop and implement effective and enduring solutions.

If you would like to discuss how PCS can assist you organisation respond to the challenges of an investigation, please call one of our Directors on (02) 8094 3100.

The Royal Commission into Trade Union Governance and Corruption: A BRAVE NEW WORLD

SINA MOSTAFAVI SENIOR ASSOCIATE

The Abbott Government's Royal Commission into Trade Union Governance and Corruption is in full swing and will result in a brave new world for trade unions and employers.

WHAT IS IT?

Further to the Coalition's election promise made prior to the 2013 Federal Election into union "slush funds", the Government has established the Royal Commission into Trade Union Governance and Corruption (the **"Commission"**), led by former High Court judge, John Dyson Heydon AC QC (the **"Commissioner"**).

Terms of reference

The Commission is inquiring into the following:

1. The governance arrangements of separate entities established by unions or their officers, purportedly for industrial purposes or for the welfare of their members, including so-called "slush funds" (the **"Entities"**), including a focus on:
   (a) how the Entities are financially managed;
   (b) whether the Entities are used for an unlawful purpose; and
   (c) the adequacy of current laws in relation to the:
      (i) financial integrity of the Entities; and
      (ii) accountability of union officers in relation to the use of Entity funds.
2. Alleged activities of the following regarding setting up or operating Entities:
   (a) the Australian Workers' Union (**"AWU"**);
   (b) the Construction, Forestry, Mining and Energy Union (**"CFMEU"**);
   (c) the Electrical Trades Union (**"ETU"**);
   (d) the Health Services Union (**"HSU"**);
   (e) the Transport Workers Union (**"TWU"**); and
   (f) any other person, association or organisation in respect of which credible allegations of involvement in such activities are made.
3. The circumstances in which funds are sought from any third parties and paid to the Entities.
4. The extent to which union members:
   (a) are protected from any adverse effects or negative consequences arising from the existence of the Entities;
   (b) are informed of the Entities' existence;
   (c) are able to have influence or control of the Entities' operation; and
   (d) have the opportunity to hold union officers accountable for any alleged wrongdoing.
5. Any conduct which may amount to a breach of any applicable law, regulation or professional standard by any officer of a registered employee association in order to:
   (a) procure an advantage for themselves or another person, association or organisation; or
   (b) cause a detriment to a person, association or organisation.
6. Any conduct by union officers responsible for the Entities which may amount to a breach of any applicable law, regulation or professional standard.
7. Any bribes, secret commissions or other unlawful payments or benefits arising from contracts, arrangements or understandings between unions/union officers and any other party.
8. The participation of any persons, associations or organisations other than unions/union officers in relation to any of the above conduct.
9. The adequacy and effectiveness of existing systems of regulation and law enforcement in dealing with any of the above conduct, including the means of redress available to unions and union members who have suffered a detriment as a result of such conduct.
10. Any issue or matter reasonably incidental to the above.

How does the Commission operate?

The Heydon Commission has broad terms of reference, with a focus on alleged improper conduct (including the use of "slush funds") and governance issues associated with unions.

The Heydon Commission is required to prepare its final report in relation to the above by 31 December 2014, however the Government has indicated that this will be subject to the Commissioner's discretion.

Practice Directions

The Commission has issued a number of practice directions setting out how its hearings will be conducted. Among the procedures set out in those documents is a restriction on cross-examination of witnesses brought before the Commission. Such cross-examination is not automatically permitted, and will only be allowed where (amongst other things):

- a contradicting witness provides a written statement of evidence, upon which the cros-examination of the Commission's witness would be based;
- written grounds for cross-examination of the Commission's witness is provided in advance; and
- the contradicting witness is available to be cross-examined.

The effect of the above regime is that in practice cross examination may not take place until weeks or potentially months after the initial examination of the Commission's witnesses, meaning that ensuing press coverage will in those cases be focused on the evidence obtained by the Commission in the first instance, before any such evidence may be challenged by contradicting witness and/or their legal representative.

Parties who believe they are "substantially and directly interested" in relation to evidence before the Commission have the opportunity to apply for advance warning of such evidence and related documents.

The Commission is empowered to depart from its practice directions where it deems appropriate.

The Commission is not bound by rules of evidence which would otherwise apply in civil and criminal trials, and is able to draw inferences which bodies hearing those trials are not able to draw. Statements made during evidence in the Commission are not admissible in civil or criminal proceedings.

Telecommunications interception powers

In June 2014, the Federal Government granted the Commission the power to intercept and access phone calls and emails, as per similar powers granted to the current Royal Commission into child sex abuse.

Penalties

The law defines a range of criminal conduct in relation to the Commission's affairs, including:

- a refusal to attend or enter questions when summoned;
- intentionally giving false and misleading evidence;
- failing to produce documents when required; and
- tampering with, destroying or concealing documents.

The penalties associated with these breaches range from $1000-$20,000, and jail terms of between six months and five years.

WHAT HAS HAPPENED TO DATE?

Pre-hearing

Prior to the commencement of the Commission's hearings, the Australian Council of Trade Unions (**"ACTU"**) expressed concern that the Commission would engage in the practice of providing advance release of allegations to the media, as they alleged was done with regard to the Cole Royal Commission into the construction industry, which reported in 2003. The Commission has denied engaging that it engages in these practices.

Preliminary hearing

The Commission held a preliminary hearing in April 2014. At this juncture, the Commissioner noted that while the Commission's terms of reference were broad in some regards, that these terms rested on "*certain assumptions which are not hostile to trade unions*". Rather, the Commissioner noted that the Commission would be enquiring into whether unions were performing their role well and lawfully, and how their performance of this role could be improved.

Counsel assisting the Commission, Jeremy Stoljar SC, emphasised at this juncture that the Commission would be looking at both sides of an alleged slush fund-related transaction, that is, both the union and any facilitation and contributions made to the slush fund by employers.

> **"The Heydon Commission is required to prepare its final report in relation to the above by 31 December 2014"**

AWU hearings

The Commission's public hearings began in Sydney in May 2014. The Commission focused on the allegations relating to the AWU/Workplace Reform Association matter, involving former AWU leader Bruce Wilson and former AWU official Ralph Blewitt. On this occasion, the Commission departed from its practice directions in relation to cross-examination, and allowed for cross-examination of Mr Blewitt by Mr Wilson's Counsel.

HSU hearings

The Commission commenced public hearings into the HSU in June 2014, including evidence being obtained from former HSU leader Kathy Jackson.

Among the issues considered by the Commission during these hearings were:

1. how HSU officials treated whistleblowers;
2. what duties were owed by union officials to HSU members; and
3. funding of HSU union elections.

TWU hearings

In June 2014, the Commission commenced its hearings in relation to the TWU. Matters heard to date include:

- whether a TWU enterprise agreement which provided for the payment of superannuation contributions exclusively to a TWU superannuation fund raised potential conflicts of interest; and
- alleged contributions by Toll Holdings Ltd to a training company established by the TWU, ostensibly on the basis of ensuring that its 2011 enterprise agreement would be approved. This was allegedly done pursuant to a confidential side deed between Toll and the TWU, which also provided for the TWU to "audit" Toll's major competitors' operations, including with regard to wages and other compliance measures.

CFMEU hearings

In July 2014, the Commission commenced its hearings in relation to the CFMEU, examining amongst other things allegations into standover tactics and other corrupt conduct.

Issues papers

The Commission has released three issues papers, respectively:

1. noting that it would likely be recommending firmer regulation and scrutiny of unions, including providing for greater protection for whistleblowers, such as the ability for police to be able to receive protected disclosures in relation to alleged corrupt or unlawful behavior by unions or union officials, including on a confidential or anonymous basis;
2. seeking comment as to measures that could be undertaken to improve governance mechanisms and laws relating to union officials' conduct and accountability; and
3. in relation to the funding of trade union elections, including a consideration of whether unions and union officials should be allowed to accept contributions from employers, and whether a compulsory register of employer contributions should be maintained.

WHAT IS HAPPENING NEXT?

Submissions in relation to the Commission's issues papers closed on 11 July 2014. The ACTU has boycotted this process, arguing that the deadline imposed provided them with insufficient time to consult with their members, and that the issues papers had "predetermined" the issues being dealt with.

Hearing schedules for the last of the five nominated unions, the CEPU, are yet to be announced.

The Commissioner is understood to be eager to meet the required timeframe of 31 December 2014.

WHAT DOES THIS IT MEAN FOR YOUR BUSINESS?

The Commission's broad terms of reference, and focus on employers as well as unions and union officials, and evidence heard to date, strongly suggest that the Commission will be making findings which will have broad implications for employers across Australia.

A key issue for many employers is in the enterprise bargaining sphere. It is more important than ever to ensure that enterprise bargaining with unions and/or employees involves a proper consideration of whether the matters being negotiated legitimately relate to the employment relationship, rather than being measures put in place to "keep the peace" and/or benefit other bodies, for example the payment of funds to union-affiliated training bodies above prevailing market rates.

While commercial imperatives are likely to increase the temptation for employers to agree to union demands simply for the purposes of getting enterprise agreements across the voting line, it is critical that employers always remember that enterprise agreements, and all dealings with unions be compliant with all applicable legislation, and also able to withstand the "front page test".

THE ROLE OF TRAINING
In Risk Management

ALISON SPIVEY SENIOR ASSOCIATE

Effective risk management is an integral part of the success of any organisation. This article examines the significant role that training can play in developing and maintaining effective risk management strategies in your organisation.

When it comes to developing and implementing effective risk management strategies, organisations can sometimes overlook the significant impact that investing in quality training have on that process, particularly when there are competing organisational and financial pressures.

However, courts and tribunals are increasingly examining the extent and effectiveness of training provided by employers in determining liability in employment-related claims, particularly in areas such as equal employment opportunity and work health and safety. As such, overlooking this crucial investment in training cannot continue if risk management processes are to be truly effective.

To appreciate the role of training in risk management, it is important to understand what "risk" and the risk management cycle are, and how training plays a role in every step of that risk management cycle. Each of these issues is discussed further below.

Also discussed below are the matters that need to be considered when an organisation is developing the most appropriate training framework from a risk management perspective.

"RISK" AND THE RISK MANAGEMENT CYCLE

Risk is defined as "*the possibility of suffering harm or loss*" and risk management is the process of identifying situations which have the potential to cause harm or loss to people or property, and taking steps to prevent, or at least reduce the potential of, the harm or loss occurring.

There are a myriad of risks to people or property in an employment context, which can ultimately lead to negative legal, financial or reputational outcomes for an organisation and, in turn, liability for the organisation and individuals within that organisation.

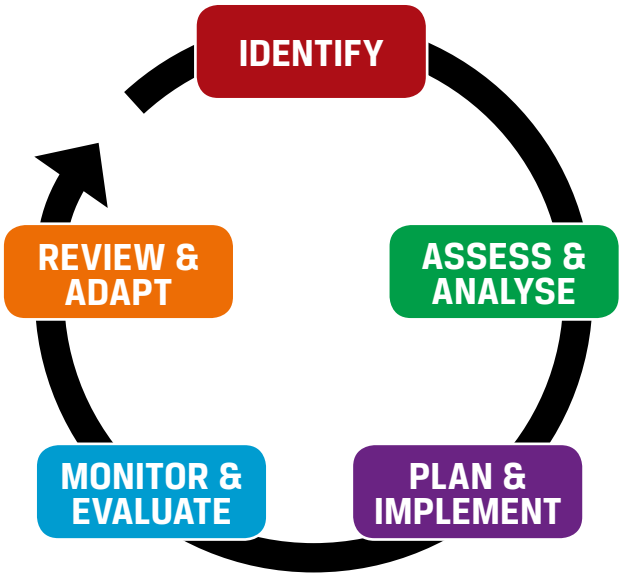
In a workplace context, systematically and proactively identifying risks and taking steps to address those risks in accordance with what is known as the "risk management cycle" are the best protection that an organisation can afford itself.

The risk management cycle consists of well-defined steps that, when taken in sequence, lead to informed decisions about how best to avoid or minimise the impact of these risks. Broadly speaking, the risk management cycle has five stages:

- identifying risks;
- assessing and analysing those risks;
- planning and implementing a risk management plan;
- monitoring and evaluating the risk management plan; and
- reviewing and adapting the risk management plan based on the monitoring and evaluation.

It is important to note that while the risk management cycle has clearly defined stages, risk management is, and is intended to be, a continuous process. The reality is that an organisation will likely be at a different stage of the risk management process for all actual and potential risks it has identified. The organisation is therefore best-placed by acknowledging and embracing continuous risk management as this will ensure risks are identified and addressed at the earliest opportunity and in the most cost-effective manner, and that there is continuous improvement in the management of that risk and in risk management within the organisation more generally.

Turning now to look briefly at each of these stages in a workplace context, and how training performs a significant role in each of those stages:



Identifying risks

The first stage of the risk management cycle is identifying actual or potential risks in the workplace. Catalysts for a process of risk identification typically include introduction of new equipment or processes, changes in legislation or regulation, change in premises, incident response, or as the outcome of regular auditing. Depending on the context, the risk identification process may be undertaken internally or externally, or a combination of both.

However, the organisation also needs to build a culture of identifying and reporting risks irrespective of when and how they become known, and at all levels of the business, with the key message being that risk management is the role of everyone in the organisation, not just management. This message should be accompanied by training in risk identification and protocols for what to do if they identify a risk (for example, reporting requirements and/or shutting down machinery).

Assessing and analysing risks

Once a risk has been identified, the next step is to assess and analyse the extent of that risk for the organisation. This includes who the risk affects, how the risk manifests, and why it manifests in the way that it does. It is also important that any assessment of the risk undertaken is done by someone who is adequately trained or qualified to do so, to ensure that the risk is properly characterised and managed. Properly understanding the risk and what it may mean for the organisation will facilitate and streamline the planning and implementation of an appropriate plan to manage that risk.

Planning and implementing a risk management plan

The next stage, the planning and implementation of a risk management plan, can be a delicate balancing act, with organisations required to measure the extent of the risk to the organisation against the cost of addressing that specific risk. Ultimately, some level of risk may in fact be acceptable to the organisation on a cost/benefit analysis. This is a reality accepted in a legal context, with the standard typically applied being that organisations take "all reasonable steps" to eliminate or minimise risk in the workplace – the courts do not expect or demand perfection.

From a training perspective, the risk management plan may include a variety of measures including the implementation or updating of a policy or procedure, and related training. Policies and procedures are one of the most significant risk management tools that an organisation can utilise as part of its training regime, as they, set the standards expected by the organisation, standardise the approach taken by the organisation to the management of identified risks, and provide an objective reference point for employees and management.

However it is important that any training conducted for the purpose of managing workplace risk is also ***effectively*** implemented, or there can be serious consequences for the organisation. The most recent example of the impact on an organisation of training being deemed ineffective is the decision of the Full Federal Court in *Richardson v Oracle Corporation Australia Pty Ltd*[1].

In that matter, the Federal Court at first instance[2] held that the employer was vicariously liable for the sexual harassment of one of its former employees by another employee, despite, amongst other measures, having a Code of Conduct in place and providing refresher training every two years, because that training did not state that sexual harassment was against the law and did not refer to the relevant legal standard (being, in this case, the relevant legislation). The Court ordered that the employer pay the harassed employee $18,000 in general damages.

On appeal, the Full Federal Court increased the damages payable by the employer to its former employee to $130,000 and, in doing so, appeared to herald a new approach to the calculation of damages in sexual harassment matters.

Monitoring and evaluating the risk management plan

After a risk management plan is implemented, the organisation should then continue to monitor and evaluate the plan to ensure that it is and remains appropriate. Two key decisions need to be made by the business at this stage of the process, namely:

- what approach it intends to take in monitoring and evaluating the plan (for example, structured, ad hoc or continuous monitoring and evaluation (or a combination)); and
- what standards it will apply in evaluating if the plan (that is, determining what "success" is in the context of managing a particular risk).

Reviewing and adapting the risk management plan

The final stage in the risk management cycle is reviewing and adapting the risk management plan based on the outcome of the monitoring and evaluation.

These outcomes may require a wholesale review of the risk management plan, or amendments to specific aspects of that plan, to rectify any deficiencies or introduce improvements.

If there are any changes to the risk management plan, the relevant personnel will need to be trained in respect of the amendments to that plan, including but not limited to in any changes to policies and procedures that apply to their employment.

1 *Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 (15 July 2014)*

2 *Richardson v Oracle Corporation Australia Pty Ltd [2013] FCA 102 (20 February 2013)*

WHAT DOES YOUR ORGANISATION NEED TO CONSIDER IN DEVELOPING ITS TRAINING FRAMEWORK?

There is no "one size fits all" approach to training in a risk management context. The circumstances of your organisation at the relevant time will largely dictate the training framework that is implemented.

However, there are critical matters that every organisation needs to consider in reviewing or developing its training framework in support of its risk management strategy. These include:

- What are the immediate areas of risk for the organisation, including areas in which it is obliged to provide training under relevant legislation or regulations?
- Does the organisation have a heightened vulnerability in one or more risk areas that need to be addressed and, if so, what training is required to address those risk areas?
- What is the organisation's current training framework (including policies and procedures) and what, if any, of that framework is directed to managing the immediate areas of risk? Are there any gaps?
- Are the organisation's policies and procedures up to date? Do those policies and procedures need to be reviewed in light of any recent legal or other developments (including organisational or technological developments)?
- What resources does the organisation have available for training? How are those resources going to be most effectively utilised?
- What does the training need to cover in terms of content? Is it necessary to develop and rollout different training for different levels within the organisational structure?
- How is the training to be delivered? Is there internal capability for developing and delivering the training, or would an external provider be preferable?
- When should the training occur (for example, at induction or on promotion) and how often? Is refresher training required, and, if so, how often and in what form?
- What steps are being taken by or on behalf of the organisation to record accurately, and retain records of, the training that is provided?

HOW CAN PCS HELP?

PCS offers a range of services to assist organisations in managing their employment-related risks, including developing and delivering training packages tailored to those organisations.

Please contact any one of the Directors at PCS if we can be of assistance.

MANAGING MENTAL ILLNESS in the Workplace

ELIZABETH MAGILL SENIOR ASSOCIATE

Managing a mentally healthy workplace is becoming an increasingly important, and an increasingly topical, aspect of workplace relations. As the prevalence of mental health conditions in the workplace continues to increase, together with the costs to employers and productivity, the management of mental health conditions often falls into the too hard basket. This article will discuss mental health conditions and how they affect the workplace and will also look at the legal considerations relevant to the management of mental health conditions in the context of two recent unfair dismissal cases.

> **"according to the World Health Organization, depression will be one of the biggest health problems worldwide by the year 2020"**

WHAT IS MENTAL ILLNESS AND HOW DOES IT AFFECT THE WORKPLACE

The Australian Government Department of Health defines mental health conditions as a general term that refers to a group of illnesses that "affect how a person feels, thinks, behaves and interacts with other people." Mental health conditions include mood disorders, such as depression and bipolar disorder, anxiety disorders, such as social anxiety disorders, obsessive-compulsive disorders or phobias, and psychotic disorders, such as schizophrenia. Latest statistics indicate that one in five Australians will suffer from a mental illness at some point in their lives and according to the World Health Organization, depression will be one of the biggest health problems worldwide by the year 2020.

In terms of how mental health conditions impact on business, a recent report prepared by PwC reveals significant costs to Australian businesses as a result of untreated mental health conditions and, in particular:

- over six million working days lost each year due to depression;
- over 12 million days each year of reduced productivity;
- 3-4 days off work per month for each person experiencing depression; and
- $10.9 billion dollars lost each year due to absenteeism, lost productivity and compensation claims.

The report also revealed that it is generally employees experiencing mild depression who represent the greater volume of financial burden to employers, with 61% of the costs attributable to those suffering from mild depression as opposed to clinical depression. In conjunction with the launch of the first national campaign to target mental health in the workplace, beyondblue, a leading mental health organisation has advised businesses "if you're not investing in mental health you're losing money."

At a practical level mental health conditions affect employees' ability to concentrate, relate and interact with others, impair judgment, cloud decision-making, can result in reduced motivation, difficulties with logical thought, lowered productivity, deterioration of work performance, social withdrawal and erratic behavior. Understanding and responding to early warning signs can have a very beneficial impact on the management of mental health conditions and it is widely accepted that the earlier the response and, if necessary, the sooner treatment starts, the better the outcome, including by reducing absenteeism and productivity costs to businesses.

FAILING TO MANAGE MENTAL ILLNESS AND THE RISKS

Prolonged disharmony in the workplace arising from workplace bullying, interpersonal conflict, excessive or unreasonable work demands or workplace change, for example, the uncertainty created by restructure, are all factors commonly cited as the cause of an employee's onset or exacerbation of mental health conditions. In addition to the business risks that arise from mental health conditions in the workplace as discussed above, mental health conditions in the workplace can also expose employers to risk with respect to workplace bullying, adverse action, discrimination, workers compensation and unfair dismissal claims. Two recent cases that have already received a good deal of media attention highlight the consequence for employers when mental health conditions are not managed in the workplace.

Brett McAuliffe v Australian Taxation Office [2014] FWC 1413 (6 June 2014)

In this decision the Fair Work Commission (the "**Commission**") handed down a scathing decision criticising the Australian Taxation Office (the "**ATO**") and its treatment of an employee who had been suffering from a mental health condition. Commissioner Riordan described the ATO's actions as "*unconscionable*" at a time when "*Australian society is focusing on the issues of mental health in the workplace*" and remarking that he hoped the ATO would not treat an employee diagnosed with depression and anxiety in the future "*in the same shabby manner*". The decision highlights the fallout that results from the mismanagement of mental health conditions in the workplace and the potential legal and reputational exposure.

Mr McAuliffe had been employed by the ATO for a period of 10 years. In the period between August 2012 and April 2013, Mr McAuliffe had been absent from the workplace for approximately two months due to "psychological issues" resulting from his perception of bullying and harassment by his managers. As a result of Mr McAuliffe's absences, Mr McAuliffe was referred by the ATO to an independent psychologist, Dr Synnott, who diagnosed Mr McAuliffe with "*an adjustment disorder with anxiety and depressed mood*". Dr Synnott certified Mr McAuliffe as being fit to work but noted that if Mr McAuliffe was required to work with the people he identified as having caused his problems, any return to work would be unlikely to be "*successful or enduring*".

Mr McAuliffe subsequently returned to work in June 2013. On Mr McAuliffe's return to work he was not transferred to another role or team, nor was his return to work plan followed by the ATO. Shortly after Mr McAuliffe's return to work, and despite there being no complaints or issues about Mr McAuliffe's performance or ability, the ATO directed Mr McAuliffe to attend a series of further consultations with Dr Synnott. These consultations resulted in a recommendation that Mr McAuliff cease work and obtain further treatment. Mr McAuliffe was directed by the ATO to "*cease work immediately and go home*". Mr McAuliffe complied with this direction and the ATO then went on to deactivate his security pass and provide Mr McAuliffe's photo to its security desk as someone to be denied access to the building.

Mr McAuliffe challenged this direction by providing two medical certificates from his GP which certified him as fit to work. Despite Mr McAuliffe producing medical evidence certifying him fit to work the ATO refused to allow Mr McAuliffe to return. Mr McAuliffe then lodged an unfair dismissal claim with the Commission claiming that he had been constructively dismissed.

Although Mr McAuliffe's unfair dismissal claim was ultimately unsuccessful, Commissioner Riordan was very critical in his judgment of how the ATO "*deliberately and mischievously delayed Mr McAuliffe's return*" to work. Commissioner Riordan also criticised the ATO for trying "*to manipulate an outcome to suit its purposes*" and found the "*ATO's behaviour in seeking multiple clarifications from Dr Synnott as appalling.*" It was also noteworthy that Commissioner Riordan found that it was "*a breach of Mr McAuliffe's contract of employment and the* [Fair Work] *Act to refuse him entry to his workplace to undertake the functions that he was contractually obligated and entitled to perform*" particularly in circumstances where the ATO knew of Mr McAuliffe's fitness to work and his dire financial situation.

Ronaldo Salazar v John Holland Pty Ltd T/A John Holland Aviation Services Pty Ltd [2014] FWC 4030 (26 June 2014)

In another particularly scathing decision, the Commission has condemned John Holland Pty Ltd T/A John Holland Aviation Services Pty Ltd ("**John Holland**") for its treatment of an employee when it sacked the employee for "serious misconduct" without having proper regard to the fact that the employee was suffering from a mental health condition and in full knowledge of the employee's mental health condition and his need for ongoing treatment.

Mr Ronaldo Salazar was employed as a Licensed Aircraft Mechanical Engineer ("**LAME**") in the maintenance of commercial jet aircraft at Tullamarine Airport. Mr Salazar was notified that he was to change work groups from Crew A to Crew B as Crew B was in need of skilled engineers. However, Mr Salazar refused to change work groups stating that he had not been appropriately trained to complete work on a Rolls Royce Trent 700 engine which predominately formed part of the work in the Crew B work group.

On 18 July 2013, Mr Salazar sent an email to Glenn Palin, the Managing Director of the John Holland Group alleging that John Holland was incompetent, was trying to "kill" him and his family, that he was being denied his legal rights as a LAME and suggesting that there may be a repeat of an air crash that occurred in San Francisco. Mr Salazar also threatened to take complaints to *Today Tonight*, *60 Minutes* or the Prime Minister.

On 5 August 2013, Mr Salazar received a letter from John Holland alleging that he had engaged in serious misconduct as a result of his refusal to change work groups as directed and as a result of his email to Mr Palin and was subsequently dismissed from his employment.

Commissioner Ryan found that the dismissal was "*invalid and unfair*" as it appeared that the managers of John Holland had not given sufficient, if any, weight to the obvious mental health problems that Mr Salazar was experiencing at the time the company directed him to change work crews and in the period that followed. Commissioner Ryan found John Holland's actions to be "*towards the major end*" of the "*scale of unfairness*" particularly as Mr Salazar had been suffering from mental health conditions since January 2013 and had provided medical certificates showing he was being treated by a psychiatrist and psychologist. As a result, Commissioner Ryan found that it was "*neither sound nor defensible*" to rely upon the conduct of an employee with an obvious mental health problem in drawing a conclusion that the conduct of the employee amounted to serious misconduct. Commissioner Ryan further found that it was totally unreasonable for the company to come to the conclusion that Mr Salazar engaged in serious misconduct and that the evidence of Mr Salazar's mental health condition provided a "*strong reason for excusing the conduct*" when Mr Salazar sent the email to Glenn Palin.

Commissioner Ryan was unable to order Mr Salazar's reinstatement because John Holland's Tullamarine operations had since closed, but ordered compensation based on lost wages and redundancy payments made to other engineers when the operations closed.

> **Commissioner Ryan found John Holland's actions to be "*towards the major end*" of the "*scale of unfairness*"**

CONCLUSION

These decisions illustrate the importance that the Commission places on the appropriate treatment of mental health conditions in the workplace both throughout the employment relationship and at the time of dismissal. These decisions also highlight the increasing importance of managing mental health conditions at a time when mental health is at the forefront of drives to improve Australian workplaces and productivity.

INNOVATION IN ENTERPRISE AGREEMENTS: How to stay ahead of the game

ERIN LYNCH SENIOR ASSOCIATE

Enterprise agreements (in a variety of forms) and their use has ebbed and flowed over time, swaying one way or the other depending on the persuasion of the Government of the time. Not only is the use of enterprise agreements, particularly versus the use of statutory or common law individual contracts of employment, a source of debate in Australia, but also the content in enterprise agreements has come under significant scrutiny.

Consequently, clauses in enterprise agreements must evolve and change to reflect varied legislative requirements as well as changing needs in the economy. As such, it is important that, rather than simply "rolling over" employers consider the productivity improvements that can be gained through innovative use of enterprise agreement terms.

As we come to the end of the fifth year since the commencement of the *Fair Work Act 2009* (Cth) with many enterprise agreements having a nominal expiry date of not more than four years and the advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 it is timely to reflect generally on the use and content of enterprise agreements and look forward to what we expect in the future.

Consistent with this theme the Fair Work Commission is establishing a database of model enterprise agreement clauses adopting one of the themes under the Commission's Future Directions of "productivity and engaging with industry", as detailed in Future Directions 2014–15: Continuing the Change Program.

It is important that employers regularly review their enterprise agreements as there can be times where Award conditions may be in fact be more beneficial to employees, as is the current case with a national retailer. Enterprise bargaining negotiations failed between the national retailer and the Shop, Distributive and Allied Employees' Association, with the union convincing the Fair Work Commission to terminate the retailer's first ever collective agreement that had a nominal expiry date of September 2012. As a result of the failed negotiations and taking a hard line stance, the retailer must now follow the conditions set out in the Modern Award, giving the retailer less flexibility and control in determining the terms and conditions of employment for employees.

CONSTRUCTION INDUSTRY CLIENTS BE AWARE – *BUILDING AND CONSTRUCTION INDUSTRY (FAIR AND LAWFUL BUILDING SITES) CODE 2014*

On 17 April 2014, the Minister for Employment, Senator Eric Abetz, published an advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 (the "**Code**").The Code provides the Commonwealth Government's expected standards of conduct for all building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The Minister announced that the Code will come into effect when the Building and Construction Industry (Improving Productivity) Bill 2014 commences and has said that enterprise agreements and other "procedures" will no longer be able to contain "restrictive work practices" or "discriminatory provisions".

Once the Code commences then entities covered by it that have enterprise agreements made after 24 April 2014 that do not meet the Code will not meet the key criteria for eligibility to tender for, and be awarded, Commonwealth funded building work.

For example, clauses and practices that will not be permitted by the new Code include:

- an agreement or practice that prohibits or limits the employment of casual or daily hire employees;
- an amount paid that nominally incorporates payment for ordinary time and other matters such as overtime and allowances in one loaded rate;
- an arrangement or practice whereby employees are selected for redundancy based on length of service alone; and
- "one in, all in" clauses where, if one person is offered overtime, all the other workers must be offered overtime whether or not there is enough work.

PCS recommends that any employer in the construction industry that intends or may bid at any time for Commonwealth projects or other work, carefully consider the terms of any agreements about which they are bargaining with their employees.

> **"It is important that employers regularly review their enterprise agreements as there can be times where Award conditions may be in fact more beneficial to employees"**

BENEFICIAL LEAVE PROVISIONS

An employer recently had an enterprise agreement approved which allows employees access to six days of compassionate leave per year. The clause is said to recognise that when this type of leave is taken it usually requires employees to travel long distances. The provision of six days' compassionate leave is three times the statutory standard for compassionate leave.

In addition to the increased flexibility around compassionate leave the enterprise agreement also allows long-serving employees to cash out personal leave if they retain at least 30 days of accrued personal leave. After completing ten years of service an employee will be able to cash out ten days of personal leave and a further five days after 15 years' service and then every five years thereafter.

With the recognition of domestic violence as a reason for requesting flexible working arrangements we may also see an increase in clauses entitling victims of domestic violence to paid leave. In 2010 a Victorian employer agreed on a groundbreaking clause entitling victims of domestic violence to 20 days' paid leave each year. Since then Sydney University's Professor Marian Baird who has undertaken a study says that similar rights had been included in more than 100 agreements or state public service awards covering more than one million workers[1].

INCREASES IN PAY

The Department of Employment's "Trends in Federal Enterprise Bargaining"[2] report shows that the agreements approved by the Fair Work Commission in the December 2013 and March 2014 quarter paid an average 3.6% increase to employees.

On an industry basis construction (4.7%) and education (3.7%) increased the average and health and community services (3%) and finance and insurance services (3.3%) pushed the private sector average down.

WHAT DOES THIS MEAN FOR US?

PCS encourages those employers with enterprise agreements or those thinking about adopting an enterprise agreement to use clauses such as the ones described above as a way to have terms and conditions of employment that suit their operation and give employees something more beneficial than the award. Clauses such as the ones discussed above can also be used to attract and retain key staff.

1 *"An equality bargaining breakthrough: Paid domestic violence leave" Marian Baird, Ludo McFerran and Ingrid Wright, JIR published online 23 January 2014*

2 *"Trends in federal enterprise bargaining December quarter 2013," http://employment.gov.au/trends-federal-enterprise-bargaining*

BIG BROTHER IN THE WORKPLACE: The legal basics of Privacy and Surveillance

KATHRYN DENT DIRECTOR
DIMI BARAMILI ASSOCIATE

How far can you push employee surveillance? Can an organisation monitor employees' activities out of hours? What rights to privacy do employees have?

It can be difficult for organisations to get the balance right between respecting the privacy of employees and ensuring they have the ability to monitor and control their business operations, processes, systems and reputation effectively. There are a myriad of surveillance and privacy laws and regulations concerning when and how organisations can legitimately examine employees' activities both within and outside the workplace and with which organisations should ensure their policies and practices are consistent.

HOW DOES PRIVACY LAW IMPACT ON MY EMPLOYEES?

The *Privacy Act 1988 (Cth)* (the **"Privacy Act"**) requires organisations (other than small businesses) to adhere to a set of Privacy Principles (the **"Principles"**) in their collection and management of "personal information". The Principles include the requirements to take reasonable steps to protect personal information from misuse, interference, loss, or unauthorized access. From 12 March 2014 there will be changes to the Principles which include shifting the onus from the individual to the organisation to take 'reasonable steps' to make corrections to changes in personal information.

An important exception to compliance with the Principles (which is not new) covers "employee records" of current or former employees. An employee record is defined quite broadly to include personal or health records relating to employment which can go so far as to capture documents concerning the termination of an employee. This exemption does not cover prospective employees, contractors or employees of other companies (such as labour hire employees, or employees of a subsidiary).

Failure to comply with relevant privacy laws may lead to disciplinary action from the Privacy Commissioner through enforceable determinations, undertakings and/or civil penalty orders. The amendments have increased the type, strength and consequences of sanctions available.

WHEN AND HOW CAN I PERFORM EMPLOYEE SURVEILLANCE?

Your organisation can conduct surveillance on your employees when they are at work through camera, tracking or computer devices in certain circumstances, provided certain conditions are met (which will vary depending on your relevant state or territory). For example, in New South Wales (one of the few jurisdictions with prescriptive regulation across all forms of surveillance) surveillance can only be performed whilst the employee is at work, with 14 days' written notice required prior to commencement of surveillance which must specify certain details about the form and nature of the surveillance. Although for new employees, if surveillance is already being undertaken prior to their commencement, they just need to be notified prior to their first day. In addition where computer surveillance is used it must be carried out in accordance with an organisation's policy where the employee has been notified in advance about the application of the policy.

Where using camera or tracking surveillance such devices must be in clear view as well as other specific requirements being met. Surveillance of any form is also expressly prohibited in a change room, toilet or similar facility, with some restrictions also attaching to the ability to block employee emails and internet access.

WHEN CAN I CONSIDER (AND MONITOR) EMPLOYEE CONDUCT OUTSIDE THE WORKPLACE?

There can be some uncertainty around when organisations can legitimately regulate employees' behavior outside of work. Generally, it is not about the physical time or place within which the behavior occurs but rather, whether it occurs in front of or with co-workers and/or has the capacity to impact upon work relationships.

This has become a vexed issue in particular with the increasing popularity of social media and more organisations deciding to monitor and take action in respect of employees' conduct in these forums. Courts and tribunals are no longer inclined to be lenient towards employees pleading ignorance of social media, however, employers should still clearly delineate acceptable uses of social media and when out of hours conduct may impact on employment.

It is recommended that your organisation puts in place appropriate policies to regulate the conduct of employees in their private time as long as the policies are reasonable and related to the practices of the business.

> **‘surveillance can only be performed whilst the employee is at work, with 14 days’ written notice required prior to commencement’**

IF YOU WANT TO PLAY 'BIG BROTHER'

- Review your privacy policy and practices to ensure compliance with the Privacy Act including its recent amendments which commenced in March.
- Include details of surveillance in standard contracts of employment and issue them prior to commencement.
- Develop and implement surveillance policies ensuring their content and the organisation's practices comply with the legislation applicable to the State or Territory where surveillance is being conducted.
- Ensure surveillance activities are confined to the "workplace" as opposed to employee's private activities.
- Create or review social media policies to ensure they encourage responsible use of these platforms as opposed to imposing a blanket ban on their use.

WHAT EMPLOYER SURVEILLANCE AND WHAT TYPES OF INFORMATION ARE REGULATED BY LEGISLATION AND WHERE?

Jurisdiction	Computer surveillance	Camera surveillance	Tracking surveillance
Commonwealth	Communications passing over telecommunications systems are regulated by the *Telecommunications (Interception and Access) Act 1979* (Cth)	Communications passing over telecommunications systems are regulated by the *Telecommunications (Interception and Access) Act 1979* (Cth)	Communications passing over telecommunications systems are regulated by the *Telecommunications (Interception and Access) Act 1979* (Cth)
ACT	Regulated under the *Workplace Privacy Act 2011* (ACT)	Regulated under the *Workplace Privacy Act 2011* (ACT)	Regulated under the *Workplace Privacy Act 2011* (ACT)
NSW	Regulated under the *Workplace Surveillance Act 2005* (NSW) and the *Surveillance Devices Act 2007* (NSW)	Regulated under the *Workplace Surveillance Act 2005* (NSW) and the *Surveillance Devices Act 2007* (NSW)	Regulated under the *Workplace Surveillance Act 2005* (NSW) and the *Surveillance Devices Act 2007* (NSW)
NT	Regulated under the *Surveillance Devices Act 2000* (NT) for law enforcement officers and if a computer is a listening device or an optical surveillance device	Regulated under the *Surveillance Devices Act 2000* (NT)	Regulated under the *Surveillance Devices Act 2000* (NT)
Queensland	Regulated under the *Invasion of Privacy Act 1971* (Qld) if a computer is a listening device	Regulated under the *Invasion of Privacy Act 1971* (Qld) if a camera is a listening device	
SA	Regulated under the *Listening and Surveillance Devices Act 1972* (SA) if a computer is a listening device	Regulated under the *Listening and Surveillance Devices Act 1972* (SA) if a camera is a listening device	
Tasmania	Regulated under the *Listening Devices Act 1991* (Tas) if a computer is a listening device	Regulated under the *Listening Devices Act 1991* (Tas) if a camera is a listening device	
Victoria	Regulated under the *Surveillance Devices Act 1999* (Vic) if a computer is a listening or optical surveillance device	"Optical surveillance devices" regulated under the *Surveillance Devices Act 1999* (Vic)	Regulated under the *Surveillance Devices Act 1999* (Vic)
WA	Regulated under the *Surveillance Devices Act 1998* (WA) if a computer is a listening or optical surveillance device	"Optical devices" regulated under the *Surveillance Devices Act 1998* (WA)	Regulated under the *Surveillance Devices Act 1998* (WA)

REDUNDANCY & RESTRUCTURING: What your organisation needs to know

KATHRYN DENT DIRECTOR DIMI BARAMILI ASSOCIATE

In recent times issues concerning redundancy and restructuring have been of major concern for organisations as they seek to structure their operations in a more effective and efficient manner. Whilst restructuring employees can have lucrative cost saving benefits employers need to ensure they are aware of and avoid the inherent legal risks presented by this process, which can have a significant impact on their organisation.

WHAT IS A GENUINE REDUNDANCY?

Redundancies should not be seen as an easy option for the termination of under-performing or problematic employees. Redundancies should only be implemented where the role is no longer required to be performed. This is not only the legal definition of redundancy (which will be reviewed by authorities such as the Australian Taxation Office or the Fair Work Commission) but it also forms the first limb to an employer being able to resist an unfair dismissal application.

If the termination is a "genuine redundancy" as defined in the *Fair Work Act 2009* (Cth) (the **"FW Act"**) then the employee has no recourse to the unfair dismissal jurisdiction. The FW Act provides that a genuine redundancy will arise where the job is no longer required to be performed by anyone due to changes to operational requirements, the organisation has complied with obligations to consult that are contained in any applicable modern award or enterprise agreement and finally that it was not reasonable for either the employer or its "associated entity/ies" to redeploy the employee.

> **“Redundancies should only be implemented where the role is no longer required to be performed.”**

It is also important that an organisation complies with obligations to consult that are contained in any applicable modern award and/or enterprise agreement as penalties may be imposed on both organisations and individuals for any breaches. Generally the consultation provision contained within a modern award, requires that where significant change is introduced all employees (and their representatives) who will be impacted need to be notified, with discussions to commence as early as is practicable after a decision to implement the changes has been made. These discussions will need to cover the likely effect of the changes and any steps to be taken to mitigate the adverse impact on relevant employees, the nature of the changes and their impact must also be provided in writing to relevant employees (and their representatives). Throughout the process the employer must give prompt consideration to any issues or queries raised by employees about the change.

In practical terms consultation needs to be a real opportunity for employees to influence the decision. The length of this process will depend on the number of redundancies and size of the organisation. In our experience because of the unpleasantness of the situation and the desire to complete the process and move forward many employers seek to get this over and done with in one meeting. While this is not necessarily in breach of the Award consultation provision it is certainly more open to challenge (either as an unfair dismissal or as a breach of Award or both) as well as potentially inflammatory and antagonistic and should, where practicable, be avoided.

At the same time as consultation, redeployment should be considered. While consultation is not mandatory unless there is an applicable award, all employees who could otherwise bring an unfair dismissal claim (because they earn under the threshold) must be given redeployment opportunities or, again, it will be considered not to be a "genuine redundancy" thereby exposing an employer to an unfair dismissal claim.

It is also important to note the breadth of the redeployment obligations and how a failure to consider these may render the redeployment "unreasonable". For reasonable redeployment an employer should:

- Consider all vacant roles which the employee is qualified to perform regardless of if they are in the same location (and yes even interstate opportunities need to be considered), at the same level (for example more junior) or less well remunerated;
- Extend the redeployment to "associated entities" (as defined in the *Corporations Act 2001* (Cth) and generally a broader range of companies than simply "related bodies corporate").

Essentially an employer should give an employee as much opportunity to be considered for redeployment and let the employee make the decision as an employer may not be possessed of all the facts that may make what might otherwise look like an unattractive proposition, attractive. After all a job at lesser pay may be better than no job at all and jobs in other locations may justify an employee moving to an area where they may have family support or where there partner has opportunities. If there are no positions within the employing or associated entities then the considerations are far easier but the communications, both verbal and written, should still confirm that the employer considered redeployment.

For an order of reinstatement to be made for failure to redeploy an individual, a recent case decided by the Full Bench of the Fair Work Commission (*Technical and Further Education Commission T/A TAFE NSW v Pykett [2014] FWCFB 714*) has indicated that a specific suitable job or position must be identified by the employer, before it is able to order reinstatement (that is the Commission can order reinstatement without specifying a particular position). Commissioner McKenna ordered reinstatement to a suitable position which was identified by the dismissed employee (*Pykett v Technical and Further Education Commission T/A TAFE NSW (No.5) [2014] FWC 3177*). In this decision Commissioner McKenna reproduced part of the Full Bench's decision remitting it to her which held that it would have been reasonable to redeploy the employee to a position other than to an "advertised, permanent vacancy". The issue across the various appeals was that at first instance the Commissioner did not make a decision that there was a job, position or other work into which the employee could have been redeployed. The employer sought a stay of this order but the Federal Court rejected

this (*Technical and Further Education Commission v Pykett (No 1) [2014] FCA 727*), and PCS understands the reinstatement order is currently on appeal by the employer.

A recent decision of the Fair Work Commission Full Bench (*Teterin and Others v Resource Pacific Pty Limited t/a Ravensworth Underground Mine [2014] FWCFB 4125*) confirmed the evidentiary burden required to be satisfied by the employer in the context of discharging its redeployment obligations for the purposes of unfair dismissal. It was held that the employer must provide adequate evidence to demonstrate the reasonableness of redeploying the individual(s). In this case an argument was raised that those who had their roles made redundant should instead have been offered roles currently performed by contractors. It was ultimately held that the redundancy was genuine, and the dismissal fair with the Full Bench noting that the employer had provided more than adequate evidence to demonstrate that it was not reasonable to redeploy the individuals. In particular, evidence that the contractors were performing generally short term, as well as highly specialised roles, and it had been explored with the union in the past whether the use of contractors could be reduced to retain permanent employees.

WHAT OTHER CONSIDERATIONS ARE RELEVANT DURING REDUNDANCIES?

In addition to the above and at a minimum, employers should:

- ensure they get termination payments on redundancy correct – they will need to pay or give notice, pay accrued but unused leave but also pay redundancy according to the most generous source ie contract, policy, FW Act, enterprise agreement or modern award; and
- consider whether the terms of the FW Act allow the employer to apply for an exemption from or reduction of any otherwise payable redundancy payment (for example if the employer is unable to pay or where the employer has provided an employee with "other acceptable employment"). What is "other acceptable employment" will depend on the employer's and employee's unique facts and circumstances, with the following factors relevant:
    - whether the work is "of a like nature";
    - comparable pay levels, hours of work, seniority, fringe benefits, workload and job security; and
    - a level of responsibility and pay similar to the original role held by the employee.

Finally organisations should be aware of the additional consultation and notification obligations under the FW Act where there are 15 or more dismissals occurring due to redundancy.

WHAT TYPES OF LEGAL RISKS CAN YOUR ORGANISATION FACE?

There are numerous actions that may be brought by or on behalf of an employee whose employment has been terminated due to a redundant position, as follows:

- Breach of an enterprise agreement or award (and possibly employment contract), which provides for certain processes and procedures to be followed and/or certain amounts to be paid. Generally, consultation requirements place the onus on the organisation to notify and provide certain information to employees who will potentially be affected often within specified deadlines, and allow employees to have a say during the process including the opportunity to raise any queries or concerns.
- A General protections claim if it is shown that selection for redundancy was for a non-genuine reason, in response to an employee exercising a workplace right such as making an inquiry in respect of their employment.
- Discrimination claim on the grounds that the redundancy was not genuine and rather, the individual was selected for redundancy on the grounds of a protected attribute such as race, sex, age, disability or sexual preference.

WHAT SHOULD YOUR ORGANISATION BE AWARE OF WHEN RESTRUCTURING / IMPLEMENTING REDUNDANCIES?

- Any applicable procedure or process is appropriately and fairly followed and appropriate documentation is maintained to demonstrate this.
- Any relevant notice periods are complied with.
- The employee is provided with the appropriate redundancy payment bearing in mind the relevant source(s) which may include the FW Act, award, enterprise agreement, and/or employer policy or custom and practice.
- The process remains open and transparent with employees able to raise any queries or concerns throughout the process.
- All reasonable opportunities for redeployment have been genuinely considered and appropriate evidence of this can be demonstrated.

An earlier and edited version of this article has been reproduced in the *Accommodation Association of Australia's Key News Update* and *HM Magazine*.

UPCOMING Events

www.peopleculture.com.au/events

WEDNESDAY, 13 AUGUST 2014

Webinar

Protecting Your Business: Confidential Information and Restraint of Trade

(12pm to 1pm)

- Why have confidential information and restraint clauses in our employment contracts?
- What is the current law relating to confidential information and restraint of trade in Australia?
- How do you most effectively use confidential information and restraint clauses in your employment contracts?
- Practical tips to maximise the enforceability of confidential information and restraint clauses

WEDNESDAY, 10 SEPTEMBER 2014

Webinar

Dealing with Adverse Action Claims

(12pm to 1pm)

- What is "adverse action"?
- What are and what are not "workplace rights"?
- What does the "reverse onus" mean?
- Determining the "real reason" for decisions
- Strategies for avoiding liability

WEDNESDAY, 15 OCTOBER 2014

Webinar

Managing Workplace Investigations

(12pm to 1pm)

- Why undertake workplace investigations?
- Understanding the steps in a workplace investigation
- Who should undertake the workplace investigation?
- Best practice checklist for workplace investigations

WEDNESDAY, 12 NOVEMBER 2014

Webinar

2014 Wrap Up and the Year Ahead

(12pm to 1pm)

In this session we will review and identify trends that have emerged throughout the year and look forward to 2015 to consider upcoming legislative changes in workplace law. More details will be published later in the year.

THURSDAY, 20 NOVEMBER 2014

Key Briefing: By Invitation Only

Hypothetical – "The Facebook Page that Launched a Thousand Suits"

(5.30pm to 8.00pm)

PCS' third annual hypothetical will bring together a panel of business leaders to analyse the implications of staff social media usage. Where is the line drawn between work and private lives and where does your organisation's reputation stand in each context? We will examine the ramifications for your business that you may not have considered.

The "Hypothetical" will be followed by our annual end-of-year celebration.

If you are a PCS client, many of our events are offered to you on a complimentary basis or at reduced cost. For further information, contact us: 02 8094 3100.

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