STRATEG-EYES:

Workplace Perspectives

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WELCOME: from the Managing Principal

As we close in on the end of another busy year at PCS (and I know the experience has been no different at your organisations), it is a pleasure to share the latest edition of our Strateg-Eyes flagship publication with you.

When we launched our first edition of this publication in mid-2010 I was very conscious that our readership was already subscribing to numerous alerts and publications and that many of the more traditional law firms were publishing informative newsletters. I wanted to ensure that our publication would not be "just another law firm newsletter". Over the years I have been pleased to receive feedback from clients (but also from members of the HR community who do not currently use our firm's services) to the effect that we have held true to our mantra and that Strateg-Eyes does look at issues thematically and strategically. I assure you we would much rather not issue a publication than issue one that is not innovative.

2015 has been yet another remarkable year for our firm with the dual launches of a migration practice and also a Brisbane office (to add to our Sydney and Melbourne offices). We took up some extra space in Sydney to facilitate further growth. The number of organisations serviced by our firm exceeded the 1000 mark this calendar year and the popularity of our partnership packages continues to increase.

We have once again contributed extensively on the philanthropic front through our pro bono practice and also sponsorships of a scholarship in Cambodia for a high school student that will take her through to the end of her university studies and support of the Keep a Child Alive Foundation. We were pleased to consolidate our relationship with Cricket NSW as one of their sponsors, to add to our principal naming-rights sponsorship of the Greater Sydney Rams in the National Rugby Championship.

Significantly, 2015 saw our firm refresh our core values through "PieCeS" and, in the same way we advise our clients to, we go to great lengths to make these living breathing principles that dictate our approach to business.

On behalf of my fellow Directors and all of the PCS team I wish you, your teams and your families a peaceful and joyous festive season and I am truly grateful for your support of our firm.

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.*

SERIOUS MISCONDUCT: when is it safe to terminate without notice?

KATHRYN DENT, DIRECTOR
BEVERLEY TRIEGAARDT, ASSOCIATE

It's a situation no employer hopes they'll have to deal with, but just in case you must, here's what you need to need to know about instantly or summarily dismissing an employee due to serious misconduct.

WHAT IS SERIOUS MISCONDUCT?

The definition of serious misconduct under the Fair Work Regulations 2009 **("the Regulations")** expands on the common law definition as including:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; or
- conduct that causes serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of the employer's business.

Depending on the circumstance, examples of serious misconduct include:

- theft;
- fraud;
- assault;
- intoxication at work;
- refusal to carry out lawful and reasonable instructions

Where an employee engages in serious misconduct, an employer is at common law entitled to summarily dismiss them, which in other words deprives the employee of any notice or payment in lieu. Many written contracts of employment will set out grounds. The employer is permitted to summarily dismiss as long as it can demonstrate that the employee has engaged in serious misconduct, serious enough to warrant instant dismissal.

Commonly, employers question what exactly that constitutes sufficient evidence for establishing the conduct occurred and how serious the conduct must be to avoid to the risks that can follow from terminating employment without notice. In short, an employer's exposure to the legal and non legal risks will be minimal if:

- the employer has complied with any relevant contractual obligations, policies and procedures;
- the employer has observed procedural fairness particularly in circumstances where the employee has access to the *Fair Work Act 2009* (Cth) ("the Fair Work Act") unfair dismissal jurisdiction, which includes an investigation (in circumstances where the conduct/allegations of misconduct may be factually in dispute);
- the employee has wilfully or deliberately engaged in conduct that is inconsistent with the continuation of their employment;
- the employer is reasonably satisfied that, on the balance of probabilities, the conduct occurred (we discuss this in further detail in this article);
- the employer acts without delay (the argument being that if the conduct was so serious to terminate without notice it should be done as proximate to the offence as possible); and
- no other form of disciplinary action is appropriate.

WHAT ARE THE RISKS?

Terminating an employee's employment without providing or paying them their notice can have both legal and non-legal repercussions for the employer.

Legal Risks

Summary dismissal can result in exposure to the following types of claims:

- Unfair dismissal claim

An employee who falls within the jurisdictional threshold can claim under the Fair Work Act that

the termination of their employment was either substantively or procedurally unfair, or both, if it was harsh, unjust or unreasonable. If the employee is successful, reinstatement, reemployment or up to six months' compensation may be awarded and in some cases backpay.

- General protections claim

Employees may claim under the Fair Work Act that their summary dismissal constituted adverse action because they exercised a protected workplace right or that they were discriminated against. For this reason, it is vital that the employer has evidence to dispel the claim as they bear the onus of proof. Compensation is uncapped in these types of claims and penalties may also be imposed on companies and individuals involved in the breaches.

- Unlawful discrimination claim

Similar to general protection claims, unlawful discrimination claims may be pursued if an employee believes (and can prove) the dismissal was causally connected to a protected characteristic including but not limited to their race, gender, marital status or political affiliations. An employer can be liable for up to $100,000 compensation in the jurisdiction of NSW. (Federally damages are uncapped)

- Breach of contract claim

If an employee can establish their conduct did not amount to "serious misconduct" then an employer may be liable for breach of contract relating to the termination of employment. Recently, an employer was ordered to pay its ex-senior executive US$2.65 million and AUD$6,425 in lost entitlements and damages when it failed to attend court to defend a breach of contract claim made by the executive after he was summarily dismissed (and thus there was no evidence to support the allegation, as pleaded, that the employee was guilty of the serious misconduct relied upon to terminate).[5]

Non Legal Risks

The range of non-legal risks include:

- Media attention

If an employer's actions in dismissing an employee reveal questionable or harsh practices, or reveal the inner workings and personalities within an organisation, then resultant litigation can impact adversely on that employer's short and long term profitability if its reputation amongst its client base, prospective clients and employees and other stakeholders is damaged. In some circumstances it may be best to avoid public litigation and the scrutiny of the press by settling a matter privately. However, depending on the nature of

5 *Coghill v Indochine Resources Pty Ltd (No 2)* [2015] FCA 1030

the conduct, it may also be in an employer's interest to show to both internal and external stakeholders the firm stance they will take in respect of certain conduct to reinforce cultural and behavioural expectations.

- Impact on other employees

The serious misconduct of an employee can impact on the productivity of other employees. Workplace gossip and speculation can divert their attention away from important tasks at hand, cultivate mistrust and unease in the workplace and reduce team morale.

PUNISHMENT THAT FITS THE CRIME

The impact of summary dismissal on an employee is significant as not only does it mean they are dismissed with no period of notice or payment in lieu of notice but the nature of the termination is such that it can adversely impact upon their reputation, career development and ability to obtain alternative employment. Therefore, it is only fair that the degree of certainty in the misconduct having occurred and the seriousness of the allegations are considered in tandem prior to instant dismissal. This is commonly referred to as applying the Briginshaw standard.

The Briginshaw test does not create a third standard of proof in addition to the criminal (i.e beyond reasonable doubt) and civil standards (i.e balance of probabilities), but rather, requires that the more serious the allegations and/or consequences arising from a finding, the stronger the proof (ie evidence of serious misconduct) should be. The Briginshaw test does not require the standard of proof in a criminal matter - employers do not need to go to that extent to prove serious misconduct occurred - but employers do need to be reasonably satisfied by evidence of sufficient weight and feel an actual persuasion based on the evidence at hand that, on the balance of probabilities, the misconduct occurred.

Accordingly, we recommend that in order to satisfy the Briginshaw standard, a prudent employer intending to summarily dismiss an employee for serious misconduct would ensure that they:

- diligently investigate the allegations of serious misconduct (deploying an appropriate level of resources having regard to the factual circumstances and legal risks);
- have regard to the seriousness of the allegations and the consequences of accepting them as truth; and
- are sufficiently persuaded that the misconduct more than likely occurred, having considered whether the sufficiency of the proof was commensurate with the seriousness of the allegations.

IS IT SUFFICIENTLY SERIOUS?

Serious misconduct is not defined by way of examples but can be characterised as conduct that damages the employment relationship to the point of no return. Summary dismissal may be warranted in the following circumstances, although each case must be considered on its own merits.

- Employee is convicted of a criminal offence

An employee's criminal conduct, if sufficiently serious and relevant to the employment, can jeopardise an employer's trust and confidence in an employee which is an essential foundation of the employment relationship and can therefore be grounds for summary dismissal. Employers should be mindful that until criminal charges are proven (resulting in a conviction) summary dismissal may not be warranted. For this reason, it is recommended that employers specify in their contract and policies that criminal charges (as opposed to a conviction) can be grounds for instant dismissal.

- Safety breaches

In the case of Singh v Fenner[6], a mill operator was witnessed by his workmates intentionally placing his hand over a machine that was rotating at high speed and placing him at risk of serious injury. The Fair Work Commission ("FWC") considered the summary dismissal of the employee as a justified ("not inappropriate") response to his actions considering the potential damage that could have been caused by the employee's reckless action (both in terms of serious injury and "significant cost resulting from disruption to the production process"). In this case, the employer was successful in defending the unfair dismissal application because it involved a serious safety breach. Not every safety breach will justify termination though and the individual circumstances must be considered.

- Conduct that is not unlawful but has the capacity to bring the employer into serious disrepute

Misconduct that involves an employer being publicly associated with the actions or views of an employee may be grounds for instant dismissal. In today's age, employers may experience this in the form of offensive

6 *Singh v Fenner (Australia) Pty Ltd* [2015] FWC 5583 (25 August 2015)

or careless use of social media by employees. This sort of misconduct must be dealt with carefully and with and in a procedurally fair manner as dismissal may not always be the proportionate response to the misconduct.

- Drug / alcohol related conduct

Instant dismissal may be justified if an employee is impaired by alcohol or illicit substances such that they cannot responsibly or safely perform their duties or fulfil their obligations towards their employer. Furthermore, cases such as *Toms v Harbour City Ferries Pty Limited* [2015] FCAFC 35 have established that where an employer has a "zero tolerance" policy on drugs and alcohol and safety is paramount to the role the employee performs, returning a positive result in a drug test can be grounds for instant dismissal regardless of whether the employee appears intoxicated or impaired.

- Dishonest conduct or theft

Dishonestly claiming personal expenses as business expenses may be grounds for summary dismissal. In *Mohapatra v Acciona Energy Australia Global Pty Ltd t/as Acciona* [2015] FWC 5976 the FWC agreed with the employer's decision to summarily dismiss an employee after he made a number of unauthorised personal purchases on the company credit over a the course of a few months and dismissed the employee's unfair dismissal application. Amongst the items were a blender, two Australia Day boxer shorts, a pair of gym shoes and shorts, a cooler bag, vitamins, a heater and 14 massages. The FWC observed that "it is such an extreme case, having regard to the level of education, responsibility and seniority of the employee" that the behaviour, "(e)ven if motivated by a lack of judgment and understanding" "has to be regarded as serious misconduct".

- Bankruptcy

In certain professions such as accounting or where an employee holds an executive role or directorship, it is an inherent requirement of the job to be adept at handling finances. An employee's insolvency may be deemed serious misconduct as it can be indicative of a lack financial proficiency required for a role and also because the negative stigma attached to insolvency can be particularly damaging to an employer's credibility and reputation. This is even more so where the employee is very senior or recognised as a public figure. In those circumstances, termination on the grounds of serious misconduct where the employee becomes insolvent, especially where such a term forms part of the employee's contract, may be justified.

WHAT CAN YOU DO TO PREVENT SERIOUS MISCONDUCT?

Hope for the best but prepare for the worst. Give your organisation the best chance of success against serious misconduct occurring by taking heed of these preventative measures.

- Induction and training

Set your organisation's expectations for standards of professional conduct by providing new starters with a proper induction and training on policies around work health and safety, workplace behaviour and codes of conduct.

- Contracts and policies

Not only do contractual clauses and policies serve as forewarnings to employees (and are therefore advisable) but they can assist to swiftly resolve termination disputes particularly where the categories of serious misconduct are set out.

- Assess your workplace culture

A culture of tolerance for wrongdoing can weaken an employer's position when allegations of serious misconduct arise. Seek to find innovative ways to reward positive behaviours in your workplace and encourage staff at all levels to speak out in the face of questionable conduct.

WHAT IF IT'S TOO LATE?

While the above measures may prevent serious misconduct from becoming an issue for your organisation, it is important to remember that an employer must deal with allegations of misconduct with a sense of seriousness and urgency, otherwise it risks being seen as affirming the employee's continued employment. While termination may be upheld by a tribunal, it could be that termination with notice is seen, by the employer's delay, as being the more appropriate outcome.

When faced with allegations of misconduct, follow your organisation's policy for investigating the conduct and remain cognisant of the need for procedural fairness. This means putting all the allegations and evidence to the employee and providing them with a fair opportunity to respond. In some circumstances, a neutral third party is best engaged to investigate serious misconduct. This can also provide insurance for the employer if there is a risk of being perceived as biased.

Employers are well within their rights to terminate employment without providing notice where serious misconduct occurs. If your organisation would like to prevent serious misconduct occurring or safeguard against a summary dismissal being mishandled, please get in touch with the experienced team at PCS.

WORKING IT OUT:

creating change + long-term pathways to employment

MATT YOUNG, MISSIONAL SERVICES MANAGER, HOPESTREET

Not far from the multi-million dollar apartments, luxury yachts and fine dining restaurants on the Woolloomooloo Finger Wharf, you'll find a community rich in social and cultural diversity yet largely isolated from society.

Tucked between Kings Cross and the City, Woolloomooloo has one of the highest densities of social housing and people experiencing homelessness in New South Wales. The need is real with SEIFA* scoring the community in the 3rd percentile of all of Australia's socioeconomic scores. This is extremely low.

A local NGO has been helping this marginalised population create real change in their own lives for over three decades. Collaborating with local businesses and corporations, BaptistCare HopeStreet has empowered individuals with education and training through a successful cleaning program, and is set to launch a new social enterprise with the aim of breaking the cycle of disadvantage while exploring the perfect cup of coffee.

"As an NGO, we don't believe there is a quick fix to homelessness, poverty or social exclusion," says Matt Young, Missional Services Manager. "We've seen real change occur when we love people where they are and stand by people at their point of need for the long haul."

A FACE OF CHANGE

This socioeconomic issue in Woolloomooloo becomes harder to ignore when we lay aside common prejudice of elected idleness, and begin to consider an individual's background. A reoccurring thread is being born into circumstance with a lack of education and support. The absence of self-confidence further

perpetuates the cycle.

For those who do receive the opportunity to embrace change, following through can be difficult. With some drug and welfare dependency issues spanning generations, how do you move away from all you have ever known?

As HopeStreet has discovered, the key is backing the opportunity with real motivation, support, skills, tools and confidence. Mike Davies** faced the challenge of rewriting his future despite his past.

"Before I started getting involved with HopeStreet, my life was chaotic and I wasn't comfortable," says Mike. "If anything felt comfortable, I would do something to sabotage it because I wasn't used to it. Since being here, comfortable is okay."

Abandoned by his parents at birth, Mike has struggled with the hurt and guilt of this his whole life, turning to drugs as a teenager to dull the pain.

"The drugs masked the feelings for a while. But the next day all the problems were still there. I was living the life of addiction, resorting to crimes to get the next fixation. I ended up in jail twice," says Mike.

Unfortunately, Mike's story is not a rarity but a reality for many people who make up the fabric of our society in disadvantaged communities across Sydney. On his second release from jail, Mike met his wife, and dedicated his time to skill development with HopeStreet, marking a turning point in his life.

"If it wasn't for my wife and HopeStreet, I would not have made the choices that I have. Who knows, I might not even be here, I could be in the gutter somewhere, or even six foot under. I have not had drugs in eight years," says Mike.

"The program has helped me with many things, like getting tax sorted and practical skills. This is the new normal. I'm very comfortable."

Last year, Mike took his education a step further and completed a Certificate 2 in Cleaning Operations through HopeStreet's Employment Training Program (ETP) and this year he's participating in further accredited training as one of six new ETP traineeships in Cleaning. The program runs in conjunction with HopeStreet Cleaning Services, which has been established for over 20 years.

CULTIVATING EDUCATION + TRAINING = ETP

Where education breeds knowledge, encouraging informed decision-making and access to employment, opportunity after hardship restores confidence and creates a clean path to better choices.

This is the grounds for HopeStreet's Employment Training Programs (ETP), which delivers practical skills through accredited TAFE training and real personal support. The commitment required by participants establishes meaningful work patterns, and provides income-earning opportunities to those who have experienced long-term unemployment.

"While we have four main programs that support the community we are based in, our ETP is about tackling the root of welfare dependency and providing opportunities for meaningful employment," says Matt.

"Sustainable employment options are scarce amongst people with complex needs. Our ETP fills this gap by providing concentrated training with career placement opportunities for people who successfully complete the program."

GROUNDWORK FOR A NEW SOCIAL ENTERPRISE

Building off the success of the established cleaning program, a new social enterprise program is in development phase for launch later this year. The Grounded Café will become the heart of a Woolloomooloo Community Centre, and operate as a training base for hospitality and barista initiatives, with future rollout including coffee vans which will operate across the city and at events.

When sourcing a name for the café, 'Grounded' was a suggestion made by Mike Davies, reflective of his journey with the NGO.

"I chose 'Grounded' because with the help of HopeStreet, I was able to get my life back on solid ground. It's not just me. There are a lot of other people in the Woolloomooloo community that do have drug, alcohol and gambling issues, and HopeStreet is a place that can help them live a normal life beyond addiction."

THE FEASIBILITY STUDY

As with all social enterprises, there are strategic keys to success. Much deliberation has gone into identifying the possible challenges and potential of the project, including targeted market research in the community, and exploring similar ventures, such as the successful Melbourne-based STREAT.

"As a social enterprise it is critical that this project is self-supporting in addition to serving the identified needs of the community," says Yvonne Morgan, HopeStreet ETP coordinator.

After collaborating with coffee industry experts Toby's Estate and Cerebos, and engaging in outreach

efforts with external social service agencies (Ozanam Learning Centre, Rough Edges, and City of Sydney), the conclusion is that this particular social enterprise has the potential to be a program leader.

"We'll provide hospitality training in a real life setting. The program will deliver a Certificate 2 in Hospitality through TAFE and barista training with a local barista school. Running parallel with the practical, we develop life skills, resume skills and provide case work support for the participant's mental and personal growth," says Yvonne.

After 12 months of training, successful participants will have the opportunity for employment transition into HopeStreet coffee vans or café, or associated organisations, as a trained barista/hospitality staff worker.

LOCAL IMPACT + YOUR CSR PROFILE

As a workplace, you can help provide vital education, training, life skills, coaching and resources to those in need in your community, as they choose to make the tough and rewarding journey towards independence.

People+Culture Strategies is partnering with HopeStreet to help deliver these opportunities, and your workplace can too. Your corporate social responsibility (CSR) profile can benefit through partnership, including media and local news presence, web and social media mentions, launch participation, and human interest content for your internal and external publications.

There are several ways you can get involved:-

As a workplace, you can provide support through corporate donations, urban education (your staff members coming down to learn about homelessness), or social enterprise partnership, where you can donate by providing program resources, provision for a coffee van's annual operating costs, or sponsorship of an ETP worker. You'll join a number of conscious work places in making a real difference in your society, including the Brett Whitely Studio, Ethinvest, Milk Crate Theatre, and Sydney Community Foundation.

As an individual, you can donate your time or money, supporting real change in your community.

Please contact HopeStreet to register your support, call Matt on 02 9358 2388 or email hopestreet@baptistcare.org.au.

*Socioeconomic index for areas as measured by the Australian Bureau of Statistics

**Name has been changed to protect his privacy

Key Takeaways

1. ETPs tackle the root of welfare dependency and provide real opportunities for meaningful employment.
2. The key to change is backing opportunity with real motivation, support, skills, tools and confidence.
3. People+Culture Strategies is partnering with HopeStreet to help deliver these opportunities in your community, and your workplace can too.

REMUNERATION RISKS AND OPPORTUNITIES: updates on remuneration and benefits laws

JAMES ZENG, SENIOR ASSOCIATE
ELIZABETH KENNY, GRADUATE ASSOCIATE

- **Employers should review and update their employment contracts to entitle them to absorb any superannuation increases.**
- **Recent changes in legislation that provide for more favourable tax treatment on ESS interests has made ESS arrangements more attractive to employers.**
- **Section 200B of the Corporations Act limit termination benefits payable to anyone who holds 'managerial or executive office'.**
- **Failure to obtain shareholder approval for a benefit that exceeds the allowable amount without shareholder approval, and that is not an exempt benefit constitutes a contravention of the Corporations Act.**

The structuring of remuneration and benefits in employment contracts can present both opportunities and risks for organisations. This article explores the limitations on the way in which remuneration and benefits can be structured, and how best to maximise any opportunities available in the way in which employment contracts are framed.

CONTRACT TERMS AND SUPERANNUATION INCREASES

Increases to the percentage of superannuation payable to employees raises questions of whether such increases add to the overall salary burden on an employer, or are absorbed within the total salary package of an employee.

The extent of superannuation contribution increases has been a matter of policy debate for some time. The required contribution has increased from 9.25% to 9.5%, and is currently set to increase to 12% by 2025, through staggered increases beginning in 2021, although this may change again if different policy objectives are adopted. The impact of such increases depends on the way in which the relationship between salary and superannuation contributions is defined in the relevant industrial instrument and/or the contract of employment. For employees whose employment is governed principally by their contractual terms, the wording of the salary and superannuation clause will determine whether the increase can be absorbed.

Two different approaches are set out below:

SALARY INCLUSIVE OF SUPERANNUATION	SALARY EXCLUSIVE OF SUPERANNUATION
Your total remuneration is $50,000 inclusive of superannuation contributions.	Your base salary is $50,000. Additionally, the Company will make superannuation contributions in accordance with superannuation legislation.

Overall, annualised salaries or total remuneration packages have the advantage of giving an employer certainty that increases in superannuation contributions will be contained within that salary package. Salary reviews present an opportunity for updating contractual terms to reflect this, where agreement can be reached on this point.

EMPLOYEE SHARE SCHEMES

Employee share schemes ("ESS") are a mechanism by which a company provides shares or rights to acquire shares (options) to its employees. Giving employees a stake in the business can be an effective recruitment

strategy to attract talented employees. But it is also an effective retention strategy, as employees often need to remain with the company over the longer term in order to realise the gains from their shares or options. This is particularly relevant to the start up sector, where it may take some years for the profitability of the venture to emerge, and retaining its best performing employees through more lean times is critical for the success of the company.

In June 2015, Federal legislation reversed a number of unpopular provisions in respect of taxation on ESS interests. Key changes include deferral of tax and concessions for start-up companies. This more favourable tax treatment has made ESS arrangements more attractive to employers especially start-ups, as a means of recruiting and retaining key team members, rewarding hard working employees, and providing these employees with a stake in the company's success.

The main changes that employers should be aware of include:

- the taxing point on the exercise of ESS rights has changed from when the right vests to when the right is actually exercised by the employee; and
- tax deferral if there is a disposal restriction.

Start up companies should be aware that there are additional tax concessions for employees with ESS interests in their start up companies, including:

- for shares acquired at a discount, the discount is exempt from income tax;
- the shares will be subject to capital gains tax only on disposal

These changes apply to ESS interests issued on or after on 1 July 2015. Employers should consider whether ESS can play an effective role in their recruitment and retention strategy and if their shareholder agreements are up-to-date. It is essential to obtain specialist taxation advice in relation to any ESS.

TERMINATION BENEFITS FOR SENIOR MANAGERS AND EXECUTIVE EMPLOYEES

A core limitation on the way in which remuneration and benefits can be structured is the manner in which the provisions of the *Corporations Act 2001* (Cth) ("Corporations Act") seek to ensure that departing executives are not excessively rewarded in the form of a "golden handshake". Section 200B of the Corporations Act imposes limitations on the termination benefits payable when senior employees leave a managerial or executive position. A termination benefit can only be paid beyond a specified cap if shareholder approval is received, or the benefit is otherwise exempt. The specified cap is 12 months base salary. Base salary is calculated as the average of the last 3 years' average annual base salary.

A good understanding of the circumstances in which shareholder approval is required and what exemptions are available under the Corporations Act facilitates compliance with the requirements of the Corporations Act and helps employers avoid any potential prosecution arising out of the giving of non-approved termination benefits. The case of *Queensland Mining Corporation Ltd v Renshaw* [2014] FCA 365 is a recent example of a Court tracing such a benefit and requiring repayment in full by the former senior employee and highlights the need for close attention to these requirements in negotiating and managing termination arrangements.

COVERAGE

The first point for consideration is the type of positions to which the requirements of the Corporations Act apply. The scope of who holds a 'managerial or executive office' is broader than merely executive or non-executive directors. It includes:

- a retiree who has held a managerial or executive office at the time of the termination of employment or engagement or within the previous three years;
- in the case of a listed company, a person who holds a position that has been listed in the directors' report for the prior financial year; or
- in the case of an unlisted company, a director or any other position in connection with the company's corporate affairs such as key senior management personnel.

TYPES OF BENEFITS

The types of benefits captured under the legislation have been interpreted broadly to give maximum effect to the intent of the legislation. Any payment, rights or interests in property and other legal and equitable rights in connection with the termination are considered benefits as well as pensions (other than superannuation), restraint or non-compete payments and payments relating to out of court settlements. For example, payments structured as notice, severance or a non-deferred bonus triggered on termination would be covered.

CONSEQUENCES

Failure to obtain shareholder approval for a benefit that exceeds the cap, and is not an exempt benefit, could result in a prosecution and the imposition of a penalty for a breach of the Corporations Act.

In the case of employees, recent litigation shows that Courts are prepared to order that an employee repay the whole amount to the employer, even the amount of the benefit that falls below the cap. It is in the interests of both the employer and employees to ensure that any termination benefit is under the cap, or complies with the relevant provisions.

A recent example is that of *Queensland Mining Corporation Ltd v Renshaw* [2014] FCA 365 where an executive employee, Mr Renshaw, and his service company, Butmall Pty Ltd ("Butmall"), were ordered to pay back nearly $680,000 in termination benefits after Mr Renshaw resigned from his position as Managing Director of the Queensland Mining Corporation ("QMC"). Various payments outlined in the settlement deed between Mr Renshaw, Butmall and QMC were found not to be exempt benefits, including purported superannuation contributions that had not accrued and payments to Mr Renshaw's accountant purporting to be remissions to the ATO which were said to be held on trust by the accountant. The Federal Court commented that payments for annual leave, long service leave, bonuses, allowances and share options could not be included in the calculation of Mr Renshaw's base salary for the purposes of determining the cap.

In the event of a breach of section 200B of the Corporations Act, the amount of the benefit is said to be held on trust by the employee to be paid back to the employer by virtue of section 200J. This includes any payments that are held on trust, such as the payments held on trust by the accountant for the ATO in this case. This highlights that despite payments being held on trust for an unrelated company, payments made to an executive employee can still be traced and subject to a demand for repayment.

ACTION REQUIRED

Employers should consider carefully whether the terms in their employment contracts or service agreements relating to remuneration or benefits payable to senior employees of the corporation in connection with termination may fall foul of section 200B of the Corporations Act, and seek appropriate legal advice where necessary. This will minimise the risk of exposure to penalties resulting from a breach of the Corporations Act.

CONCLUSION

Employers should be aware of not only the limitations on the ways in which remuneration and benefits can be structured, but also the opportunities that can arise from careful drafting of the terms of their employment contracts. Incorporation of superannuation increases into an employee's annualised salary presents an opportunity for employers to ensure that any increase in superannuation is captured within the existing salary arrangements. Employers may also wish to consider the termination benefits payable to an executive in connection with termination to ensure that they do not fall foul of section 200B of the Corporations Act and risk a penalty being imposed. Finally, recent tax changes giving more favourable tax treatment to employee share schemes make then a useful mechanism for attracting and retaining talented employees.

THE GREAT PENALTY RATE DEBATE

NED OVEREND, SENIOR ASSOCIATE
ALEXIS AGOSTINO, GRADUATE ASSOCIATE

Penalty rate reform is one of the key topics at the forefront of industrial relations debate this year. The Australian Government is under increasing pressure from stakeholders in affected industries (including retail, hospitality and entertainment) to make changes to the current penalty rates system, particularly with respect to Sunday penalty rates and new public holidays.

The introduction of new public holidays in Victoria has further stirred debate about penalty rates and their role in a modern workplace relations system.

Public holidays can come at an enormous cost to the national economy and business owners, with little thought given to matters such as who bears the increased cost of wages when public holiday penalty rates are applied. According to PwC Australia, the new Grand Final Eve public holiday in Victoria alone may have cost the economy as much as $852 million as a result of the closure of businesses that would normally be open on that day.

The cost to businesses that remain open is also potentially significant, given that a majority of employees are likely to be entitled to penalty rates of as much as two and half times their regular wages for working on a public holiday.

WHAT ARE PENALTY RATES AND WHY DO THEY EXIST?

Penalty rates refer to the additional remuneration paid to employees by employers in order to compensate them for working at undesirable or unsocial hours. This includes payment for:

- overtime work;
- regular or unpredictable work;
- weekends;
- public holidays; and
- shift work.

The penalty rate system originated at a time when the landscape of the Australian society and labour market was vastly different to how it is today. The majority of the workforce were males working in full time industrial jobs, there was little to no casual or part time employment and low female participation rates in the workforce.[7]

Most people worked during the week so weekends and public holidays were the only time available for socialising and worship, therefore working during these hours was considered to be "unsocial". Accordingly, employers were expected to pay a "penalty" for engaging employees during these unsocial hours.

A TIME FOR CHANGE?

Australian society has changed dramatically since this time. Today there is a 58% female participation rate in the workplace[8], casual employment, part time employment and flexible work arrangements have become commonplace and weekend and after hours work is often deemed necessary to fulfill the demands of a consumer society and compete in a globalised world.

In the past, Saturdays were reserved for recreation and sport while Sunday was the day of religious

7 *Phil Lewis, 'Paying the Penalty? The High price of Penalty Rates in Australian Restaurants' (2014) 21 (1) Agenda: A Journal of Policy Analysis and Reform 7, 8.*

8 *Joanne Simon-Davies, Women in the Australian workforce: A 2013 update (8 March 2013) Parliament of Australia*

observance[9], but this may no longer resonate with contemporary Australian society. Now, participation in sport and outdoor activity is outweighed by engagement with audio/visual media.[10] Similarly, fewer Australian's actively engage in Sunday worship with the 2011 census reporting that 22.3% of Australian's have no religious affiliation, 7% more than the 2001 census.

Further, with increases in technology and globalisation allowing people to work from anywhere at any time and across multiple time zones, the concept of a regular working week with set social and unsocial hours is becoming more and more diluted.

The position of those who support the modification of penalty rates argue that the penalty rate system is a relic of the past. The evolution of contemporary Australian society and modern business practices has made "unsocial hours" irrelevant and the penalty system must adapt to serve a today's society.[11]

Advocates for the penalty system argue that the penalty rate provides an incentive for people to work on weekends or at undesirable times. While this may be the case for some employees others prefer the flexibility of working at these times. For example, for employees with carer responsibilities during the day, working weekends and nights may suit their schedules better as their partners who work regular hours can look after the children at that time. This is also the case for many other groups, such as university students, where working weekends and public holidays often fits in better with their existing commitments.

While supporters of the penalty rate system argue that businesses that are open during "unsocial hours" will profit from increased trade, this is not necessarily the case. Many employers argue that trade on weekends and public holidays is often required to enable business to trade and support employee wages during quieter periods during the week.

Watch this space.

PRODUCTIVITY COMMISSION

This year the Productivity Commission will deliver its inquiry into workplace relations and the Fair Work Commission will decide on the future of penalty rates in the retail and hospitality industries. Together, these decisions will impact on the future of penalty rates.

In August of this year, the Productivity Commission's draft report into Australia's workplace relations framework was released. This included, amongst other things, recommendations that:

- employers not be required to pay for leave or any additional penalty rates for any newly designated State and Territory public holidays; and
- Sunday penalty rates that are not part of overtime or shift work be set at Saturday rates for the hospitality, entertainment, retail, restaurants and café industries.

In November 2015, the Productivity Commission will deliver its final report and recommendations into Australia's workplace relations framework. From this, legislative changes are expected.

PENALTY RATE CASE

In addition to any reforms flowing from the Productivity Commission, the Fair Work Commission is currently reviewing penalty rates under the hospitality and retail industry modern awards as part of its 4 year modern award review.

Key stakeholders in these industries have until early December 2015 to file submissions presenting their arguments for and against penalty rate reform. Following this, a decision will be handed down that will potentially amend the application of penalty rates in these awards.

While a complete overhaul of the regime is unlikely, some change like the alignment of Sunday rates with Saturday rates is expected.

WHAT DOES THIS MEAN FOR EMPLOYERS?

The debate on the penalty rate system is far from over, but while the debate continues, penalty rates still apply. It therefore remains critical for employers to understand and comply with their obligations in relation to penalty rates and ensure they are up to date with any forthcoming changes.

PCS can assist you if you have any questions about your business' obligations in relation to penalty rates or how to comply with them.

9 Restaurant and Catering Association of Victoria [2014] FWCFB, [23].

10 Ibid.

11 Emily Aitken, 'Living for the weekend: Should weekend penalty rated be reduced or abolished' (2014) 5 Workplace Review 126, 127.

GETTING MORE THAN YOU BARGAINED FOR: enterprise bargaining for your brand

ALISON SPIVEY, ASSOCIATE DIRECTOR
DAVID WEILER, ASSOCIATE

The enterprise bargaining process is a minefield of legal, financial and reputational risks. However, if done properly, it can also be a very effective way of reflecting and enhancing your business' brand. What can your business do to manage the risks and get the most out of the bargaining process in terms of branding?

Employers and employees have been engaging in enterprise bargaining at the workplace level for more than 20 years. For some, it has become the norm, the way in which their employment rights and obligations are formed. For others, it is a relatively new process, and one they may not have engaged in voluntarily.

Irrespective of a business' relative experience in enterprise bargaining, what often gets overlooked is that the way that employers engage in bargaining, and the resulting enterprise agreement (particularly if the terms and conditions in that agreement are unique or innovative), form an important part of the recruitment, selection and retention strategy for a business.

This article explores:

- **why an employer might engage in enterprise bargaining, as opposed to choosing another way of regulating the employment relationship with its employees; and**
- **what steps an employer can take to manage the risks posed to their brand by enterprise bargaining and how they may use the enterprise agreement process to enhance their business' brand.**

WHY BARGAIN?

There are a number of means available to employers to regulate their relationship with their employees including individual employment contracts, or reliance on award terms and individual flexibility agreements, and enterprise agreements, to name a few.

The reasons as to why employers bargain for an enterprise agreement will differ from business to business. What sets an enterprise agreement apart from the other options from an industrial perspective is that an enterprise agreement:

- allows you to tailor the terms and conditions of employment that you apply to your employees to your business needs;
- showcases the terms and conditions of employment offered by your business in a way that is not typically possible in a job advertisement or interview;
- provides consistency and certainty for your business for the life of the agreement, not only in terms of employee costs, but also in an industrial sense, because parties are prevented from taking industrial action prior to the nominal expiry date of the agreement;
- encourages employee engagement, as employees are provided with an opportunity to have their say about their terms and conditions of employment, whether they actively participate in the bargaining process or choose only to vote on the agreement;
- can be a vehicle of organisational change, if change is on the horizon for your business; and
- can be used to promote a business' values and culture.

How can your business manage its risk and enhance its brand through enterprise bargaining?

There are a myriad ways that an employer can manage the risks posed to their brand by enterprise bargaining and best ensure that the process is as effective from a branding perspective as it is from an industrial one. Of critical importance are:

- the proposed content of the enterprise agreement; and
- the manner in which the employer conducts itself during the bargaining process – not only in terms of how the employer interacts with stakeholders (including its employees and their representatives), but also the commitment of the employer to that process demonstrated by the level of planning the employer has engaged in.

Each of these is discussed further below.

USING THE CONTENT OF THE ENTERPRISE AGREEMENT TO BUILD YOUR BRAND

In recent times, we have witnessed a growing acknowledgement of the enterprise agreement as a potential branding tool, together with an increasing sophistication in how enterprise bargaining and enterprise agreements are used by businesses to meet their strategic objectives.

In addition to providing certainty in relation to terms and conditions of employment for the life of the agreement, by including certain terms in an enterprise agreement, an employer can shape and maintain the culture of its business.

The terms of the enterprise agreement are in themselves a public statement of what a business stands for and are a reflection of how they intend to treat their employees. This can be a powerful recruitment tool, enticing prospective employees to come and work for your business.

These terms can also provide a competitive advantage against competitors seeking to entice employees away from your business whom you otherwise may wish to retain.

Another way of building your brand through the content of your enterprise agreement is to include new or innovative terms in that agreement. For the most part, inclusion of these terms tends to be driven by what is happening in society at large when bargaining is occurring.

A number of enterprise agreements, particularly those negotiated for large well-known organisations, have sought to introduce additional benefits in relation to such matters as workplace flexibility, parental leave and, more recently, domestic violence leave, as these issues increasingly gain public awareness and understanding.

PROTECTING YOUR BRAND DURING THE BARGAINING PROCESS

Knowing each party's rights and obligations in the enterprise bargaining process plays a key role in protecting and potentially enhancing your business' brand. From the outset, it is the employer's approach to the bargaining process that sets the tone for the negotiations.

There is nothing more potentially detrimental to a business' brand than when it appears that the employer does not, or is perceived to not, understand their own rights and obligations or the rights and obligations of other bargaining parties in that process. Nothing

will undermine an employer's stated commitment to the bargaining process more than poor planning and preparation.

So what do you need to do? In essence, your business needs good planning and preparation before it engages in enterprise bargaining.

Firstly, it is important that you take steps on behalf of your business to understand the enterprise agreement process and the rights and obligations of the parties in connection with that process.

By way of summary, in order for the Fair Work Commission ("FWC") to approve an enterprise agreement, each of the following requirements must be met:

- all mandatory pre-approval steps must be taken (for example, notification of representational rights and an appropriate access period);
- the group of employees covered by the agreement must be "fairly chosen";
- the FWC must be satisfied that the parties have reached "genuine agreement";
- no terms of the agreement may contravene the National Employment Standards;
- mandatory terms must be included (see below for further detail);
- unlawful terms are to be excluded;
- additional requirements relating to shift workers, piece workers, school-based apprentices and trainees and outworkers under the FW Act must be met (if applicable); and
- the agreement must pass the "Better Off Overall Test" (BOOT).

In addition, the parties are obliged to bargain in good faith throughout the enterprise bargaining process, as provided for in the legislation.

Secondly, the business must take steps to put in place mechanisms that will allow it to maintain control of the bargaining process to the extent that it possibly can and within the confines of the legislation. Managing the expectations of the stakeholders in the bargaining process, including those of the bargaining representatives at the bargaining table, is crucial to this aspect of your strategy.

There are a number of practical mechanisms that a business can adopt in practice to manage stakeholder expectations, including:

- establishing bargaining protocols at the outset of the bargaining processes. These protocols are particularly important if there are a number of bargaining parties at the negotiating table. These commitments may deal with issues such as logs of claims, meeting times and places and the rules of engagement between the parties; and
- developing and committing to an expansive communications strategy. It is preferable that this strategy be developed and in place to the extent

reasonably practicable prior to commencing bargaining. However, that strategy will also need to be flexible in order to respond appropriately to developments during the bargaining process, and, above all, ensure precise, concise and transparent communications with stakeholders to avoid any suggestion that the employer is not bargaining in good faith.

Lastly, your business needs to identify its bargaining position – the "yes", "no" and "maybe" of what will be included in the enterprise agreement – and commit to that position. This includes undertaking appropriate financial modelling to ensure that your business can afford what it is proposing to commit to by way of the enterprise agreement.

While this may seem like a simplistic model, the enterprise bargaining requirements in the legislation are highly technical and can be difficult to navigate for those unfamiliar with the requirements. Failure to adhere to the requirements may ultimately prove to be expensive, with the parties having to potentially renegotiate aspects of the enterprise agreement and then undertake the access and voting periods again.

Whatever your company's size, an enterprise agreement can provide you with benefits. Building a brand through effective bargaining can set companies apart from the competition while also improving or solidifying an organisation's culture.

PCS works with its clients to navigate the entire enterprise agreement process in order to ensure that the bargaining benefits both the brand and the business.

Mandatory Terms of an Enterprise Agreement:

- The dispute resolution term provides a mechanism to resolve disputes between the parties in relation to the agreement and the National Employment Standards.
- The flexibility term provides employers and employees covered by the agreement with the ability to reach an agreement about the operation of specific aspects of the agreement to better suit their individual circumstances.
- The consultation term of the agreement imposes obligations not only in relation to "significant changes" that may affect employees, but also in relation to proposed changes to rosters and hours of work.
- The regulations contain model dispute resolution, flexibility and consultation terms for the parties to rely on.
- A nominal expiry date, which can be no more than four years from approval.
- A coverage term that sets out precisely which of the employees employed by the employer will be covered by the enterprise agreement. The Commission must be satisfied that the group of employees proposed to be covered by the enterprise agreement has been "fairly chosen".

GETTING A HEAD START ON START-UPS: What are they and do you want one?

ERIN LYNCH, SENIOR ASSOCIATE
MICHAEL STARKEY, GRADUATE ASSOCIATE

When you hear the words "startup culture", a stereotypical image comes to mind. Zoe and Dean playing ping-pong on their lunch break. Brady spending his breaks napping in a sleep pod. Marsha confirming Sydney's latest tropical house DJ for Friday night drinks. But what's underneath it all?

WHAT MAKES A STARTUP CULTURE?

Behind the stereotypical image, one can identify characteristics common to the culture of the most successful startups. However, these characteristics do not work in isolation and success is dependent on the right balance within an organisation.

1. Humanity and humour

While responsibilities may be structured hierarchically, interactions between co-workers don't always need to reflect these same structures. Everyone is respected equally and relied upon to contribute to the success of the organisation, from the intern who started yesterday to the founder and CEO. Collaboration across different levels of the organisation can engender commitment, motivation and a high-performance culture.

Although the success of an organisation is paramount and the responsibility of everyone, success does not need to be achieved in a sterile work environment. It is possible to maintain a commitment to organisational goals while encouraging a more relaxed working culture. In fact, organisations with a less formal working culture can breed creativity and collaboration, from which success often flows organically.

2. Confidence and self-awareness

A reflective organisation is able to identify its strengths and its weaknesses. The best leaders have faith in their own ideas, but recognise where there is room for improvement and are not afraid to ask for help where this is needed.

Alongside this, an organisation and its employees must want to be the "best" and know what they want to be the "best" at. This means having a well defined and strongly articulated vision and set of values which guide the organisation at all times. Here at PCS, we live by our PieCeS: Positivity, Innovation, Expertise, Collaboration, Efficiency and Service.

> "A CULTURE IS GOING TO FORM WHETHER YOU LIKE IT OR NOT, AND IF YOU PAY ATTENTION TO IT, YOU CAN CRAFT SOMETHING THAT MAKES THE COMPANY STRONGER"
>
> – BIZ STONE, CO-FOUNDER, TWITTER.

3. Honesty and communication

Whether it's blogging on your organisation's website, Tweeting updates to your followers, or encouraging active discussion between employees at round table meetings, a startup culture embraces open and continuous communication.

An essential aspect of that communication is honesty. An organisation that acknowledges its failures, as well as celebrating its successes, will earn respect both internally and externally. This does not necessarily mean exposing an organisation's weaknesses; rather, each failure is presented as an opportunity for improvement.

4. Creativity and innovation

There is no need to reinvent the wheel, but making existing processes and procedures more efficient is essential. The way of thinking should always be: "how can we do this better?"

The answer often lies in allowing people – at all levels of the organisation – to voice their ideas without fear of criticism or ridicule and encouraging employees to pursue projects that spark their creativity. Employees who are given some autonomy to explore their passions are more likely to produce better work across the board.

> "WHEN YOU'RE A TEAM OF FIVE DOING THE WORK OF 10 PEOPLE, YOU NEED TO BE ABLE TO COLLABORATE, AND COLLABORATE WELL"
>
> – MATT BARBA, CO-FOUNDER, PLACESTER.

WHAT ARE THE RISKS?

While a culture possessing the above characteristics is one that can add value to your organisation if crafted properly, there is a need to remain alert to the potential pitfalls associated with its creation.

1. Too much fun

While all work and no play makes Jack a dull boy, all play and no work makes Jack worthless. In the quest to establish an atmosphere conducive to creativity and innovation it is all too easy to lose sight of the core goal: to make the organisation an on-going success.

From day one, employees need to understand that, while there is room for some frivolity, freedom and informality, these concepts must run in parallel with achieving organisational goals and, at an individual level, employees performing their role to the best of their ability.

> "MAKE YOUR TEAM FEEL RESPECTED, EMPOWERED AND GENUINELY EXCITED ABOUT THE COMPANY'S MISSION"
>
> – TIM WESTERGREN, CO-FOUNDER, PANDORA.

This can be achieved by ensuring that the organisation's leadership team are role models of ideal behaviour and that a certain number of "fun" activities are always aligned to business development. It is also prudent to ensure that in promoting a less hierarchical and a more relaxed work culture within an organisation, this does not replace an organisation's core values.

2. Too much money

The modern, high-tech, designer image associated with startup culture doesn't come cheap. An organisation must always consider whether the money it wants to spend on a pinball machine might be better spent, for example, training staff.

An organisation should not be distracted by an obsession with image and appreciate that this is only one aspect of a startup culture. It is important to know your limits and invest wisely.

3. Blurred lines

An organisation in which contributions by all members are considered equally important must not be one in which there is no leader. Strong leadership is essential in order to craft culture and guide an organisation when decisions need to be made.

That being said, leadership does not need to be asserted through a "tough" approach. Effective communication, honesty, respect for the ideas of others and an ability to articulate and live an organisation's values are clear hallmarks of good leadership.

4. Recruitment: wants vs needs

When it comes to recruitment, what you think you want might not be what you need. As with the physical office, an organisation should not be swept up in the image

> "I BELIEVE THAT YOU HAVE TO BE THE ARCHITECT OF THE CIRCUMSTANCES – THAT OPPORTUNITY IS SOMETHING YOU MANUFACTURE, NOT SOMETHING YOU WAIT FOR"
>
> – BIZ STONE, CO-FOUNDER, TWITTER.

of a candidate and whether it fits a certain stereotype. While a candidate's charisma may be important, it should not be allowed to distract from whether a candidate's skills and capabilities are what is needed to drive the success of the organisation.

Recruitment should be based on position descriptions and selection criteria suited to the needs of the organisation. Similarly, candidates should be assessed on what they can bring to your culture, keeping organisational values in mind.

While the stereotypical image that this article opened with may be attractive, the message is that there is more to startup culture than that. Any organisation can build a culture based on startup principles, no matter its size, resources or industry. When crafted well and with balance in mind, startup culture adds value to an organisation by boosting morale and driving achievement, which in turn can deliver success.

THE GENERAL PROTECTIONS REGIME: Four things you probably don't know

SINA MOSTAFAVI, SENIOR ASSOCIATE
MICHAEL STARKEY, GRADUATE ASSOCIATE

Most employers are well aware of the basic principles of the general protections regime of the Fair Work Act 2009 (Cth) (the "FW Act")... and so they should be. After unfair dismissal claims, general protections claims are the most common type of claim faced by employers in the Fair Work Commission (the "FWC"), with 987 claims lodged in the first quarter of 2015 alone.[12] Further, employers face a maximum penalty of $54,000 for a breach of the regime and, in addition, may be ordered to pay compensation to an affected individual.

For those of us a little rusty, under the general protections regime, a person must not take "adverse action" against another person (for example, by terminating their employment) for certain prohibited reasons (for example, because that person has exercised a "workplace right" or because of their sex, race, age or disability).

While the concept behind the regime is straightforward, its intricacies are less so. Here are four things you probably don't, but definitely should, know...

1: It's not all bad news... employers have workplace rights and can bring a general protections claim

While the majority of general protections claims are brought against employers by employees, the FW Act also enables employers to bring claims against employees, independent contractors or industrial associations in certain circumstances. This means that the general protections regime is a source of rights, not just responsibilities, for employers.

In *Esso Australia Pty Ltd v The Australian Workers' Union* [2015] FCA 758, the FWC found that the AWU took adverse action against Esso by organising unprotected industrial action in an attempt to coerce Esso into changing its position in relation to a proposed enterprise agreement.

While the AWU had obtained authorisation to undertake certain protected industrial action in relation to the negotiations, a number of particular work bans it proposed had not been notified to Esso in accordance with the FW Act, and therefore constituted unprotected industrial action which fell outside the scope of the authorisation. The question was then whether that unprotected action was intended to deny Esso its "workplace right" to freely negotiate an enterprise agreement with regard to its own interests.

Having regard to the fact that relevant AWU officials were aware of the significant impact the industrial action would have on Esso's productivity, the Court held that the intent of the AWU "was to apply sufficient direct pressure on [Esso] to cause it to act otherwise than in the exercise of its own free choice. It was to cause it to agree to terms in a prospective enterprise agreement to which it would not, as a matter of choice, have agreed in the absence of that pressure".[13]

2: HR managers beware... individuals can be held personally liable for their role in breaches of the

12 *See <https://www.fwc.gov.au/documents/documents/quarterlyreports/fwo-3Q-FY14-*

13 *Esso Australia Pty Ltd v The Australian Workers' Union* [2015] FCA 758, [174].

general protections regime

While many human resources managers will be aware of the FWC's power to impose a penalty on organisations for a breach of the general protections regimes, it is less well-known that individuals may be held personally liable for their involvement in such a breach. The maximum penalty that can be imposed on an individual for each breach is $10,800.

Significantly, it is not necessary that an individual be actively involved in aiding or abetting a breach in order to have a penalty imposed on them. Rather, it is enough that an individual has been in any way "knowingly concerned in" or "party to" the breach, whether directly or indirectly. The breadth of this provision makes it essential for managers to be thoroughly aware of their organisation's obligations, in order to avoid liability for a perhaps unintentional misstep and to actively assert their voice within their organsaition in order to steer it clear of legal pitfalls.

In *Director of the Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors (No 2)* [2015] FCCA 2129, the Federal Circuit Court fined two human resources managers $3,500 each for their role in coercing an employee off his salaried contract of employment and onto an enterprise agreement under which he would be paid wages.

Interestingly, in that case, the Court rejected an argument that the managers should not be personally fined because they were following their employer's direction, highlighting the need for human resource managers to take personal responsibility for their organisation's dealings with employees. The Court held that the mangers "had a choice of not implementing the decision [to move the employee off his salaried contract], but failed to implement that choice".

3: One bad apple spoils the bunch… a decision motivated in part by a prohibited reason will be unlawful, even if the decision can be justified on other grounds

It is common sense that not everyone in a workplace will get along. From an organisational perspective, while personal animosities may be difficult to stamp out completely, it is essential that they are not allowed to infect professional decision-making processes. That is because perceptions of "bad attitude" may be motivated (perhaps subconsciously) by a prohibited reason under the general protections regime, for example, a person's tendency to make complaints in relation to their employment. To this end, every person materially involved in a decision in relation to an individual's employment must be able to justify that decision on objective grounds related to the employment.

The danger that arises if such justification is not possible was recently demonstrated in *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Ltd* [2015] FCA 1014. In September 2014, Clermont Coal announced a restructure that would result in around 100 workers losing their jobs. Redundancies were to be determined based on scores awarded to employees in four criteria:

1. performance reviews;
2. performance management;
3. skills/competencies; and
4. attitude.

Following his assessment by multiple managers, Mr Scott, an executive member of the CFMEU, was selected for redundancy. The CFMEU challenged Mr Scott's redundancy on his behalf, alleging that Mr Scott had been made redundant because of his union activities.

While the Court was satisfied with the decision-making process of two of Mr Scott's three managers, it upheld the CFMEU's claim, noting the consistently low scores attributed to Mr Scott for his "attitude" by the other manager, Mr Fleming. The Court held that *"Mr Fleming [did not concentrate] as he should have… on Mr Scott's performance as an employee and his attitude and manner more generally. Instead…Mr Fleming was distracted from that course by his difficult relationship with Mr Scott, which stemmed from his terse dealings with him as a CFMEU executive member".* [14]

4: Same same, but different… there is a difference between the exercise of a workplace right and the impact of the exercise of a workplace right… for now

In a decision which could limit the scope of operation of the general protections regime, the Full Court of the Federal Court, in *Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76, has held that adverse action is not taken against an employee if that employee is dismissed due to the impact on the employer of the employee exercising a workplace right, rather than due to the exercise of that workplace right itself.

That case involved an employee, Mr McDermott, being moved from a weekend to weekday roster after failing

14 *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Ltd* [2015] FCA 1014 [211].

to present for weekend shifts due to illness (the "First Decision"). After some months, Mr McDermott was moved back to weekend shifts, on the condition that he agree to provide a medical certificate for future absences due to illness. Following a subsequent absence, Mr McDermott failed to provide a medical certificate, and was moved back to weekday shifts (the "Second Decision").

By majority, the Full Court of the Federal Court held that neither of the Decisions contravened the general protections regime. Highlighting the importance of the "subjective reasons for action of the decision-maker"[15] , the majority upheld the original finding that:

- the First Decision was made because of the "lack of predictability" in Mr McDermott's attendance on weekend shifts;[16] and
- the Second Decision was made because Mr McDermott failed to notify his absence in accordance with the agreement and, taking into account Mr McDermott's history, Endeavour Coal had reason to doubt that his absence was due to illness.[17]

The Court accepted that, in making the Decisions, Endeavour Coal was concerned only with the implications of Mr McDermott's absences, rather than his right to be absent from work on personal leave.

The distinction between the impact and exercise of a workplace right is complex and evolving. We will be following its development with interest, particularly given the CFMEU is seeking to appeal the Endeavour Coal decision in the High Court.

If the distinction is ultimately upheld, employers may be able to successfully defend a general protections claim despite:

- the employee exercising a workplace right; and
- adverse action having being taken,

if the employee's exercise of that right negatively impacts the business and that impact is the subjective reason for the adverse action being taken.

15 *Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] FCAFC 76 [91]

16 *Endeavour Coal, [34].*

17 *Endeavour Coal, [38].*

CHANGE MANAGEMENT AND PERFORMANCE MANAGEMENT: how to get the best out of people

CLAIRE BRATTEY, ASSOCIATE DIRECTOR

Resistance to change is normal.

The successful management of change is defined by the ability of people to move towards, and accept, the vision for change.

It sounds simple.

The manner in which the terms 'Performance Management' and 'Change Management' are thrown around the office these days you could be forgiven for thinking that the processes have been so well developed that they are always successfully implemented.

But according to New York Times best selling author John Kotter, 70% of change initiatives in organisations and businesses fail.

Why? In most cases the principal reason for failure, is simply a failure to communicate.

Regardless of whether it is a change management process or a performance management process, bad implementation and execution of any process causes stress within the workplace.

Workplace stress is costing the Australian economy at least $14.81 billion a year - 3.2 days a year, per worker are lost to workplace stress. [1]

A great deal of time and money has been spent by many research institutions on how to implement effective change management and how to get the most out of employee performance management, yet recent research indicates that neither are being implemented effectively.

According to a public survey by Deloitte, only 8% of companies report that their performance management process drives high levels of value, while 58 percent said it is not an effective use of time. [2]

What is clear is that the meaning of change management and performance management is different to an employer and an employee.

Unless something is done at the beginning of the process to bring both the employer and the employee closer together, both parties will often travel down different paths and fail to arrive at the same destination.

WHAT DOES 'CHANGE MANAGEMENT' MEAN TO EMPLOYEES?

For most employees, their first reaction to change management is 'Am I going to be made redundant?'

It is rarely received as a good thing. After all, since when has advancement in technology increased the headcount within an organisation?

Change is therefore met with resistance by employees who are often highly suspicious and sceptical of any new process. This resistance quickly develops a life of its own and starts to create its own narrative. Employees can be heard uttering phrases such as, "Change won't work because it takes far too long to do it the new way," "it has so many teething problems it will never do what it was supposed to do," "I don't like the new system, it is too hard, too difficult, the old way was quicker.."

If the resistance is allowed to fester, employees will look to senior management to see whether they truly believe the change is worthwhile.

Unfortunately, if the resistance is not managed at the beginning and it is allowed to build momentum, senior management will be themselves fatigued with the change or simply overwhelmed by the negative feedback and therefore they too believe it will never succeed. It becomes a self fulfilling prophecy.

WHAT DOES 'CHANGE MANAGEMENT' MEAN TO EMPLOYERS?

In most cases the need for Change Management means that something within the organisation could be improved, leading to greater efficiencies and increased profits.

Efficiencies may be achieved in a variety of ways, including technological advancement or an automation of process or sometimes a restructuring of the organisation .

Usually, whatever has been scored as 'room for improvement' is costing the organisation in lost productivity or loss of revenue. In many cases it does not necessarily mean that the business is losing money, but rather that it could be doing better.

Senior management spend weeks and months identifying the source of the problems within the organisation and come up with a plan to resolve issues or improve current ways of working. Ultimately the goal is to increase profits.

A perfect example of this is Deloitte's recent overhaul of its performance management process.

Deloitte's had identified that their existing process was not delivering the benefits that it was designed to do. When they started to analyse the data they discovered that when they tallied the number of hours the organisation was spending on performance management, they found that completing the forms, holding the meetings, and creating the ratings consumed close to 2 million hours a year.[3]

At first glance, the correlation between improving the performance management process and improving profits might not appear obvious. However, the statistics are that if your workforce is engaged, the organisation is likely to enjoy a 26 percent higher revenue per employee.[4] Furthermore, it was found that organisations with highly engaged employees earned 13 percent greater total returns to shareholders.

The divide between what is motivating management and what motivates employees can be vast.

1 *The cost of workplace stress in Australia – report by EconTech Commission and published by Medibank Private 2008*

2 *Performance Management is Broken – Deloitte University March 4, 2014*

3 *Reinventing Performance Management – April 2015 Marcus Buckingham and Ashley Goodhall –published by Harvard Business Review*

4 *Taleo Research 2009*

WHAT DOES 'PERFORMANCE MANAGEMENT' MEAN TO EMPLOYERS?

Successfully implemented and managed at an organisational level, this process will assist the organisation to improve productivity and efficiency. This translates to an increase in profits.

The actual process contains many elements covering the life cycle of the employment. It should determine what the initial performance requires, ensure that the performance levels are benchmarked and that those levels are maintained if not improved upon. It should evaluate the organisational needs and ensure that training and development is identified and implemented. This in turn will drive a high performance culture, determining remuneration levels, bonus and promotions. Of course, where those standards are not being met, it will also provide for disciplinary procedures and terminations.

Its purpose is to ensure that employees' activities and outcomes are congruent with the organisation's business objectives.

Effective Performance Management measures the progress being made towards the achievement of the organisation's business objectives.

WHAT DOES 'PERFORMANCE MANAGEMENT' MEAN TO EMPLOYEES?

Performance Management is perceived by many employees as a derogatory term.

To most employees it means little more than the dreaded annual appraisal. An annual event that will determine their salary, their bonus or indeed whether they still have a job.

In many organisations, managers are promoted on the basis of their technical proficiency and not their staff management skills. They are poorly equipped to either praise staff and encourage high performance or have constructive conversations with staff to set expectations and improve performance.

Poorly prepared managers approach a meeting with staff in a similar manner to a disciplinary meeting - they go in to the meeting armed with examples of when the employee did something wrong and see the appraisal as their opportunity to address the mistake.

Employees are left feeling that they have been blindsided and rather than have an opportunity to have a constructive discussion about their strengths and goals for the future. They feel compelled to defend their existence.

As a result, no-one wins, the business does not achieve its organisational goals and employees are left feeling under valued and disengaged.

COMMUNICATION IS KEY

Regardless of whether you are implementing a Change Management process or a Performance Management process, the difference between success and failure comes back to one simple action:

'Communication.'

Unless senior management takes the time to understand what motivates an employee and their stake in any change, the implementation of the process is highly likely to fail.

It is the responsibility of team leaders to manage change in a way that employees can cope with.

To achieve that, managers must be equipped with the critical tools to be able to do this. Change is not just about following process. It is about being able to successfully manage the emotional response that it generates.

All too often we see senior managers promoted on the grounds of technical competency but without proper regard to the communication or human management skills required.

Faced with managing change, they often find themselves out of their depth.

The human race is a complicated species. How people communicate and interact with each other depends on a variety of different elements. There is no written manual to give to managers.

Understanding the workforce and responding to their needs will take time. The first thing senior managers need to learn is to listen to their workforce.

Once they understand the needs of the workforce, they can use this data to interpret how best to respond and communicate with their workforce.

Communication can take a variety of forms including:

- formal announcements from the senior leadership team delivered at town hall meetings;
- announcements on notice boards;
- using social media to up-date the workforce on a regular basis;
- weekly up-dates given in person;
- informal check-ins with employees;
- organising team building events; and
- arranging one to one meetings by phone, skype or in person.

Managers need to be able to communicate extremely well. Therefore, they need to be comfortable with the message and the different ways it can be delivered.

KEY BENEFITS

Equipping senior managers with the tools to interpret emotional intelligence and therefore communicate with the workforce will enable managers to champion the change and respond positively to all employees capabilities and needs. Importantly, they will be seen by their team to lead. As Kotter said, for change to be successful employees must see and feel the benefits, only then will they change.

Is it time you reviewed the way you communicate?

UPCOMING EVENTS

2016 Events Schedule

www.peopleculture.com.au/events

PCS has a proud history of thought-leadership in labour and employment law. 2016 will be the fifth year that our firm will deliver a comprehensive range of webinars, education and training sessions and key briefings designed to span the areas that our clients consider to be the most relevant.

If you are a PCS client, many of our events are offered to you on a complementary basis or at reduced costs.

WEBINAR PROGRAM

All webinars are facilitated by members of PCS's Senior Legal Team using our interactive webinar software. This cutting edge software allows you to see the presenter and their presentation simultaneously while giving you the ability to ask the presenter questions and engaging in group discussion.

WEDNESDAY, 17 FEBRUARY 2016

Webinar

Performance Reviews: Beyond the tick box and formal appraisals

WEDNESDAY, 16 MARCH 2016

Webinar

Today's Workplace: Part 1

WEDNESDAY, 20 APRIL 2016

Webinar

Today's Workplace: Part 2

WEDNESDAY, 18 MAY 2016

Webinar

Under surveillance: Auditing and assessing your workplace surveillance and privacy policies and processes

WEDNESDAY, 15 JUNE 2016

Webinar

A fresh look at productivity

WEDNESDAY, 20 JULY 2016

Webinar

Sign on the dotted line: What your employment contacts should look like

WEDNESDAY, 17 AUGUST 2016

Webinar

Fit v unfit for work: When is an employee unfit for work?

WEDNESDAY, 14 SEPTEMBER 2016

Webinar

10 things you didn't know about labour law

WEDNESDAY, 19 OCTOBER 2016

Webinar

Managing redundancies in today's environment

WEDNESDAY, 16 NOVEMBER 2016

Webinar

2016 wrap up and the year ahead

LEGAL BASICS FOR EMERGING HR PROFESSIONALS

This four-part program is ideal for junior HR professionals and line managers. The series includes core legal principles across all facets of employment law.

	Session 1	Session 2	Session 3	Session 4
Sydney	Tuesday 26 April	Tuesday 10 May	Tuesday 24 May	Tuesday 7 June
Melbourne	Wednesday 27 April	Wednesday 11 May	Wednesday 25 May	Wednesday 8 June
Brisbane	Thursday 28 April	Thursday 12 May	Thursday 26 May	Thursday 9 June

PCS SIGNATURE EVENTS

These are our twice-yearly invitation only events. Our June Key Breakfast Briefing will explore our 2016 White Paper and our hugely successful Hypothetical series returns for it's fifth year in November 2016.

KEY BREAKFAST BRIEFINGS

Sydney: Tuesday 21 June 2016
Melbourne: Wednesday 22 June 2016
Brisbane: Thursday 23 June 2016

THURSDAY, 10 NOVEMBER 2016

Signature Events

2016 Hypothetical

Sydney

RECENT Events

2nd Annual PCS and Pitcher Partners Golf Day, The Australian Golf Course

An evening with clients at the Bledisleo Cup 2015, ANZ Stadium

Joydeep Hor with Wallaby legends at the PCS Greater Sydney Rams season launch long lunch, Parramatta Town Hall

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"CHANGE BEFORE YOU HAVE TO"

- JACK WELSH

MARIANNA PAPADAKIS, JOURNALIST THE AUSTRALIAN FINANCIAL REVIEW

Marianna Papadakis (@catscram) is a multi-media journalist at premium business, finance, investment and politics newspaper the Australian Financial Review (@ FinancialReview www.afr.com) where she focuses on news in law, justice and legal affairs.

Marianna has more than 10 years experience in diverse roles at Fairfax Media encompassing news content for print, radio and video. Her role includes reporting on government policy, business, legal cases, corporate crime and royal commissions as well as industrial relations and employment cases. Marianna has also reported on technology, taxation and markets in equities, commodities and currencies. She has an interest in how workplaces and corporate operations are evolving in the technology era.

Marianna has three degrees in law, European studies (political science and French) and library and information science. An avid social media networker, Marianna keeps a pulse on the latest communications technology.

MELINDA TUNBRIDGE, PRINCIPAL AGILE PEOPLE PARTNERS

Currently the founder and Principal Consultant of Agile People Partners, a consultancy specialising in straightforward people management solutions that will make a measurable difference. Agile People Partners also helps existing HR teams to get projects done, by project managing or adding additional thought leadership or grunt where necessary. This allows HR Directors and their teams to celebrate and promote the success internally whilst not losing traction on business as usual.

A multi-award winning and thought provoking senior HR practitioner with more than 15 years' experience in a variety of HR roles, Mel has thrived in some tough environments and loves the challenges associated with getting the best out of people to drive an organisation's agenda whilst recognising they have more in their lives than work. Experience in the public and private sectors has rounded out Mel's portfolio to a broad base dealing with a variety of associated and sometimes competing stakeholders.

Mel is passionate about HR and has a pragmatic, straightforward approach recognising that the HR cog is a small, but vital part of a big wheel within an organisation. She has also held senior roles outside of the HR sphere.

Mel has a BA in Science, Masters in HRM & IR and an MBA and is also an active Non-Executive Board Director.

NEALE ANDERSON, DIRECTOR CATALISE

Neale specialises in leading the people and organisation elements of major business change such as - mergers and acquisitions, restructuring initiatives, turnarounds of underperforming companies, implementing business improvement initiatives, start-ups and building shared service centres. He has over 25 years' experience in working with companies in Australia, Europe and the Caribbean to help them implement strategic change. He is known for his practical advice, hands on approach and willingness to do the heavy lifting with strong commercial sense.

He has been a Director of award winning consultancy Catalise since 2003, firstly in the UK and now in Australia. Prior to Catalise, he worked with PwC in London, and Direct Line Insurance in the UK, helping them set up a new business division for vehicle repairs across the UK. In Australia, prior to moving offshore, Neale worked for Caltex (including the merger with Ampol), Pepsi Co, Sony and Westpac and has recently worked on the turnaround of Air Malta in Europe. Some of his clients with Catalise here and overseas include Nokia, DHL, Deutsche Post, Caribbean Airlines, Williams Lea, Clinphone Pharma, Carlton Television, France Telecom, 7-Eleven, Nandos and Shell Oil.

THE PANEL

MICHELE GROW, CHIEF EXECUTIVE OFFICER DAVIDSON TRAHAIRE CORPSYCH

Michele is the CEO of Davidson Trahaire Corpsych (DTC), a leading provider of corporate psychology, EAP, critical incident management and employee health and wellbeing services in the Asia Pacific.

Michele has particular expertise in the areas of workplace risk management including employee wellbeing, mental health, fatigue management, stress, and bullying. Michele provides strategic guidance to Boards and Senior Executives on minimising risk across the workforce and maximising the measurable outcomes and benefits from wellbeing services. She has conducted leadership assessment and leadership programs for major organisations and has provided leadership coaching to senior executives over many years.

Michele is a regular presenter on workplace issues and has conducted benchmarking research on the impact of work-related issues on individuals and organisations. She has been involved in the measurement of return on investment studies for EAP and wellness programs over the last decade and the DTC EAP study is now referenced globally. In addition, Michele is a Board Director for the global EAP association.

She holds multiple fellowships including Fellow of the Australian Human Resource Institute, Fellow of the Australian Institute of Management, and Associate Fellow of the Australasian College of Health Service Management. Michele is a member of Chief Executive Women and the Australian Institute of Company Directors and is an active participant in the international professional bodies for stress, conflict and workplace bullying.

Michele holds tertiary qualifications in Human Resource Management, Corporate Management and Business and is currently in the final stages of a Master of Science in Global Management.

JOHN DAKIN, DIRECTOR DIRECTIONEERING

John has over 20 years of experience as a director of unlisted companies. He was the Executive Director of an educational trust and consulted to schools and tertiary institutions across Australia.

John's work as a career consultant began with Morgan and Banks where he instigated the Executive Career Transition service. He then moved to Right D&A where he developed a detailed understanding of deep career support. In 2003 he joined Directioneering as a Director of both the NSW business and Directioneering International. This follows over 15 years' experience working with predominantly senior executives as they negotiate career transition. Increasingly this work is dealing with developing portfolio careers. He is now a Director of The Career Insight Group and continues his work with senior candidates at Directioneering.

He is a graduate of Macquarie University (Earth Science and Education), and has a MEdAdmin from the University of NSW. John recently served as a director of the Royal Rehabilitation Centre, Sydney and was Chairman of its Foundation.

WELCOME TO THE 2015 HYPOTHETICAL

On behalf of the PCS team, it is with great pleasure that I welcome you to the fourth in our firm's annual Hypothetical Series. Over the last few years, this event has become our firm's signature event in thought leadership and I am not aware of any other professional services firm that has replicated such an innovative forum to bring together industry experts and clients to discuss matters of currency and relevance.

As always, we have assembled an outstanding panel who each bring to the table a wealth of experience in working with organisations across a range of industries and in various locations. It will once again be my pleasure to facilitate the discussion.

This year's subject is change management and as some of you are aware our firm has invested a considerable amount of energy on this subject across presentations that we have conducted. I have addressed HR audiences around the country on best practice in change management at the HR Summit events of which we were once again the Legal Sponsor. We have tried to emphasise that change-agility is a pre-requisite for business success; after all, if an organisation does not change how can it assure itself of future success in a highly competitive global landscape.

We are particularly excited about hosting this year's event at the Monkey Baa Theatre. Monkey Baa does some tremendous work for inspiring creativity and performance in young people and it has been a great privilege to have supported Monkey Baa as part of our firm's pro bono program.

I hope you enjoy the event!

Joydeep Hor

THE CONCEPT

The concept of the "Hypothetical" was pioneered by prominent Australian Human Rights Barrister and media personality Geoffrey Robertson QC in the early 1980's. The series created by Robertson aired on ABC.

The television show proposed a hypothetical situation followed by a discussion between Robertson's guest panelists. Robertson's guests were notable personalities recognized as influencers, thought leaders and captains of industry. Panelists explored the ethics and dilemmas inherent in the everyday situations that were the subject of the hypothetical scenario.

The hypothetical format was used to explore many controversial and relevant social issues ranging from health, drugs, abuse, the environment, immigration, divorce and the court process and constitutional issues involving the recognition of Indigenous Australians and many more. The commonality of cause was that all the issues could potentially divide an audience and spark lively debate as a kaleidoscope of perspectives clash and merge.

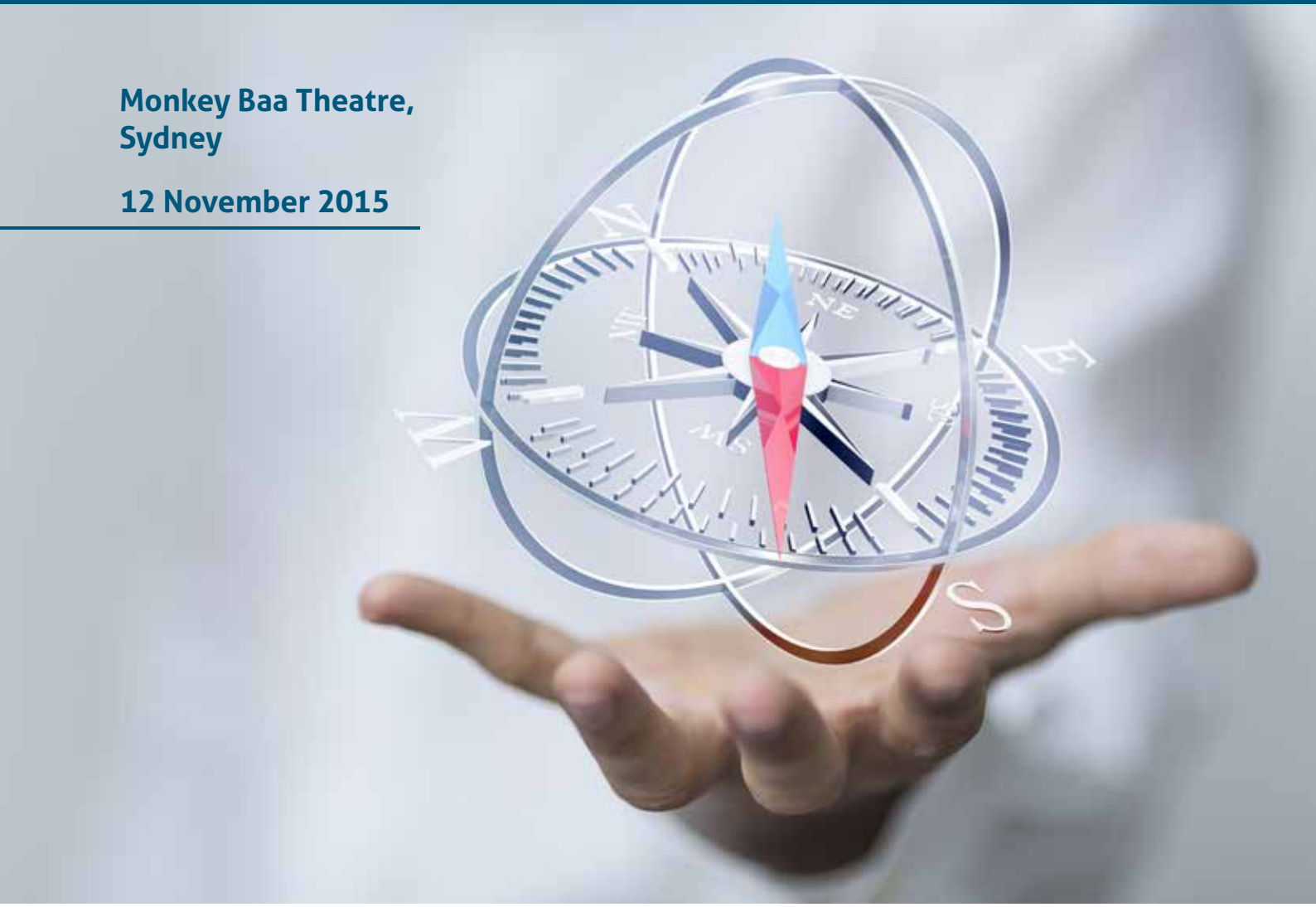
Some of the prominent individuals who appeared in the Hypothetical include: Dick Smith, environmentalist Bob Brown, Ita Buttrose, radio personality Alan Jones, singer Neil Finn, novelist Bettina Arndt, John Howard, Sir James Gobbo, and Aboriginal activist Michael Mansell.

Hypothetical 2015

"The times, they-are-a-changing":
The Change Management Challenge

Monkey Baa Theatre, Sydney

12 November 2015



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