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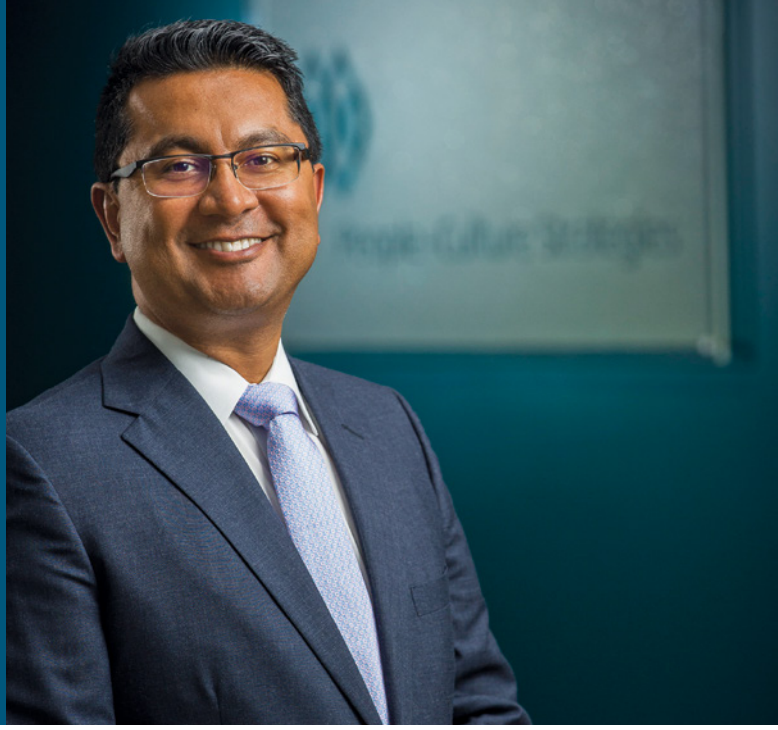


from the Founder and Managing Principal

On behalf of the PCS team I am very pleased to present our latest Strateg-Eyes publication. This edition focuses specifically on labour and employment developments around the world and their potential ramifications within the Australian market.

PCS is now in its tenth year (as hard as that is for all of us, including myself, to believe). Many of you have been clients of our firm since the first day of business and some of you have worked with us across multiple organisations in that time. Regardless, the personal and institutional loyalty shown to us is never taken for granted.

We have invested considerably in our senior talent in recent months and in addition to my amazing fellow Directors, I am very pleased to have as part of our team Donna Trembath and Joanna Knoth as Executive Counsel. We recognise that access to senior and experienced professionals is a source of great comfort to all of our clients and we intend to continue to invest in this depth.

Our philanthropic blueprint as a firm continues to develop and we are excited to once again be on board with Packemin Productions as they put on “Mamma Mia” at Riverside Theatres in Parramatta.

Finally, many of you will be aware that our firm has been acting for NSW Rugby in the recent high-profile Israel Folau matter. For that reason, we are unable to make any comment about that case other than to acknowledge the significant interest in that case across numerous social and political paradigms.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL

“The Right to Disconnect”

By Daniel Anstey, GRADUATE ASSOCIATE

In times gone by, the boundaries between work and personal time were clear and distinct. Now, advances in smartphone technology and the proliferation of innovative work-related applications have greatly improved the connectedness, productivity and flexibility of employees, to the point where a workplace could now be anywhere in the world with phone reception.

At the same time, these devices have also taken a central place in our home lives through the use of communication functions, cameras and entertainment. Studies have shown that depending on age and other factors, people on average check their phones 80 to 150 times a day, but how much of this is work-related and how much is personal will vary greatly from person to person.

It is becoming increasingly clear that being constantly connected in this way can come at a cost. Research has shown that workers who are “always on”, tend to have higher levels of stress and anxiety, and poorer quality of sleep leading to burnout and exhaustion. Indeed, it has been shown that the mere expectation of availability can increase strain for employees and their families, and negatively impact mental health.

What role can the law play – the right to disconnect?

So pressing are these issues in modern day society that several countries have decided that, in order to combat the problem of permanent connection, they would purport to create a new “quasi human right” – *the right to disconnect*. This is not a right to ignore one’s manager once they leave the office, but is more accurately described as an obligation on employers to consult with employees on their connectivity and availability outside of office hours.

The country to start this trend was France, sparked by a decision of the *Cour de Cassation* (the country’s highest court) holding that an employee was unfairly dismissed after being fired for not responding to work emails outside of work hours.

The changes have been immensely successful and been used as a model for similar laws subsequently implemented in Italy, Germany, Spain and the Philippines, with dozens more countries currently debating similar bills in their legislatures.

How would this affect employers?

Many businesses may be of the view that enshrining this *right to disconnect* in law will be detrimental to their productivity and profits. However, there is every chance that the opposite could be true. Indeed, it is likely that many employees find that being able to disconnect allows them to be more productive during work hours.

As the inability to escape work-related communications is having a tangible effect on some employees' mental health and well-being, it is likely that a "digital detox" will be greatly received by those in need of it.

Further, when faced with a choice, it is likely that many employees would not opt out of after-hours electronic communications, particularly in industries and businesses who operate across time zones and require diligent responsiveness from their employees.

If these changes do make their way into the Australian employment landscape, organisations will need to make it a priority to strike the right balance between their employees' private lives and the business requirements of each individual organisation.

Are these changes likely to be implemented in Australia?

Although there has not yet been much discussion on the topic in Australia, it is likely only a matter of time before it is on the horizon, especially since the International Labor Organisation has recently recommended the implementation of such a right in their 2019 report, *Work for a Brighter Future – Global Commission on the Future of Work.*

Enforcement issues?

While enforcement may be difficult, such laws will have served their purpose if they can change cultures and attitudes in workplaces and facilitate fruitful discussions to give employees what the ILO refers to as *time sovereignty.*

Differing methods of enforcement have been adopted in France, with some employers simply encouraging workers not to check emails after hours, and others going as far as setting their internal servers not to route emails to employees who are off work.

There may be concerns from businesses that legislating limits on around-the-clock communications may hurt their bottom line. However, the ILO suggests that providing employees with greater *time sovereignty* may result in improved health and wellbeing, which in turn may have a flow-on effect to the productivity of an organisation.

Preventing the cover up

Curbing the use of non-disclosure agreements in workplace discrimination and harassment cases

Roxanne Fisch, SENIOR ASSOCIATE

The UK will soon be legislating to prohibit the use of non-disclosure agreement ("**NDAs**") in preventing people from disclosing information to the police, health care professionals and legal professionals. This follows a consultation process launched by the UK government into the use of confidentiality clauses in the employment context.

How the UK is tackling the abuse of NDAs

While it is recognised that many employers do use NDAs for valid purposes, such as ensuring employees do not disclose financial information, business plans or intellectual property to others, they can sometimes be used to cover up criminal conduct in the workplace. This follows some recent high-profile cases in the UK, as well as a recent UK Parliamentary inquiry which investigated the use of NDAs in workplace discrimination and harassment cases in an effort to challenge the 'cover-up' culture of victims being silenced.

How are NDAs being misused?

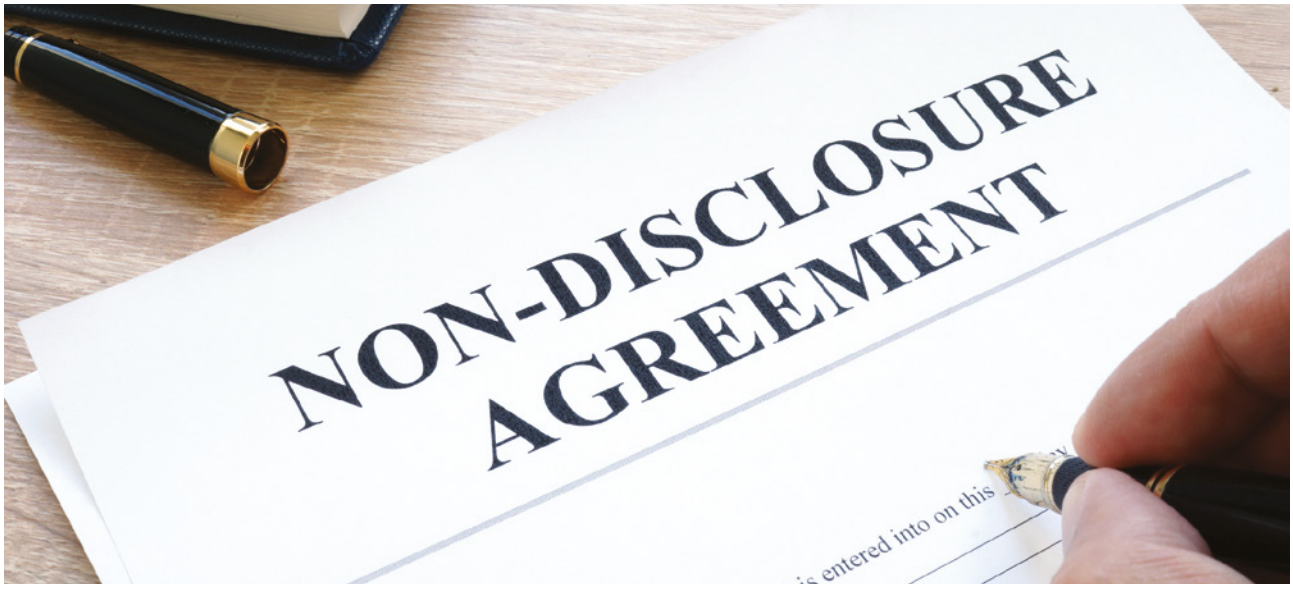
Non-disclosure agreements ("**NDAs**") (or confidentiality clauses as they are more commonly known in Australia), are sometimes used in settlement agreements following disputes relating to alleged discrimination, harassment or unlawful conduct in the workplace. While, for many employers, this attempts to ensure the resolution of the matter, the NDAs effectively prevent or limit the employee from disclosing the alleged behaviour or disparaging the alleged perpetrator or employer. According to the UK Women & Equalities Committee, this in turn has a detrimental effect on the victims of such conduct, with many suffering emotional and psychological damage, suffering financially as a result of losing their job and affecting their ability to work in the same sector again thereby impacting on their future job prospects. It also "allows management behaviour and organisational culture to go unchallenged and unchanged" and "perpetuates a culture of secrecy and discrimination".[1]

While we are yet to see the detail of how these laws will be framed and put into practice in the employment context, in its report into the use of NDAs, the Women & Equalities Committee called for the UK Government to:

- ensure NDAs do not prevent legitimate discussion of allegations of unlawful discrimination or harassment, and stop their use to cover up allegations of unlawful discrimination;
- require standard, plain English confidentiality, non-derogatory clauses and ensure that such clauses are specific about what information can and cannot be shared and with whom;
- strengthen corporate governance requirements to require employers to meet their responsibilities to employees in protecting them from discrimination and harassment; and
- require named senior managers at Board level to oversee anti-discrimination and harassment policies and procedures and the use of NDAs in discrimination and harassment cases.

A number of these recommendations have since been addressed in the UK's consultation response.

1 *"The Use of non-disclosure agreements in discrimination cases"*, House of Commons Women and Equalities Committee, Ninth Report of Session 2017-19, 11 June 2019.



Will Australia take a similar stance?

Unfortunately, the use of NDAs is not foreign to many Australian employers, HR professionals and legal advisors who are all too familiar with instances of employers agreeing to part ways with an employee following an investigation process in exchange for the employee agreeing not to take the matter further. What is concerning is the use of NDAs in circumstances where the allegations or complaint have not been properly investigated or where they are being used to avoid the need to conduct a proper investigation. The report raises important questions as to whether in their attempts to resolve workplace disputes, employers and their advisors are thereby complicit in covering up a "culture of discrimination".

While the use of NDAs is yet to be the subject of its own parliamentary inquiry on Australian shores, it is not foreign to Australia's Sex Discrimination Commissioner, Kate Jenkins, who last year announced the First National Inquiry into sexual harassment in Australian workplaces. This was following a national survey undertaken by the Australian Human Rights Commission between April and June 2018, which investigated the prevalence, nature and reporting of sexual harassment in Australian workplaces and the community more broadly. An extensive consultation and submission process has since been underway across the country covering a wide-range of industries and sectors.

In November 2018, Commissioner Jenkins also called for companies to grant a limited waiver of NDAs for those who wanted to participate in the Inquiry, which ultimately led to around 40 organisations agreeing to issue a limited waiver. In May 2019, Commissioner Jenkins spoke to The New York Times on the issue noting that the use of NDAs *"was contributing to an ecosystem that was relying on silence to protect reputation, and still does"*.

Where to from here?

Internationally, combatting violence and harassment in the workplace is still very much a matter of concern. Last month in Geneva, at the recent International Labour Conference a new Convention (the Violence and Harassment Convention, 2019) and Recommendation has, remarkably for the first time, been adopted to combat violence and harassment in the workplace. After two member States ratify the Convention, it will take effect 12 months later, with the Recommendations providing guidance as to how the Convention could be applied.

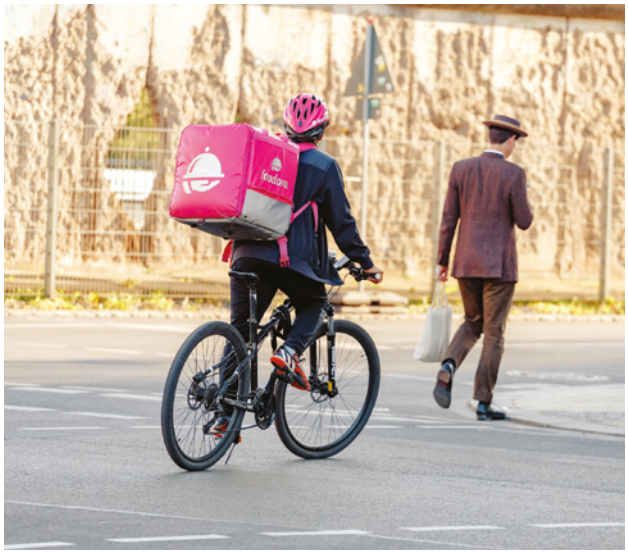
Australia's use (or misuse) of NDAs will likely become clearer once the National Inquiry is complete and we have a greater understanding as to what regulations are required to protect victims of unlawful workplace conduct. It remains to be seen what, if any, legislative outcomes will arise as a result of this Inquiry and, in particular, if similar recommendations will be made with respect to legislating about the use of NDAs in the context of workplace discrimination and harassment cases.

The Gig is up

The case for a new classification of work in a changing economy

By Andrew Jose, ASSOCIATE

A series of recent decisions by the Fair Work Commission have soundly reconfirmed the status of Uber drivers in Australia as independent contractors, despite the protestations of some of the drivers engaged through its "Partner App" that they are employees. These decisions reinforce the prevailing binary classification of workers in Australia - you are either an employee or an independent contractor.



With the rise of the so-called 'gig-economy' and the proliferation of new types of work and digital platforms, is it time we considered changing how we classify the work that people do? Recent case law in the United Kingdom demonstrates that workers in the gig-economy may not fit into the traditional contractor-employee dichotomy. Perhaps a new category is needed to balance the needs of businesses such as Uber to have flexible sources of labour, while affording a limited set of entitlements and protections to workers who are becoming increasingly dependent on these digital platforms for an income?

Background

The term 'gig-economy' refers to the growing area of work involving temporary or freelance style engagements of work in areas such as transportation, food delivery, odd jobs and even professional services. Everyday consumers are able to engage these services through digital platforms such as Uber's Partner App, Airtasker, Ola and Deliveroo, where they are connected with workers and through which payments for the services are made. Workers on digital platforms such as Uber and Deliveroo execute service agreements with the company, which allows them to use the digital platform to provide their services. The company will often require their workers to meet certain requirements. For example, Uber mandates that their driver-partners hold a full drivers licence, have car insurance and undergo background checks. Payments made by consumers using the digital platform will be transferred to the workers, with the relevant company taking a certain percentage of each transaction.

The crucial element of the gig-economy from an employment law perspective is the fact that workers are strictly engaged as independent contractors, not employees.

The Victorian Government recently conducted a study into the participants in the gig economy, titled 'Digital Platform Work in Australia'. The survey found among other things that participants were reporting dissatisfaction with earning a fair income, their ability to set the prices for their services and their ability to gain new skills through their work. These findings reflect a growing sentiment that changes may need to be made to how these workers are classified, which is evident in the growing area of case law surrounding the gig-economy.

Challenges to the independent contractor classification

In Australia, there is a growing body of cases that have been heard by the Fair Work Commission where workers engaged by Uber have challenged their status as independent contractors, arguing that they are instead employees and are therefore protected from unfair dismissal. In three separate cases the Fair

Work Commission has firmly rejected claims brought by former Uber drivers that they were unfairly dismissed from their employment on the basis that they are in fact independent contractors and therefore not protected by the unfair dismissal provisions of the Fair Work Act.

In making these decisions, the Fair Work Commission considered various factors to determine the relationship between the drivers and Uber, using the 'multifactorial test' set out in the French Accent case before the previous industrial relations tribunal, Fair Work Australia. The multifactorial test looks at factors including the level of control over the person, if the person provides their own tools and equipment, if the work can be further delegated or subcontracted, if they can perform work for others and if the other party can suspend or dismiss them. In all three cases the Fair Work Commission decided that the drivers were independent contractors, pointing to factors such as the ability of drivers to log in and out of the Partner App, to control their hours of work, the ability to refuse trip requests along with other factors such as no requirements to wear uniforms, display branding and being able to work for other companies as indicative of there being a contracting relationship.

Although the Fair Work Commission found no strong arguments in favour of a finding that these drivers were employed by Uber, Deputy President Val Gostencnik's comments in the case of *Kaseris v Rasier Pacific V.O.F*[1] indicate that the traditional dichotomy of independent contractor/employee that has developed in Australian law may be outdated in the face of economic and societal changes which have manifested into the gig economy. In that case the applicant in part tried to rely on a decision in the United Kingdom, *Uber BV v Aslam*,[2] which found that Uber drivers were workers and not independent contractors, but Deputy President Val Gostencnik rejected this line of reasoning. However the Deputy President did suggest in his judgment against the applicant that the traditional multi-factorial test was "*no longer reflective of our current economic circumstances*", because the factors *"take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition"*.

On the flipside of these cases is the decision of the Fair Work Commission in *Klooger v Foodora Australia Pty Ltd*.[3] Foodora was another participant in the gig-economy, providing food delivery service through a network of delivery riders and drivers. The applicant delivery rider was successful in establishing that he was an employee of Foodora and in doing so was successfully able to make an unfair dismissal claim. The Fair Work Commission found after applying the multifactorial test that Foodora's rostering system exhibited a high degree of control over the riders, with no ability for them to work outside of those hours or locations. The riders were also required to use branded attire and equipment, and the employment contract was drafted in such a way that it contained provisions which closely resembled an employment contract. The Fair Work Commission did consider the applicant's use of a 'substitution scheme' whereby he was able to use third parties to perform the work through his account on the Foodora application, but did not allow Foodora to rely on this line of reasoning due to its acceptance and validation of the scheme despite it being in breach of contract and other Australian laws for other reasons.

There is currently a sham contracting case on foot in the Federal Circuit Court against another food delivery service, Deliveroo, in which the applicant rider has claimed that he is in fact a casual employee and is therefore entitled to higher rates of pay along with entitlements. Recent media reporting suggests that the applicant will rely on factors such as being required to wear a uniform, using branded equipment and the 'batching system' used by Deliveroo to determine priority for offering shifts to riders.

Recent developments in the United Kingdom

In the United Kingdom instead of the independent contractor/employee dichotomy there are three categories for classifying the work that people do. People are either

1 Michail Kaseris v Rasier Pacific V.O.F [2017] FWC 6610

2 Uber BV & Ors v Aslam & Ors [2018] EWCA Civ 2748 (19 December 2018)

3 Joshua Klooger v Foodora Australia Pty Ltd [2018] FWC 6836 (16 November 2018)

employees, workers or independent contractors, with different levels of entitlements and protections afforded to each category. Workers are entitled to:

- the national minimum wage;
- protection against unlawful deductions from wages;
- minimum levels of paid holidays;
- minimum lengths of rest breaks;
- not work more than 48 hours per week or the right to opt out of this;
- protections for whistleblowing and against unlawful discrimination; and
- not to be treated less favourably if they work part-time.

Employees will receive all of these rights along with other entitlements such as sick leave, maternity/paternity leave and minimum notice periods. Independent contractors sit on the other side of the spectrum, not receiving any of these entitlements aside from any work health and safety protections.

There have been two major cases which have considered the question of how to classify participants in the gig-economy in the United Kingdom; *Uber BV v Aslam* and *Independent Workers' Union of Great Britain v RooFoods Ltd (t/as Deliveroo)*.[4]

The decision of the Employment Appeal Tribunal in *Uber BV v Aslam* confirmed that Uber drivers in the United Kingdom are in fact workers and not independent contractors. The deciding factor in this matter was that drivers for Uber were "incorporated" into the business of Uber under their arrangements and controls, which contradicted Uber's argument the drivers were conducting their own independent businesses. The tribunal found that drivers were able to establish their own business relationship with customers, worked on the understanding that they would be indemnified by Uber for bad debts, and they were subject to various controls by Uber including setting default routes to take, limiting vehicle choices, fixing the fare so that the driver cannot negotiate a different fare with the passenger, and performance management facilitated through the driver rating system.

In contrast to this, following this decision the Central Arbitration Committee (a specialist body on trade union matters) found in *Independent Workers' Union of Great Britain v RooFoods Ltd (t/as Deliveroo*) that riders for Deliveroo did not have worker status because they had a genuine right to use a substitute to perform deliveries before and after they had accepted a particular job.

Outside of these developments, it is apparent that the United Kingdom is at least considering how these new forms of work should be dealt with in terms of classifications and entitlements. In 2017 the "Good Work: the Taylor review of modern working practices" reported on the changing employment practices in the modern UK economy, advising that employer practices needed to change in order to keep up with modern businesses. In relation to digital platform-based work, such as Uber, it recommended that clearer distinctions be drawn between workers (referred to as 'dependent contractors') and independent contractors, with additional protections given to dependent contractors and stronger incentives for firms to treat them fairly. The report recommended that legislation around principles of classification be made clearer, with a right of substitution no longer being a barrier to being a worker, and more emphasis placed on the principle of control (not just supervision).

Where do we go from here?

Digital platforms and the so-called gig-economy have had a significantly positive impact in providing useful services through cheaper and more responsive methods, which are in large part due to the ability to use independent contractors. Businesses such as Uber, Ola and Deliveroo are able to focus on the core services and sharpen these offerings through the flexibility, freedom and cost savings provided by independent contractors.

However, it has become clear that as the gig-economy grows and its labour participants become increasingly reliant upon businesses such as Uber as a primary source of income, the legal framework will need to respond to ensure that there is a balance struck between the needs of workers and the businesses engaged in the market. The 'worker' labour classification in the United Kingdom provides a reasonable middle-ground between the two separate classifications of workers and independent contractors in the Australian context. Perhaps by using this as a starting point, we can create a third classification to meet the emerging challenges of the digital landscape and work in the gig-economy.

4 Independent Workers' Union of Great Britain v RooFoods Ltd TUR1/985(2016)

Doesn't Anybody Stay in One Place Anymore?

Managing workforces in fluid office spaces

By Justin Peñafiel, SENIOR ASSOCIATE

"Open plan" and "hot desking" have been the buzzwords of workspace design for years, but regular opinion polls suggest that they are indeed the preferred office environments for Millennials and members of Generation Z. But if, in the words of Carole King, nobody [literally] stays in one place anymore, what does this mean for workforce management strategies?

For several years, offices have been transforming their spaces into open-plan environments. Other companies have even done away with fixed offices altogether, requiring employees to move between shared desks and quiet spaces as required by the immediate task at hand – if there is even a need to be in the office to begin with.

The push for open-plan offices has been partly tempered, borne out of the desire for increased collaboration between colleagues. However, in recent years, debate has ensued about how much open place offices contribute to collaboration and, ultimately, productivity. The open-plan office has subsequently seen some pushback. Research in 2017 by Regus, a company that specialises in providing serviced offices, suggested that 76% of workers in Australia considered enclosed workstations as optimal for concentration (and not the open plan). A similar proportion of respondents in the same study indicated a preference for enclosed workstations for productivity, and the protection of workers' privacy.

In 2019, the debate on open-plan offices has been tempered, suggesting that they are not inherently bad, but just being "used wrong". However, the general debate on the optimal office design appears to have transformed into discussions about how fluid office environments (namely "hot desking") can cater towards the demand for flexibility, particularly for Millennials and Generation Z, who increasingly comprise the majority of workers and demand the flexibility to work both inside and outside of the office. Deloitte has conducted its Millennial Survey since 2012, and its latest 2019 report flags the increasing demand not to just work from home, but for work conditions that mimic the so-called "gig economy". Matters of work conditions extend beyond mere office design, but considerations of balancing managerial control with ever-increasing flexibility.

Whether in an open-plan office, or in a company that practices hot desking, the physical transformation of the physical work environment has a bearing on how managers can influence or exert any necessary control over their workforces in an age where flexibility is all the rage. As managerial control is increasingly exerted through electronic or virtual means, it may seem less overt, reduced, and maybe even unnecessary. However, managerial obligations and responsibilities for employees have not necessarily changed nor been reduced in the same way that fixed office spaces and face-to-face contact have been reduced.

Legal advice and strategic guidance about your obligations and strategies is therefore necessary, even when the focus might be on the choice of new furniture, or the latest technology to gather colleagues electronically at the same time in the same virtual setting. For example, People + Culture Strategies is available to advise on both flexible work arrangements, and even assist with assessing home-office environments when employees request to work from home. As decisions about open-plan offices and hot desking may ultimately result in a grant of increased flexibility, People + Culture Strategies encourages employers to take a step back and consider its strategies for managing a more fluid and dispersed workforce.

"It's Okay to Pay Women More"

By Donna Trembath EXECUTIVE COUNSEL and **Rocio Paradela** GRADUATE ASSOCIATE

On 24 May 2019 an important decision was handed down in the United Kingdom confirming that employers are entitled to provide birth mothers with better paid parental leave ("**PPL**") than husbands or partners. This is unsurprising in Australia, where a similar case was determined in 2013, but worth noting as many employers in Australia prefer a gender-neutral approach.

The UK decision about "paying women more"

The case of *Ali v Capital Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police*[i] was a joint appeal of two male employees against the parental leave policies of their employers.

The statutory backdrop is that women in the UK have a right to 39 weeks of paid "maternity leave", six weeks' at 90% of their full rate of pay and the remainder at a lower "statutory rate" of pay. Women can bring their maternity leave to an end after two weeks and opt to take the remainder of their leave with their husband or partner under a "shared parental leave" regime for up to 52 weeks (less the two-week compulsory period) at the statutory rate of pay. At the relevant time the statutory rate was around £139 per week, or about $247 per week in Australian dollar terms.

Employers are, of course, free to supplement the statutory scheme by having their own, more generous, policies, which is what had occurred in this case. The employers were paying women who had given birth at their full rate of pay for up to 14 or 18 weeks, respectively. However, husbands and partners taking shared parental leave received only the lower statutory rate.

The circumstances of the employees

Mr Ali's daughter was born on 5 February 2016, after which he immediately took two weeks of leave. During that period his wife was diagnosed with post-natal depression and advised by her doctor to return to work. Mr Ali sought to take shared parental leave to care for his daughter to enable this to occur and wished to be paid at the same rate of pay as a female employee would have been paid on maternity leave.

Mr Hextall was a police constable whose wife ran her own business. His wife gave birth to their second child on 6 September 2015 and Mr Hextall took 14 weeks' shared parental leave. He brought a claim alleging that his employer's policy of remunerating shared parental leave at the statutory level only caused particular disadvantage to men and was unlawful discrimination.

Findings by the UK Court of Appeal

The issues in the *Ali* and *Hextall* cases included:

- whether the men should receive equal treatment and pay from their employers for performing the same role as a birth mother; and
- whether the predominant purpose of maternity leave is not childcare but other matters exclusive to the birth mother resulting from pregnancy and childbirth and not shared by her husband and partner.

The Court of Appeal found that there was no direct discrimination by the employers, because women taking maternity leave are in materially different circumstances than men and are entitled to special treatment afforded to women in connection with pregnancy or childbirth. Nor was there indirect discrimination against the male employees, with the Court finding that there was nothing unusual about the employers' maternity or parental leave schemes particularly when Parliament had made an exception for provisions giving special treatment to a woman in connection with pregnancy or childbirth.

The Australian position

The approach taken in the UK case is also available in Australia.

The *Sex Discrimination Act 1984* (Cth) (the "**SDA**") has an exemption for special measures

intended to achieve equality. Section 7D of the SDA provides that a person may take special measures for the purpose of achieving substantive equality between various types of people, including:

- men and women;
- women who are pregnant and people who are not pregnant; and
- women who are breastfeeding and people who are not breastfeeding.

An employer does not discriminate against another person by taking special measures authorised by section 7D of the SDA. An employer will be regarded as having taken a special measure to achieve equality even if the measure is taken for a range of purposes and is not the dominant purpose.

States including New South Wales, Victoria and Queensland have a similar type of exemption.[ii] A case in point is *Tung v State of Queensland*.[iii]

Tung v Queensland Health

This decision of the Queensland Civil and Administrative Tribunal ("**QCAT**") was about whether it was discriminatory for an employer to refuse to provide a male employee with the same level of PPL as a female employee in the same position.

Mr Tung was a male nurse employed by Queensland Health. Mr Tung's wife ran her own business as a hairdresser and was unable, for practical reasons, to take much time away from her business. The couple decided that Mr Tung would be the primary caregiver for their child for a period after its birth. Mr Tung applied for 14 weeks' paid maternity leave that was available to female employees of Queensland Health and was refused. Mr Tung alleged that this amounted to both direct and indirect discrimination under the *Anti-Discrimination Act 1991* (Qld) ("**ADAQ**").

On the face of the departmental policies which provided for such leave, it was available only to female employees who were pregnant. QCAT found that there was no direct sex discrimination, because a female employee who was not pregnant would have been treated the same way as Mr Tung.

When considering whether there was indirect discrimination, QCAT asked whether providing a benefit to working mothers as part of what might colloquially be described as "affirmative action" or "positive discrimination" is unreasonable when similar benefits are not available to other, arguably, equally-worthy employees who also have family responsibilities. Expert evidence was given that there are benefits to both parents and the child itself if fathers are allowed time to have an active parenting role.

However, QCAT decided that the focus must be upon whether the term of the policy limiting the benefit to mothers was reasonable, not whether it would have been reasonable to provide a similar benefit to other employees. The policy was reasonable because it:

- took account of the impact of pregnancy on the mother, and was designed to allow full recovery of the mother from both the pregnancy and childbirth;
- was designed to enhance child and maternal health, development and bonding (although it was recognised that this might equally be said in support of the provision of such leave to fathers); and
- facilitated greater workforce participation by women and promoted gender equality and the retention of skilled women in the workforce.

QCAT considered that, even if it was wrong in concluding that there was no discrimination against Mr Tung, the policy was exempt from these considerations under the "welfare measures" and "equal opportunity measures" in the ADAQ.

The takeaways

. As in the UK, Australian employers are allowed to provide better PPL policies for women who give birth than other types of employees.

. Many employers prefer to have a gender-neutral PPL policy that provides benefits to the "primary care-giver". This ensures equal treatment for all employees regardless of whether they become parents through giving birth, their partner giving birth or surrogacy.

. However, the scope exists for employers to implement lawfully special measures to assist female employees who are birth mothers back into the workforce.

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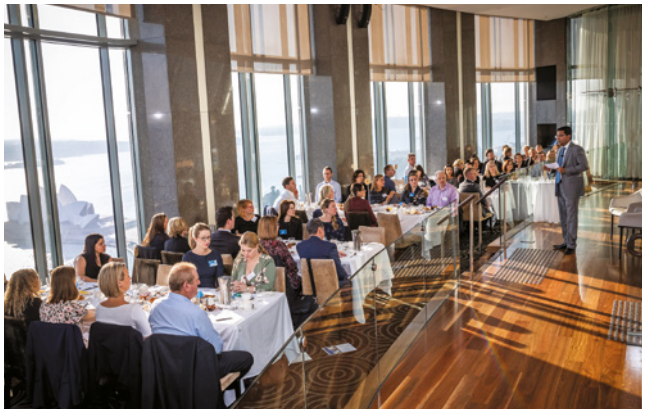
[i] [2019] EWCA Civ 900.

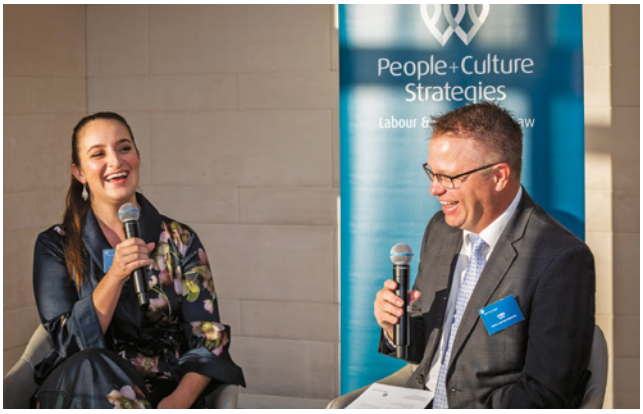
[ii] Section 35 of the *Anti-Discrimination Act 1977* (NSW), section 12 of the *Equal Opportunity Act 2010* (Vic) and section 105 of the *Anti-Discrimination Act 1991* (Qld).

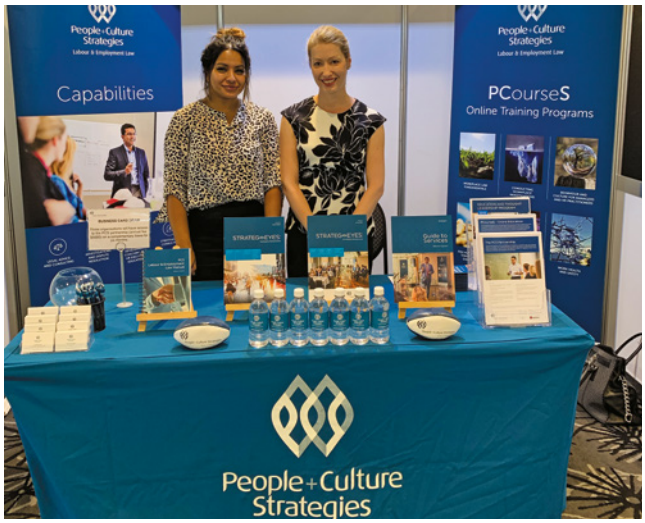
[iii] [2013] QCAT 251.

Events

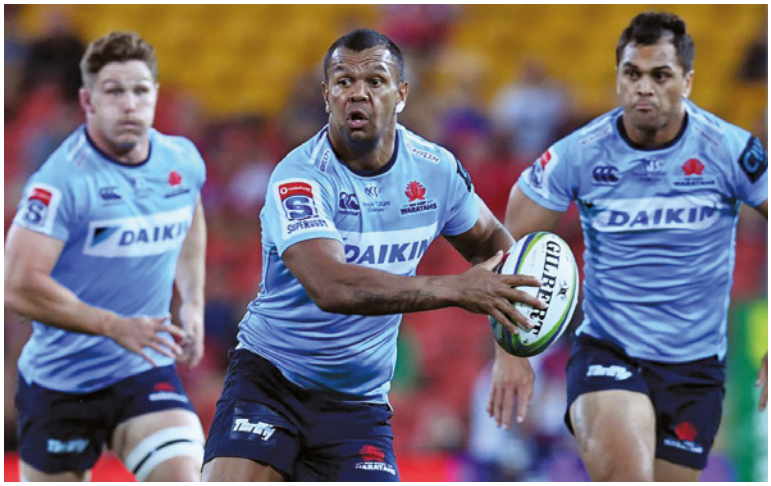
PCS has hosted a wide variety of thought leading and education events in 2019, including our signature Key Breakfast Briefing at the Shangri-La Hotel and the launch of our very successful PClasseS series. PCS was once again the Legal Sponsor at the National HR Summit at Luna Park in Sydney.

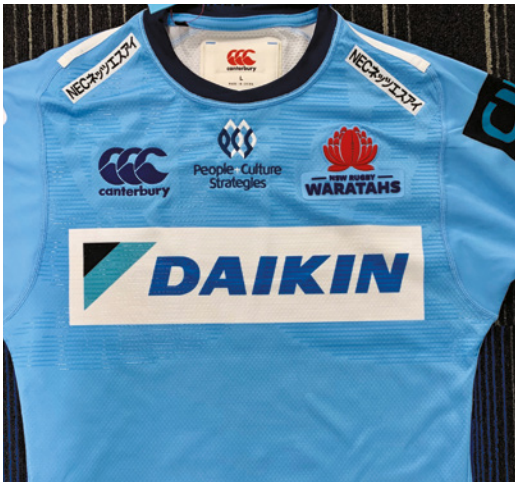


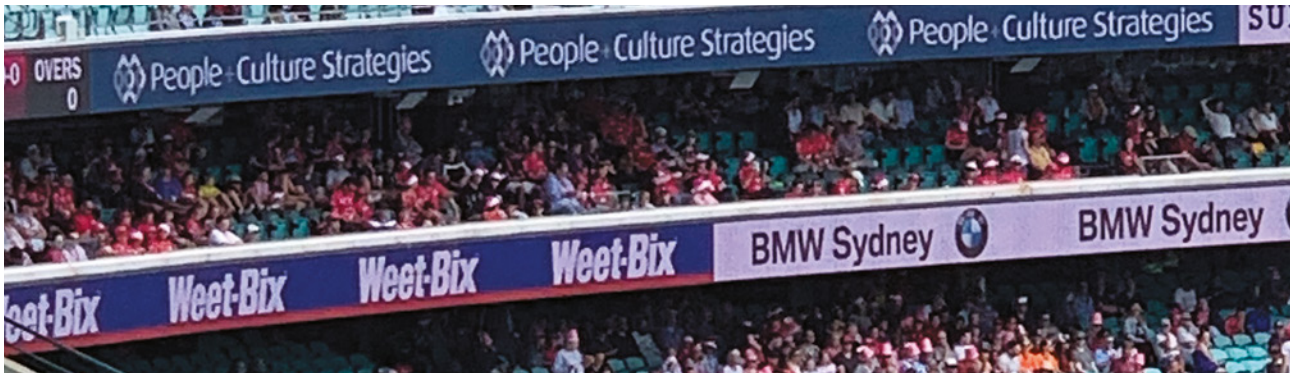




Throughout 2019, PCS has continued to maintain prominence in the community at large through its wide philanthropic footprint. The Firm greatly values its commercial partnerships with the Waratahs, Cricket NSW and Cricket Tasmania, Packemin Productions and Bloom Creative Productions. We have also maintained our sponsorship of Srey Oun in Cambodia through her secondary school studies in partnership with the Song Saa Foundation.







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