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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies

Labour & Employment Law

A LOOK INSIDE:

Welcome

from the Founder and Managing Principal

Since our last edition of Strateg-Eyes, the global landscape has been dominated by a raft of tragic events together with highly significant political developments. With the US presidential candidates now confirmed it appears the next few months will be particularly exciting.

Here in Australia, the outcome of the recent Federal election does not bode well for political certainty and within the labour and employment law landscape it is far too early to tell whether this term of Parliament will see any reforms introduced. We will keep our clients informed as news comes to light on what they need to be doing to stay ahead of the game.

Critically, we launched our highly innovative Guide to Services on 1 July 2016 setting out a broad suite of services and pricing options for our clients that reflects our firm's commitment to providing the highest quality legal and strategic support in our areas of practice while allowing clients to save considerably on what their spend in these areas might otherwise have been. The signature innovation of the Guide is the transparency of the fixed fee services which I am very pleased to say has been universally lauded by clients and members of the profession alike. The very approachable "PCS Partnership" has also received a high take-up rate.

My fellow Directors and I welcome the opportunity to discuss the Guide with you and exploring how we might be able to create value.

Finally, effective 1 October 2016 PCS will revert to servicing all clients out of its Sydney office, with our small Melbourne and Brisbane offices closing.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL

Australia Votes:

What this means for workplace relations

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Following the second longest federal election campaign in Australian history, the country still had to wait another week before learning that Malcolm Turnbull and the Coalition would return to government. While workplace issues were the trigger for the double dissolution election (after the Australian Building and Construction Commission ("**ABCC**") Bills and the Registered Organisations Bill were rejected multiple times by the Senate), the election arguably failed to give rise to any clear policy direction in this area, aside from the indication that one of the major parties is in favour of jobs and growth.

In this article we examine the position adopted by the Coalition during the campaign around key employment and labour law issues and look forward to what actions the Turnbull Government may take in relation to laws affecting Australian workforces. In doing so we are mindful of the difficulties of getting legislation passed with only a slim majority and in circumstances where the composition of the Senate and the voting intentions of various senators on workplace relations issues remain uncertain.

Areas to watch

Based on the Coalition's formal policies and its positions adopted in the last sitting of Parliament, we have focused on the following key employment and labour law issues that could have a considerable impact on employers:

- ABCC and Registered Organisations Bills;
- protection of vulnerable workers;
- penalty rates; and
- paid parental leave.

Australian Building and Construction Commission

The ABCC is the former watchdog that was originally introduced by the Howard Government to monitor the construction industry and enforce workplace laws. After the repeal of WorkChoices and the introduction of the *Fair Work Act 2009 (Cth)* ("**FW Act**"), the body was renamed Fair Work Building and Construction ("**FWBC**").

The major differences between the FWBC and the proposed ABCC would be the removal of certain safeguards on the coercive powers (for example, in relation to gathering information) of the agency. Currently, if the FWBC wishes to exercise its coercive notice powers (a breach of which can result in fines and potential jail time), it must seek the authorisation of a presidential member of the Administrative Appeals Tribunal ("**AAT**"). In order for it to grant such an authorisation, the AAT must be satisfied that other methods have failed. The proposed changes would allow the ABCC to authorise such notices itself and as a first resort. In addition, under the new ABCC, those in the construction industry would face higher maximum penalties for breaches of workplace laws than those in the general Australian workforce.

Registered Organisations

The other Bill that was a trigger for the double-dissolution election was the Registered Organisations Bill. Much of the impetus for what is set out in this Bill comes from the findings of the Royal Commission into trade union governance and corruption.

If this Bill is passed, it would establish a new regulator (the Registered Organisations Commission) in respect of registered unions and employer associations. The new body would expand the obligations imposed on officers of registered organisations around such things as the disclosure of material personal interests and transparency requirements in relation to financial management matters. It would also introduce higher civil penalties as well as potential criminal liability for serious breaches by officers of their statutory duties.

The fate of the Bills is uncertain. If the Coalition fails to gain support from enough cross-benchers, the Governor-General may convene a joint sitting of the Senate and House of Representatives to enable the two houses of parliament to vote together. However, as the Coalition has only a slight majority (76 seats) in the House of Representatives and at the time of writing appears unlikely to have sufficient numbers in the Senate, it is quite possible that neither of the Bills will be put to a vote.

Vulnerable Workers

A number of employment relationships have recently come under scrutiny because of the impact these relationships can have on vulnerable workers.

The franchisor/franchisee relationship was a high-profile media item leading up to the election. The issues that the media coverage brought to light raise questions regarding the interaction between workplace relations regulation and the franchising model.

Another topic around worker vulnerability is the situation of non-permanent residents subject to exploitation by unscrupulous employers. This was highlighted in the proceedings commenced by the FWO against a regional NSW roadhouse, which allegedly withheld government provided paid parental leave payments from a 487 visa holder. Following a complaint by the employee to the Department of Human Services that she had not received the payments, the employer allegedly produced falsified documents claiming it had paid the amounts. It was not until the FWO challenged the authenticity of these documents that the employer paid the employee the amounts owed. The employer recently admitted to the claims made by the FWO and consented to the relief sought. The matter is now proceeding to a hearing on the question of penalty[1].

Government's approach

During the campaign the Coalition promised to broaden the liability of franchisors by amending the FW Act *"to make franchisors and parent companies liable for breaches of the Act by their franchisees or subsidiaries in situations where they should reasonably have been aware of the breaches and could reasonably have taken action to prevent them from occurring".* Based on the party's platform, this would require franchisors to educate franchisees about workplace obligations and to have assurance processes in place.

While this proposal may sound compelling, it is unclear how this would work in practice as it will require the re-examination of company structures and legal liabilities between various entities. It is also questionable whether any such amendment would go beyond the current accessorial liability provisions of the FW Act.

Another response to the media coverage of these particular relationships is the proposed introduction of a new offence, which specifically covers circumstances where an employer pays the correct wages to an employee, but then forces the individual to repay a portion of these amounts back in cash.

> ***"...the election arguably failed to give rise to any clear policy direction..."***

[1] *Fair Work Ombudsman v Noorpreet Pty Ltd & Anor* [Federal Circuit Court File No. SYG1368/2016].

Strengthening the FWO

In response to the risks facing vulnerable workers, the Coalition also promised during the election more resources and more power for the FWO to address cases like the one discussed above.

However, it remains to be seen whether the pledged increase to the FWO's funding by $20 million is a meaningful shift in resources. Not only has the Coalition not stated if this is an annual increase (as opposed to over two or three years), it fails to acknowledge that the regulator's 2016-17 budget was cut by the previous government by approximately $17 million.[2]

In addition, the Coalition has foreshadowed that it may seek to increase the powers of the FWO by allowing it to compel individuals and companies it suspects of contravening the FW Act to produce information and answer questions. These powers are currently held by bodies such as the ACCC, the ATO and ASIC.

The Employment Minister Michaelia Cash has also announced that Professor Allan Fels will lead a new Migrant Workers Taskforce within the FWO to address the exploitation of migrant workers.

Bigger fines

To enforce these new protections, the Coalition has indicated that it will increase the penalties that apply to employers who underpay workers, and who fail to keep proper employment records. The party's platform cites a possible figure of ten times the current maximum penalty of $54,000 for corporations, and $10,800 for individuals.

A new higher penalty category of "serious contraventions" may also be introduced by the Coalition, and will apply to any employer that has intentionally "ripped off" workers, regardless of the employer's size.

Penalty rates

Reforms to penalty rates is an ongoing contentious issue. On the whole, employers and the business lobby want Sunday penalty rates to be cut from double time, to time and a half, and public holiday penalties from double time and a half, to double time. They argue that there needs to a sensible limit on the remuneration payable, otherwise businesses will close or reduce their hours. On the other hand, employees and unions defend the current system of penalty rates, arguing that penalty rates provide an incentive for people to work on weekends or at undesirable times, and that many people rely on the extra cash.

[2] FWO Budget Statement available at <docs.employment.gov.au/system/files/doc/other/pbs_2016-17_-_fwo.pdf>.

As part of the 4 yearly review of modern awards, the Fair Work Commission ("**FWC**") is reviewing penalty rates in a number of awards in the hospitality and retail sectors. The penalty rates case, which is currently before the FWC, commenced in early 2015 and interested parties were able to make submissions. Labor took the unprecedented step of making a submission to the FWC, arguing against cuts to penalty rates, which was a first for any political party. The Coalition has declined to make a submission and has said it will accept the decision of the FWC.

The Coalition recently rejected Labor's proposal for the Government and Federal Opposition to co-author a submission to the FWC during this term of parliament that emphasises the importance of penalty rates and advocates against any cuts. This position is consistent with the Coalition's response to Labor's first offer of a joint effort on penalty rates in the last parliamentary term. Although the issue of penalty rates featured in each of the major parties' election campaigns, it is clear that the Coalition is firm on leaving the matter in the hands of the industrial umpire, rather than treating penalty rates as a critical agenda item in this parliamentary sitting.

Paid Parental Leave Scheme

As discussed in a previous edition of Strategeyes, in mid-2015 the Government proposed changes to the *Paid Parental Leave Act 2010* ("**PPL Act**") as part of its 2015-16 budget measures.

Under these proposed changes, an employee who is eligible to receive paid parental leave must notify the Government of any employer provided parental leave payments. If any such payments are being received, the employee's paid parental leave would be reduced by the amount of those payments. This could mean that an individual would not be entitled to receive any paid parental leave under the paid parental leave scheme.

The proposed changes were originally scheduled to take effect on 1 July 2016 but did not pass through the House of Representatives before the election. Although this was not a major campaign issue, the Turnbull Government is publically committed to making changes to the paid parental leave scheme going forward. Whether the changes take the form of the changes already proposed, or the Turnbull Government puts forward some revised changes, remains to be seen.

Navigating the uncertainty

The new Parliament must sit no later than 7 September 2016. Going forward, employers will need to be vigilant in relation to any changes to workplace laws that may be introduced by the newly minted government and should take care when framing policies on the basis of legislative entitlements that may be subject to changes. ■

Key Takeaways

The Coalition has announced plans to:

- re-establish the ABCC;
- create a Registered Organisations Commission;
- strengthen the powers of the FWO through increased funding and resources;
- protect vulnerable workers;
- introduce higher penalties for the underpayment of workers; and
- make changes to the existing paid parental leave scheme.

Watch and learn:

Getting proactive with workplace surveillance

Chris Oliver DIRECTOR **Sam Cahill** ASSOCIATE

Workplace surveillance can be an effective way of protecting company assets, monitoring employee performance, deterring and detecting misconduct, and protecting the safety of people in the workplace. It should therefore come as no surprise that many employers have been quick to adopt the latest surveillance technology, from cameras and computers to GPS tracking devices. At the same time, a number of Australian states and territories have laws that regulate the use of surveillance technology by employers in the workplace. This regulatory framework means that employers need to take proactive steps to ensure that any workplace surveillance is lawful and effective.

The reactive approach

Employers often experience problems with workplace surveillance laws because they only turn their attention to surveillance once something has gone wrong, or when it would be immediately useful to obtain surveillance data. The risks of this reactive approach to workplace surveillance are illustrated by the following fictional scenario.

We're Watching – The Computer

*Michelle is the Human Resources Manager at We're Watching Pty Limited ("**We're Watching**"), a company based in Sydney. One day Michelle receives a formal complaint from an employee named Julie. In the complaint, Julie says that when she arrived at work yesterday, she noticed that her colleague Steve, was not yet in his office, but his work computer was already on. On the computer monitor Julie could see the internet browser was displaying an offensive website.*

Michelle begins her investigation into the incident by reviewing the internet history on Steve's computer.

Computer surveillance is regulated in New South Wales and the Australian Capital Territory. In both of these jurisdictions, "computer surveillance" is defined to include any monitoring or recording of the accessing of internet websites.

In order to lawfully conduct computer surveillance in New South Wales, an employer is required to:

(a) have an internal policy on computer surveillance and ensure that employees are aware of this policy;

(b) only conduct surveillance in accordance with its policy; and

(c) before commencing surveillance, provide employees with 14 days' written notice, including details of how and when the surveillance will be conducted and the purposes for which the employer may use or disclose records of the surveillance.

We're Watching has a standard message on its log in screen which alerts the user that We're Watching may monitor employees' computer use, but does not have a computer surveillance policy.

We're Watching – The Camera
The internet history on Steve's computer shows that several offensive websites were accessed on the computer between 7.40 and 7.50 am on the day in question. When Michelle raises the issue with Steve, he denies the allegation and claims that it could not have been him because on that day he did not arrive at work until 8.30 am.

In order to determine when Steve arrived at work that day, Michelle reviews the footage from the surveillance camera located in the entrance to the office.

Camera surveillance is regulated in New South Wales, the Australian Capital Territory, Victoria, Western Australia and the Northern Territory.

In order to lawfully conduct camera surveillance in New South Wales, an employer is required to:

(a) ensure any cameras used for surveillance are clearly visible;

(b) ensure there are signs notifying people that they may be under surveillance; and

> ***"... employers need to take proactive steps to ensure that any workplace surveillance is lawful and effective."***

(c) before commencing camera surveillance, provide employees with 14 days' written notice, including details of how and when the surveillance will be conducted and the purposes for which the employer may use or disclose records of the surveillance.

When the camera in the office entrance was installed, We're Watching provided employees with written notice that it was going to conduct camera surveillance, but has not gotten around to installing any signs notifying people that they may be under surveillance.

We're Watching – The Car
Michelle remembers that Steve drives to work in a company car, which was recently fitted with an anti-theft tracking device. Michelle reviews the data stored on this device to help determine when Steve arrived at work on the day of the incident.

Tracking surveillance is regulated in New South Wales, the Australian Capital Territory, Victoria, Western Australia and the Northern Territory. The use of a GPS tracking device to determine the location of a company vehicle would constitute tracking surveillance under the laws in each of these jurisdictions.

In order to lawfully conduct tracking surveillance in New South Wales, an employer is required to:

(a) ensure there is a notice clearly visible on the vehicle indicating that the vehicle is the subject of tracking surveillance; and

(b) before commencing tracking surveillance, provide employees with 14 days' written notice, including details of how and when the surveillance will be conducted and the purposes for which the employer may use or disclose records of the surveillance.

In Victoria, Western Australia and the Northern Territory, employers are required to obtain the express or implied consent of the person who is being tracked or who is in control of the object being tracked.

We're Watching did mention to Steve months ago that all company cars were being installed with anti-theft tracking devices, but there is nothing in writing and no sign to this effect on the car.

We're Watching – The Dismissal
The footage from the surveillance camera and the data from the tracking device both show that Steve arrived at work at 7.30 am on the day of the incident. On the basis of this evidence, Michelle decides to terminate Steve's employment for accessing offensive material on his work computer and also lying during the investigation.

Fast forward two weeks and Steve has made an unfair dismissal claim in the Fair Work Commission. We're Watching's lawyers have reviewed the evidence to support the dismissal and have realised that the bulk of this evidence was obtained in breach of the Workplace Surveillance Act 2005 (NSW). The lawyers now have the difficult task of explaining to Michelle that We're Watching may be unable to rely on this evidence in the Commission.

The story of We're Watching illustrates one of the main problems that can arise when an employer does not take a proactive approach to workplace surveillance – by the time the crucial situation arises, the opportunity to comply with any legal obligations has already passed.

Getting proactive

We recommend that employers take a proactive approach to achieving compliance with any obligations under workplace surveillance laws. To determine what steps are required under this approach, managers and human resources practitioners should start by asking themselves the following questions.

What types of surveillance technology can we use?

The three main surveillance technologies are cameras, computer software and tracking devices. Computer surveillance software can be used to monitor or record any use of a computer by an employee. This includes the sending and receipt of emails and the accessing of internet websites. Tracking surveillance can be used to monitor or record the location or movement of a person, or an object such as a vehicle or other asset.

What steps do we need to take to achieve compliance?

Once an employer has decided on the types of surveillance it intends to use, it will need to determine what steps must be taken in order to comply with the workplace surveillance laws in the relevant state or territory. These requirements can vary significantly depending on the jurisdiction.

New South Wales and the Australian Capital Territory have the most comprehensive regulation. The law in these jurisdictions is principally based on "notification". In order to lawfully conduct any of the defined types of surveillance (camera, computer and tracking), an employer must provide the employee with written notice and detailed information regarding the surveillance to be carried out. As discussed above, the employer must also comply with other specific requirements depending on the type of surveillance.

In relation to tracking surveillance, the law in Victoria, Western Australia and the Northern Territory might require more than mere notification, as these laws require employers to obtain the consent of the person who is being tracked or who is in control of the object being tracked.

What types of surveillance are prohibited?

With the exception of Queensland, South Australia and Tasmania, each state and territory has laws prohibiting the use of surveillance in areas such as toilets and washrooms, or prohibiting surveillance of "private activities".

Generally, relevant surveillance legislation also prohibits tracking or computer surveillance of employees while they are not at work.

There are also laws in each state and territory regulating the use of listening devices. The general proposition under each of these laws is that employers and employees are forbidden from using a listening device to record a conversation without the consent of each of the participants in the conversation.

Can we take a "nationwide" approach?

Unlike other areas of workplace relations law, the regulation of workplace surveillance varies significantly between the different states and territories. This gives rise to an additional challenge for employers with operations in more than one jurisdiction. These employers may be interested in developing an approach to surveillance that can be applied throughout Australia.

While this may seem most efficient, employers should keep in mind that this approach would generally require the company to treat the most onerous state or territory regulations in respect of each type of surveillance as though they applied throughout the country, including in jurisdictions where there may be little or no regulation of workplace surveillance. ■

The following table sets out the types of workplace surveillance which are regulated across the various states and territories.

Jurisdiction	Surveillance Legislation	Camera	Tracking	Computer
NSW	*Workplace Surveillance Act 2005* (NSW)	Yes	Yes	Yes
ACT	*Workplace Privacy Act 2011* (ACT)	Yes	Yes	Yes
Victoria	*Surveillance Devices Act 1999* (Vic)	Yes	Yes	-
Western Australia	*Surveillance Devices Act 1998* (WA)	Yes	Yes	-
Northern Territory	*Surveillance Devices Act 2007* (NT)	Yes	Yes	-
Queensland	*Invasion of Privacy Act 1971* (Qld)	-	-	-
Tasmania	*Listening Devices Act 1991* (Tas)	-	-	-
South Australia	*Listening and Surveillance Devices Act 1972* (SA)	-	-	-
	Surveillance Devices Act 2016 (SA)*	Yes	Yes	Yes

* The *Surveillance Devices Act 2016* has not yet commenced. The commencement date is not yet known.

Getting it "right":

The benefits of engaging external investigators for workplace investigations

Alison Spivey ASSOCIATE DIRECTOR

With increased scrutiny surrounding workplace investigations, the importance of getting investigations 'right' has never been greater. In the wake of the launch of People + Culture Strategies' White Paper on Workplace Investigations[1], this article will explore how engaging an independent external investigator can minimise the financial, legal and reputational risks associated with poor investigation practices.

Workplace investigations are becoming increasingly important due to the proliferation of cases arising from allegations of unacceptable workplace behaviour and the expectations that are placed on employers in terms of how they manage those allegations. Often, issues that are taken into account by a court or tribunal during employment-related litigation will have first been investigated internally for the purposes of taking remedial or disciplinary action, or for discovering the factual circumstances behind a grievance. It is therefore important that organisations carry out investigations properly, as a failure to do so can, amongst other things, compromise how they defend the matter if it progresses to litigation.

The White Paper, which was released in June 2016, provides an analysis of the responses of 110 PCS clients and partner organisations to a survey directed at identifying the circumstances in which workplace investigations are undertaken. Respondents represented a variety of industries, ranging from professional services and banking to hospitality and manufacturing. The respondents also varied with regards to the size of the organisations (ranging from 1 to 1,000+ employees) and their annual turnover (ranging from $500,000 to $100 million+ per annum).

[1] PCS White Paper – http://peopleculture.com.au/2016-pcs-white-paper-workplace-investigations ("**White Paper**")

The responses to the survey reflected in the White Paper not only reinforce the risks for employers that may arise from poor investigation practices, but also highlight the need for employers to perform a cost/benefit analysis in determining how to best approach workplace investigations more generally.

Key mistakes in internal investigations and the potential risks

The risks associated with poor investigation practices are not insignificant, and mistakes can expose employers to significant financial, legal and reputational risks. And with 40% of respondents to the White Paper survey answering "yes" to having legal proceedings commenced at least once following an internal investigation, it is imperative that employers consider whether the risks of investigating internally outweigh the benefits.

Key mistakes that employers often make during the course of an internal workplace investigation include:

(a) a lack of pre-investigation planning;

(b) a morphing of the investigation and disciplinary steps;

(c) relying on "untested" information, unduly favouring one account and ignoring discrepancies;

(d) failing to establish a process that is perceived as independent and free of bias; and

(e) delay in undertaking an investigation that fuels speculation and gossip and can jeopardise appropriate disciplinary action.

More often than not, these mistakes are the result of a lack of experience and skill on the part of the internal investigator appointed by the employer. The potential consequences of utilising an inexperienced internal resource to conduct a workplace investigation were made clear in *Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775:

> *"Ms Green had never conducted a disciplinary investigation into allegations of physical assault at the workplace. Her inexperience and lack of forensic skills as to the assessment of witness evidence, was a major contributory factor to the weaknesses exposed in the respondent's evidentiary case. This should not be seen as a criticism, per se of Ms Green, but rather it demonstrates a failure of senior management to recognise the seriousness of the issues and their causes and a failure to independently assess the investigator's findings and recommendations. Ms Green should not be blamed for these failures."*

The employee's dismissal was overturned by the Fair Work Commission due to the flaws in the investigation that led to it.

The case of *Richardson v Oracle Corporation Australia Pty Ltd*[2] also highlighted the significant financial liabilities employers expose themselves to when failing to properly investigate complaints. In that case, the Court criticised Oracle for requiring the complainant to maintain contact with her colleague (who was ultimately found to have sexually harassed her) during the investigation process. Only once the investigation had been completed were the two separated at work. The Court was satisfied that the requirement to remain in contact during the investigation contributed in part to the complainant's psychological injury for which she was awarded $130,000 in damages.

What are the advantages of an external investigation?

While external investigations can involve an upfront cost for an organisation (in terms of engaging an investigator to conduct the investigation and provide a report), this needs to be weighed up against the significant costs involved in upskilling internal personnel sufficiently to conduct appropriate workplace investigations, the potentially greater risk of having to defend the internal process in any subsequent legal proceedings and the payment of any compensation that may be ordered.

[2] [2014] FCAFC 82

In this regard, we note that the respondents to the White Paper survey indicated that they were investing an average of one-five days per year per staff member in training their staff on how to conduct investigations. However, when this figure is considered in the context of how many respondents have had legal proceedings commenced against them following an internal investigation, the question arises as to whether the training that is being provided to train staff in conducting workplace investigations internally is sufficient or whether those resources could be better allocated.

There are also significant benefits associated with engaging an external investigator to conduct workplace investigations. Two of the more significant of those benefits (confidence and confidentiality) are discussed further below.

Confidence

One of the benefits of engaging an external investigator to conduct workplace investigations is that it may provide all participants in the investigation process with greater confidence in the process and its outcomes.

The responses to the White Paper survey:

- confirmed the importance of maintaining perceptions of impartiality and due process to maintaining the integrity of a workplace investigation;
- revealed that respondents remained concerned about the capabilities of internal personnel conducting investigations despite almost 69% of respondents investing in at least one day's training for such personnel;

> ***"There are also significant benefits associated with engaging an external investigator to conduct workplace investigations."***

- disclosed that respondent organisations which conduct only internal investigations were nearly two and a half times more likely to cite concerns around legal proceedings as a reason preventing them from implementing recommendations arising from an investigation. They were also 56% more likely to be uncertain about how to implement any recommendations following an investigation; and
- confirmed that respondents to investigations are more likely to commence legal proceedings in circumstances where they have concerns about the manner in which the investigation process was conducted and its overall fairness.

These findings from the White Paper survey (in isolation) reflect a potential lack of confidence in internal investigations and the manner in which they are conducted, the outcomes of the investigations (and implementing those outcomes) and an increased likelihood of legal proceedings in response to the investigation outcomes.

While it is acknowledged that there are advantages in having internal personnel understand the investigation process and managing investigations into minor or "everyday" workplace issues, employers ought to consider whether it may be a better investment to engage an experienced external investigator in relation to issues that have potentially significant consequences for their organisation.

In engaging an external investigator to conduct workplace investigations an employer is also "buying" access to the benefit of the external investigator's skills and experience, not only in terms of ensuring that the investigation process is conducted in an appropriate way, but also in terms of any recommendations that are made as to what may be appropriate action by the employer in response to the investigation findings (assuming that the investigator is also requested to provide recommendations following the investigation).

Confidentiality

A further benefit of engaging an external investigator to conduct workplace investigations is the additional confidentiality, or perception of confidentiality, attaching to an external investigator's involvement in that process. This too may also enhance the perceived integrity of the investigation process with the investigation participants, in turn reducing the risk of disputes in relation to the investigation outcomes.

The use of an external investigator may enhance the perception that the matter will be investigated at "arm's length" and it is more likely that the subject matter of the investigation (and the investigation itself) will remain confidential. Further, an external investigation is less likely to impact upon ongoing workplace relationships (to the extent that the investigator will not remain in the workplace on completion of the investigation process), which is particularly important if the investigation relates to personal or sensitive matters.

Additional benefits in respect of confidentiality can also be achieved if an employer engages a lawyer as an external investigator, to the extent that the employer may be able to claim legal professional privilege in respect of the workplace investigation. This privilege protects certain oral and written communications between lawyers and their clients which are prepared for the dominant purpose of providing legal advice or services relating to litigation (actual or contemplated). This facilitates a free exchange of information between the lawyer and client, so that the client can be properly advised, without fear of potentially prejudicial information being disclosed at a later date.

While legal professional privilege will not automatically attach to an investigation report prepared by a legal practitioner, it can be of significant benefit to an organisation if it is established. The obvious benefit of legal professional privilege is that communications and documents attracting privilege retain their confidentiality and need not be disclosed, unless privilege is waived. This is particularly important in circumstances where documents contain information about matters that could bring the organisation into disrepute, or if information is of a highly sensitive nature, such as pertaining to sexual harassment investigations.

The case of *Bowker and Ors v DP World and Ors*[3] demonstrates the value of legal professional privilege for organisations. In this case, Ms Bowker and others sought access to a number of documents, including an investigation report, in connection with their bullying proceedings commenced against DP World. DP World's lawyers had engaged an independent investigator to provide them with advice in relation to the bullying complaints. DP World attached a summary document outlining the findings of the independent investigation to one of the witness statements it had filed with the Fair Work Commission ("**Commission**"). The applicants submitted that legal professional privilege and client legal privilege had been waived by attaching this summary document. The Commission held that the investigation report and associated documents were privileged and that this had not been waived in the course of the bullying proceedings. In particular, the Commission determined that the documents "came into existence for the purpose of enabling the solicitors for DP World to provide legal advice". Accordingly, DP World's investigation report remained confidential.

What other factors need to be considered?

The decision as to who will conduct an investigation is crucial to the success of that process. Ultimately, a range of factors will influence an employer's decision as to whether to appoint an internal or external investigator.

Central to that decision will be whether the employer considers that it has the appropriate resources to conduct the investigation internally, having regard to:

- the nature and seriousness of the matters the subject of the complaint (including any sensitive matters);
- the seniority of the employees involved in the investigation;
- the degree of bias that may be perceived if the investigation were to be conducted internally;
- the skill and experience within the employer's business for conducting the level of investigation required;
- the timing or urgency of the investigation, including whether the complaint has been raised during a peak period for the employer, or if there is a risk to health and safety; and/or
- the extent of the resources (time and personnel) that would need to be dedicated to the investigation when compared with the costs of an external investigator. ■

Key Takeaways

- Mistakes in investigations can be very costly for employers and employees. There is a need to consider what the best approach is to conducting workplace investigations taking into account the needs of the business.
- One of the most significant considerations for employers is whether to engage an external investigator.
- While not appropriate in every circumstance, there are a variety of benefits attaching to engaging an external investigator to conduct workplace investigations, including that participants in the investigation process are likely to be more confident that the findings of an external investigator are unbiased, and accordingly may be less likely to challenge them.

[3] [2015] FWC 7887

BREXIT:

What next for employers with UK operations?

THIS ARTICLE WAS WRITTEN BY THE LONDON BASED LAW FIRM CM MURRAY LLP A FELLOW MEMBER OF THE INNANGARD GLOBAL ALLIANCE AND HAS BEEN REPRODUCED WITH THE PERMISSION OF THAT FIRM

What should multi-national employers be considering and doing in the short and medium term following the UK's vote to leave the EU?

Communication, Communication, Communication

Communicate with your employees globally, including those working in the UK. Reassure them that there will be no knee-jerk reactions to the UK vote, but rather a measured approach based on the business's long term strategy. Confirm that the management team is actively monitoring the position.

Employee comments in the media

Issue clear guidelines to employees on commenting on the UK vote and its implications in any media, including that any employees who are active on social media should not refer to their employer without express permission, nor should they otherwise make comments which might be potentially harmful to the business. Consider reissuing your social media and communications policy to all employees globally to remind them of the company's rules and that any breach is likely to be regarded as a disciplinary issue.

Support your people

Nominate one or more people from HR or Employee Relations within each country in which you operate to whom staff can turn to ask questions or express concerns. Even if there is little or no concrete information in the early stages, having a company contact person will assist to reassure staff.

Consider offering a counselling service if one is available to those employees who are particularly upset and distressed about the implications of the UK vote for them and their colleagues.

Keep immigration issues under review

Many of your staff may be EU citizens based in the UK, or UK citizens based in the other EU member states, who are feeling unsettled by the vote for Brexit and anxious about their right to live and work in the UK or other EU member states in the future.

In terms of EU citizens in the UK a number will have lived in the UK for more than 5 years and should be encouraged to think about applying for permanent residence sooner rather than later. It is unlikely that others who are currently working or studying visa-free in the UK or who are UK citizens in other EU member states will be affected in the short term, as they will continue to be subject to the freedom of movement principle during the two year negotiation period between the UK and EU (which may not be triggered until September-October 2016.

The immigration status of these affected employees will need to be kept under review during that period and expert advice should be sought. The affected employees should be provided with a key point of contact in their local HR department and with access to specialist immigration advice.

Protect your business

Create a team to monitor and assess the implications of Brexit for key employees, potential departures and any resulting uncertainty for the business. To minimise the risk of a "brain drain" from your organisation, consider entering into retention arrangements with key employees including expatriates, who might otherwise be persuaded to move employers, or country, as a result of the UK vote.

Allow time for proper redundancy planning and processes - and be prepared!

If redundancies or restructurings do become necessary in due course as a result of the vote, ensure that your business plans properly and allows enough time to undertake objective and fair selection processes, and thoroughly documented collective and individual procedures.

Prepare in advance the terms of any potential package and severance agreement which would be offered to staff who might be asked to leave, as well as controlling carefully the communications and messaging around those redundancies.

Conclusion

The UK vote to leave the EU is an unfolding story and there is uncertainty as to what the Brexit vote will mean in practice – in particular whether the UK may yet retain access to the Single Market on a basis agreed between the UK government and the EU. Whatever the outcome, multi-national employers will need to keep the situation under close review. ■

Education

To learn more about our programs or register, go to www.peopleculture.com.au/events/

Executive education

Leadership Development, Coaching & Executive Education is a core PCS capability area. To learn more about our programs or register, go to our website "Events" page. Certain PCS Partnership Plus clients may have a complimentary registration included as part of this participation.

18 OCTOBER — ISSUES IN PEOPLE MANAGEMENT

	TOPICS	PER PERSON FEE[11]
Suitable for: HR Business Partners and HR Generalists (minimum 4 years' experience recommended) Duration: full day Facilitators: PCS Directors	• Performance Management Best Practice • Strategic risk management of bullying, harassment and culture issues • How do you introduce change? • Termination of employment and preparing for employment litigation • Introduction to Negotiation in the Workplace	$950

27 OCTOBER — ADVANCED STRATEGIC PEOPLE MANAGEMENT

	TOPICS	PER PERSON FEE[11]
Suitable for: Senior HR Professionals (minimum 10 years' experience recommended) Duration: two full days Facilitator: Joydeep Hor	• Auditing and impacting the culture of your organisation • Negotiation strategies in the workplace • Critical review of systems and HR infrastructure in your organisation • Influencing decision-makers on people issues • Understanding termination of employment across "bad fits" and employees who "don't get it"	$1,950

Dial in and connect to our monthly webinars. Webinars are complimentary to PCS Partnership Plus and Partnership clients. Head to the PCS website and register on the "Events" page.

Webinars

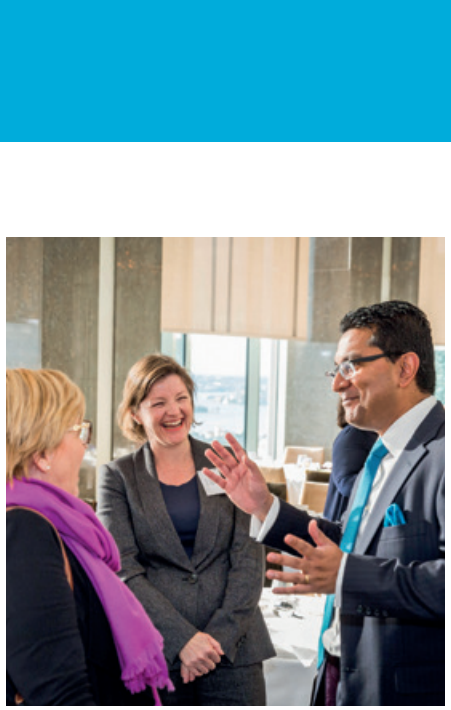
AUG 17	SEP 14	OCT 19	NOV 16
ABSENTEEISM, UNFIT-FOR-WORK EMPLOYEES AND WELLBEING	NEGOTIATION SKILLS IN THE WORKPLACE	MANAGING REDUNDANCIES	2016 WRAP UP AND THE YEAR AHEAD

Events

Key Breakfast Briefing

For the fourth year in succession we were delighted to host our annual Key Breakfast Briefing at the Shangri-La Hotel on Tuesday 21 June 2016.

With over 80 people in attendance and incomparable views of Sydney Harbour and the Opera House as our backdrop, we launched our annual White paper on Workplace Investigations. Our Founder and Managing Principal Joydeep Hor then provoked the audience with a thought-leading analysis around the bigger picture of workplace investigations with his overarching guidance to organisations being not to get so fixated on process and to think more holistically about the ramifications of investigations on individuals, culture and business.



1. Sue Middlebrook, Louise Rassack and Joydeep Hor
2. Erin Lynch, Anne Paredes, Michelle Barletta and Sarah Gray
3. Fiona Creal and Sharon Kuhn
4. Therese MacDermott, Chris Oliver and John Bourne
5. Kathryn Ellis and Kathryn Dent
6. Helen Rutherford, Karen Atfield and April Myles
7. Mathew Paine, Kay Bourke and John Alexander

Events

The annual "PCS Hypothetical" is fast approaching

PCS will once again be hosting its signature "Hypothetical" event in November 2016 at the Monkey Baa Theatre. The last few hypotheticals have dealt with sexual harassment, termination of employment, social media and change management and this year's event will deal with something similarly topical. Always a well attended event, the invited panellists will be provoked and challenged "real-time" to deal with a scenario and share their expertise on how they would respond to it.

THURSDAY
10 NOV
SAVE THE DATE

The PCS Legal Team

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Founder & Managing Principal

MICHELLE COOPER
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