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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies
Labour & Employment Law

A LOOK INSIDE:

Message

from Founder and Managing Principal

Since our last edition of Strateg-Eyes our firm has been extremely active on a number of fronts. On the professional side, we have consolidated our status as a non-traditional solutions provider with a significant number of projects involving culture audits, creation of high performing organisations and facilitating improved teamwork across leadership teams. For those of you who are using us only as your legal advisers, while grateful for that privilege, I urge you to find out more about our offerings in that space.

The Waratahs (for whom we are the Official People Partner) have commenced their 2018 quest to win their second Super Rugby championship in 5 years and we wish them all the very best in the season. PCS was also delighted to have sponsored Shrek - The Musical which played at Riverside Theatres in Parramatta in February 2018. My congratulations to Neil Gooding and the Packemin team for putting on such a great production and we look forward to Legally Blonde later in the year.

PCS will once again be the legal sponsor of the National HR Summit at Luna Park in Sydney and if you are attending that event please pay us a visit at our booth. I will be addressing both the main delegation and the HR Directors Forum at that event.

I do hope you are finding our contributions to thought leadership to be of value. The Advanced Strategic People Management program was once again a resounding success and we hope you will be able to identify suitable participants to attend our Legal Concepts program in April.

As always, if there is anything we can be doing differently or better, please contact me or one of the other Directors of the firm.

Joydeep Hor

FOUNDER AND MANAGING PRINCIPAL

The Journey to High Performance

This article is based on a webinar presented by Joydeep Hor on 14 February 2018

Sam Cahill, Associate

The majority of business leaders aspire to instil a culture of high performance. However, the notion of organisational culture, and especially high-performance culture, can be difficult to define, let alone apply to the running of an organisation. In this article, we look at the key components of high-performance culture and how business leaders can assess and improve the performance culture in their organisation. This is the beginning of the journey to high performance.

High-performance culture

It is tempting to assess an organisation's culture by reference to incidents or themes that recur within the organisation. For example, an organisation may spend a great deal of time dealing with disciplinary issues or instigating performance management. This approach is problematic, as it can lead to an undue focus on these negative aspects of people management, rather than the creation of a high-performance culture.

Instead, we advocate a more proactive and holistic approach, which involves a structured framework for assessing and improving an organisation's performance culture. An example is the "V-S-C" framework, where performance culture is measured against three key metrics:

- "Vision and Values"
- "Systems and Structures" and
- "Capability and Credibility".

What follows is an analysis of each of these metrics of performance culture, in order to give a clearer picture of the practical steps that business leaders can take to develop and maintain a high-performance culture.

Vision and Values

A good starting point for assessing an organisation's culture is to start with some simple questions:

- What is the organisation's vision or over-riding objective? What is it trying to achieve?
- What are the values of the organisation? What are the things that management "stands for" or "stands against"?
- How does the organisation articulate its vision and values? Are employees aware of the organisation's vision and values? Do they share them?

For performance culture to be given the weight that it warrants, it is essential for an organisation to have a clearly-articulated commitment to high performance as part of its mission statement (or vision). It enables an organisation to articulate its aspirations in terms of a commitment to high performance, and to not limit this simply to the meeting of basic targets or revenue benchmarks.

It is essential for an organisation to spend time in articulating its vision in terms of performance. If time is spent on articulating and formalising vision and values, it makes it easier to communicate this to employees and ensure their performance is in sync. It is also important for the values of the organisation to be embraced and reinforced by individual managers, as this will enhance buy-in from employees.

However, organisations must also recognise that, at best, vision and values are only the beginning. Once an organisation's vision and values have been articulated, they need to be actioned by management and continuously reinforced. The "lived experience" of the vision means that employees are more likely to adhere to it, and also facilitates the achievement of high performance. Finally, an organisation's vision and values are not set in stone. Constant reflection on an organisation's vision and values is an important part of a high-performance culture.

Systems and Structures

An organisation's systems and structures are the building blocks of its approach to human resources and people management. The articulation of the organisation's vision and values must be carried through in its systems and structures. When assessing an organisation against this metric, it is important to ask:

- How does the organisation recruit and induct new employees?
- Does the organisation have written employment contracts, position descriptions and internal policies? What do these documents say about working for the organisation?
- What is the organisation's reporting structure? What are the opportunities for career progression?
- How does the organisation provide employees with feedback on their performance? Does it have a system of performance appraisal?

By way of example, staff inductions provide an opportunity to explain the rights and responsibilities of employees and the organisation, promote an understanding of the organisation and its history, inform employees about points of contact within the organisation and communicate policies and procedures.

One aspect of staff inductions that some organisations may overlook is scheduling a conversation between a valued and successful employee and a new employee or employees. This discussion is an authentic and powerful tool designed to promote not only individual success, but also instil a sense of drive to achieve the organisation's desired outcome.

Similarly, an organisation's employment contracts, position descriptions and internal policies provide an opportunity for an organisation to infuse its systems and structures with its vision and values. Employment contracts and position descriptions can be used to set clear expectations regarding performance, while policies can be used to articulate what it means to work for the organisation and what is required of employees. The framing of the vision and values in such documentation ensures that they have been formally recorded and that staff understand what it is the business aspires to achieve.

Credibility and Capability

The best systems and structures will only be as good as the leaders who are responsible for implementing them. This means that, in order to have a high-performance culture, an organisation must have managers and supervisors with the capacity to lead and inspire high performance.

When assessing an organisation against this metric, it is important to ask:

- Do managers and supervisors espouse and uphold the values of the organisation? Do they talk the talk? Do they walk the talk?
- Do managers and supervisors conduct themselves in a manner that resonates with the organisation's high-performance mantra?
- Do leaders have the necessary "credibility" to execute the organisation's vision and values?
- Does the organisation take steps to monitor its leaders to ensure that this is the case?

A good leader will have traits and values that reflect the broader vision and values of the organisation. Moreover, a good leader will be able to build rapport with employees and encourage them to adopt those same traits and values. This enables and promotes a strong alignment between the objectives and values of the organisation and the personal aspirations of employees.

To build rapport and inspire employees, leaders must have credibility. One way of testing against this metric is to gain an understanding of how the organisation's leaders are perceived by employees, either through dedicated group discussion sessions or using survey tools. If employees see that leaders are walking the talk, this can enhance the performance culture within the organisation.

Culture audits

An effective starting point in the journey to high performance is to conduct a culture audit. This enables an organisation to gain an understanding of its performance culture as its stands. It can help an organisation understand the strengths and weaknesses of its performance culture and the areas in which there is scope for improvement. Using the simple V-S-C framework, an organisation can use the findings of an audit to embark on a journey towards a culture of high performance. At the same time, this approach can highlight where problems exist, and therefore prevent costly and time-consuming people management issues that can impact on the effective and productive functioning of the organisation.

PCS regularly conducts culture audits and works with organisations nationally and globally to implement a high-performance culture in their organisations. Please contact info@peopleculture.com.au or any of the PCS Directors for further information.

A bitter pill to swallow:

Drug and alcohol policies in the workplace

Michael Starkey, Associate **Rohan Burn**, Graduate Associate

With the Alcohol and Drug Foundation reporting that alcohol and drug misuse costs Australian workplaces approximately $6 billion per year in lost productivity, it is understandable that many employers will seek to implement a framework for dealing with drug and alcohol usage in the workplace.

Ensuring that employees are not impaired by the effects or after-effects of drug and alcohol use is an important part of driving a high-performance culture, meeting an organisation's responsibilities regarding the health and safety of employees, protecting an organisation's reputation, and encouraging employee wellbeing. However, introducing a drug and alcohol policy into the workplace is often not an easy task. For any organisation, determining where to draw the line on drug and alcohol use (for example, whether the policy should be "zero-tolerance" or adopt a different approach) will depend on a number of factors, including the work health and safety context in which the organisation operates ("high-risk" or "low-risk"), and the nature of the work undertaken in the organisation. Just as importantly, when enforcing drug and alcohol policies, employers also need to consider a number of legal risks that may arise, including under anti-discrimination and unfair dismissal laws.

When it comes to drug and alcohol policies, what does a best practice approach look like?

While any employer is likely to receive some pushback when seeking to implement a drug and alcohol policy, it is possible to mitigate this by adopting an approach focused on obtaining the "buy-in" of the workforce. The rationale for the policy should be clearly communicated, and it may be appropriate to develop the terms of the policy in consultation with the workforce. Further, best practice policies tend to take a holistic approach, rather than simply a focus on punitive outcomes. A holistic approach includes an emphasis on providing support, counselling, and education, rather than seeking to "catch out" workers. In addition, it recognises the reality that many employees take prescription medications, and will encourage responsible use and disclosure. Moreover, the policy should seek to build an understanding of the impact

of alcohol or drug misuse in the workplace, as well as the likely disciplinary consequences. This is important from both a cultural and legal perspective. Policies framed in this way are more likely to be accepted by a workforce, and more likely to be looked at favourably by courts and tribunals.

What is a zero-tolerance drug and alcohol policy?

In most cases, the term zero-tolerance is used to refer to a drug and alcohol policy which sets "cut-off" levels, and stipulates that testing which reveals a breach of the policy will result in disciplinary action. The levels specified in a policy will often depend on the nature of the work carried out in the organisation. For example, in high-risk industries such as manufacturing and mining, where the potential safety ramifications of a breach of the policy are significant, a zero-tolerance policy is likely to be the most appropriate response. Conversely, in industries which depend on entertaining and interacting with client (for example, because employees may reasonably be expected to consume some alcohol while entertaining clients) policies might be tailored to cover how employees are expected to behave in situations where alcohol is being consumed, while prohibiting other conduct outright, such as illegal drug use. Ultimately, employers have a right to set what they regard as reasonable standards for drug and alcohol use within and affecting their workplaces, and to enforce those standards.

While, on their face, zero-tolerance policies prohibit certain conduct, they also serve the function of educating employees on their responsibilities and the organisation's behavioural expectations. They should detail the method of testing to be used, and outline the steps involved in any disciplinary process. Where a breach of a drug and alcohol policy is established, any disciplinary outcome needs to align with the terms of the policy and take into account all the surrounding circumstances of the employee in question. This will maximise the likelihood of an employer being in a position to defend the decision in the event that an employee pursues legal action.

What is the role of the Australian Standards?

In a number of recent Fair Work Commission ("**FWC**") decisions, the FWC has indicated that reference to the relevant Australian Standards can be an appropriate way to communicate and implement a drug and alcohol policy effectively. The FWC has also commented that while compliance with the Australian Standards is not mandatory, it can enhance the integrity of a drug and alcohol policy. The Australian Standards provide guidance on the processes required for drug testing to be performed in a valid and reliable manner. In one case, an employer implemented a zero-tolerance policy in which it defined the expression "free from the presence of other drugs whilst at work" as a reference to not having a reading in excess of the relevant Australian Standard cut-off level. The effect of linking it to the Standard was that the organisation communicated clearly to employees that they were not permitted to work with any concentration of drugs to the extent that this could be detected by the processes set out in the Standard.

What method of testing should be used?

There is a separate Australian Standard for urine, saliva, and alcohol testing, and employers need to consider which method of drug testing is appropriate for the circumstances of their business. Historically, the preference of unions has been for saliva testing to be used, on the basis that a mouth-swab is more indicative of present levels of impairment, while a urine sample is more likely to detect historical drug use. However, recent decisions of the FWC have indicated that employers are able to utilise either or both methods of testing, provided adequate protections are implemented to protect the privacy of the employee being tested (for example, it may be inappropriate for a urine sample to be taken by an employee's colleague). In one case, the FWC rejected the submission that urine testing is unnecessarily invasive because it has the potential to reveal information about an employee's out-of-office conduct that an employer should not need to know or try to control.

How should disciplinary action for breaches of a drug and alcohol policy be managed?

Disciplinary action should be approached on a case-by-case basis. Just because a policy provides for termination of employment in particular circumstances, does not mean that termination will always be appropriate when those circumstances eventuate. Employers should take a broad approach and consider all the circumstances of the individual employee, including an employee's record of service. For example, terminating the employment of an employee with a "clean" and long record of service for a minor breach of a drug and alcohol policy may give rise to a successful unfair dismissal claim on the basis that the dismissal was harsh or unjust if it is in a "low-risk" industry. Additionally, the circumstances of an employee's drug or alcohol use should be considered, including whether this may be a result of an addiction. Where addiction is an issue, it may be more appropriate to approach drug and alcohol use as a "fitness for work", rather than "misconduct" issue, although it is always advisable to seek legal advice in such circumstances, particularly around the safety aspects that may arise. In order to build a solid foundation on which to take disciplinary action in the right circumstances, employers should ensure that all employees receive adequate training on the relevant policy and understand what the organisation expects from them.

Key takeaways

- Employers should tailor their drug and alcohol policies to their industry and workplace.
- Develop policies that set standards of expected behaviour, are focused on safety and wellbeing, and build a culture of compliance, not policies that only seek to punish.
- Consider referring to the relevant Australian Standard to bolster the integrity of your policy.
- Make your policy well known and ensure employees receive adequate training.
- Consider disciplinary action on a case-by-case basis, taking into account the circumstances of the employee involved.

PCS assists clients in policy development and review and conducts training for managers on these and other WHS issues.

Not a word:

Confidentiality provisions in employment contracts, settlement agreements and non-disclosure agreements

Therese MacDermott, Consultant **Roseanna Smith**, Graduate Associate

Recent publicity around sexual harassment and other forms of misconduct in the workplace has brought into the spotlight the extent to which confidentiality provisions in employment contracts, settlement agreements and standalone non-disclosure agreements are used to keep such conduct out of the public domain. While a litigated dispute will mean the issues are aired in a public forum, few matters are in fact litigated, and settlement on confidential terms is a widespread practice.

Competing factors come into play surrounding the extent to which such matters become public knowledge. On the one hand, parties to a dispute are at liberty to settle a dispute on terms that they can agree on, including a provision that makes the fact that the conduct occurred confidential and not something to be disclosed by any party to the agreement. On the other hand, serious forms of wrongdoing and/or systemic practices at a workplace may be of genuine concern to the broader community, and hence a valid subject of public interest.

This article considers recent developments in this area, including the proceedings seeking to enforce the obligations under a deed of release signed by a former employee of the Seven Network, and the recent campaign that banks should waive their rights to enforce non-disclosure agreements against former employees who may wish to give evidence to the Royal Commission into Misconduct in the Banking, Superannuation and Finance Services Industry (the "**Banking Royal Commission**").

How non-disclosure terms operates in an employment context

Confidentiality clauses

Most employment contracts contain confidentiality provisions that limit the extent to which employees can disclose confidential information during, and after the conclusion of, the employment relationship. In addition to contract law principles, equitable obligations of confidentiality are also applicable. The type of information which is generally defined as being "confidential information" in an employment contract includes intellectual property, business plans, trade secrets, client lists, research and commercially sensitive information. These types of clauses, however, are not general regarded as preventing employees from disclosing sexual harassment and misconduct in the workplace given that they are aimed at governing very specific types of information that are confidential to the employer, and not principally directly to the manner in which a workplace may operate.

Settlement Agreements

Settlement agreements commonly make provision for tailored confidentiality clauses, as well as non-disclosure terms. This will often be a standard practice where an end to an employment relationship is negotiated between the parties. This could include circumstances where the relationship comes to an end on the basis of established misconduct or other inappropriate behaviour.

In terms of confidentiality, settlement agreements can impose specific obligations regarding the confidentiality of information, processes or contacts the employee or executive in question had access to during their employment. Such clauses are likely to be more particularised than a standard clause in an employment contract. In addition, the terms of a settlement agreement may protect the confidentiality of:

1. the negotiations leading up to a settlement,
2. the terms of the agreement; and
3. any conduct that led to the entering into of the settlement agreement.

A well-drafted agreement will not only include a non-disclosure clause, but also contain a release which ensures that the parties cannot pursue any further claims arising out of the subject matter of the settlement agreement.

Non-disclosure agreements

It is less common in the Australian employment context to have a standalone non-disclosure agreement ("**NDA**"). However, such an agreement may be entered into where the parties agree to keep confidential certain matters either of a sensitive commercial nature or where wrongdoing may have occurred, but no other matters requiring settlement terms are involved. Such an agreement might also be used regarding commercially sensitive information where contractors or consultants are engaged.

Obligations to disclose wrongdoing

In the case of sexual harassment that amounts to, for example, sexual assault, an employer may be subject to a positive obligation to report such conduct if the employer has "*knowledge or belief*" of the commission of a "*serious indictable offence*", defined as an offence which is punishable by a sentence of imprisonment of five years or more. Offences of that nature could include sexual assault.

In New South Wales, section 316(1) of the *Crimes Act 1900* ("**Crimes Act**") provides that it is a criminal offence for an individual or a corporate entity to fail, without reasonable excuse, to report a "*serious indictable offence*". Relevant to establishing the requisite state of knowledge or belief, is an awareness that the offence has, or may have, been committed, or the holding or withholding of information which might be of material assistance in securing the apprehension or conviction of the offender. The application of the Crimes Act's obligation to legal practitioners has always been a contentious area, given client confidentiality.

Whistleblowers

Misconduct in the workplace may also come to light by way of a whistle-blower disclosing events or past misconduct. The *Corporations Act 2001* (Cth) (the "**Corporations Act**") provides some protection for whistle-blowers, as it makes it a criminal offence to victimise a whistleblower or terminate their employment based on the disclosure of certain information. The Corporations Act provides protection from any civil or criminal liability for making the disclosure and no contractual remedy or other right may be exercised against a person on the basis of the disclosure.

However, the protection offered by the Corporations Act is narrow, as it only protects current officers, employees, contractors and employees of contractors. Its protections do not extend to individuals who may have had their employment recently terminated. Further, the relevant disclosure can only be made to the Australian Securities & Investments Commission or the company's auditor, director, secretary or senior manager or a person authorised to receive whistleblower disclosures. Finally, the legislative provisions only apply when the whistleblower has reasonable grounds to suspect that the company, or an officer or employee of the company, has or may have contravened the Corporations Act.

Intervention by the courts

The role of the courts in overseeing agreements that have been reached in respect of non-disclosure, was considered in the case of *Seven Network (Operations) Ltd v Harrison*. [1]

Ms Harrison was employed by the Seven Network as an executive assistant. During her employment she formed a consensual relationship with the Chief Executive Officer of the Seven Network. The relationship ended in 2014, and around a similar time as an investigation into Ms Harrison's expenses on the company credit card.
On 1 August 2014, Ms Harrison entered into a deed with the Seven Network (the "**First Deed**"). The First Deed effected a role transfer of Ms Harrison within the company and an undertaking to repay $14,000.00 worth of expenses back to the company. Ms Harrison was ultimately terminated from her employment in late 2014 by way of a deed of release between Ms Harrison and the Seven Network (the "**Second Deed**"). The Second Deed imposed strict obligations on Ms Harrison that included, among other things, non-disclosure of information regarding the relationship with the Chief Executive Officer and that Ms Harrison discharge Seven Network from any claims that she could have against them.

In March 2015, the Seven Network suspended payments to Ms Harrison under the Second Deed on the basis that Ms Harrison had refused to comply with her obligation under the deed to return certain company property when requested to do so by the Seven Network.

Ms Harrison alleged that the suspension of payments amounted to a repudiation of the deed. By way of accepting the repudiation, in May 2015 Ms Harrison lodged a complaint with the Australian Human Rights Commission ("**AHRC**") alleging sexual harassment, discrimination and victimisation.

Between November and December 2016, Ms Harrison shared information publicly about her relationship with the Chief Executive Officer and aired various grievances she had in relation to her former employer. In December 2016, a media release that detailed confidential information contained in the Second Deed and the facts that led to the creation of the two deeds was released. In response, the Seven Network applied to the Supreme Court for an interlocutory injunction to restrain conduct it alleged was in breach of the deeds.

The Court found that the Seven Network's suspension of payments was a response to Ms Harrison's refusal to return company property and as such did not amount to a breach of the Second Deed. Further the Court noted that even if this was a breach, the obligation of non-disclosure was not conditional on the Seven Network's performance of their obligations.

In response, Ms Harrison argued that her case was a matter of public interest, arguing that the enforcement of the non-disclosure obligation would stifle freedom of speech and the open reporting of matters of public interest.
She also claimed that the dispute was in the public interest as it involved the interests of the Seven Network and its shareholders, both in a financial sense and because the dispute could shed light on the way in which the Network conducted its corporate governance.

While it was accepted by the Court that the case involved an element of public notoriety and by virtue of that, was in the public interest, the Supreme Court held that the Seven Network's legitimate interests under the agreement outweighed any public interest in the matter. The Court made clear that where private parties enter into agreements freely, courts will be reluctant to interfere. Hence the court granted the Seven Network an interlocutory injunction preventing any disclosures that came within the terms of the agreement, stating that "*if parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done... the thing shall not be done*". [2] *The Court emphasised that it requires "compelling discretionary reasons*" to refuse to grant injunctive relief where a breach of a negative covenant has occurred. [3]

[1] *[2017] NSWSC 129.*

[2] *Otis Elevator Co Pty Ltd v Nolan* [2007] at 30 referencing *Doherty v Allman* (1878) 3 App Cas 709, 720.

[3] *Otis Elevator Co Pty Ltd v Nolan* [2007] at 17.

Is there too much cover-up?

The recent commencement of the Royal Commission has re-ignited discussion around the use of non- disclosure terms in agreements to prevent parties revealing misconduct or other wrongdoing.

The Royal Commission has been set up to, among other things, inquire into misconduct and questionable behaviour within the finance sector. One difficulty the Royal Commission faces is that many victims or witnesses to misconduct are subject to non-disclosure terms. As a consequence, unless the Royal Commission exercises its power to secure information or the corresponding party to the agreements waive their rights, these individuals face the prospect of proceedings alleging a contractual breach should they choose to disclose information to the Royal Commission.

Prior to the start of the Royal Commission, the Australian Council of Trade Unions ("**ACTU**") launched a campaign seeking to secure agreement that banks and other financial institutions would waive their rights with respect to disclosure of information relevant to the Royal Commission. The "Big Four" Australian banks have confirmed that customers and former employees who had signed an agreement as part of a settlement are free to give evidence to the Royal Commission, without the threat of legal action.

Limitations, however, have been placed on the waiver. In particular, the Commonwealth Bank has signaled that the waiver is limited to disclosures to the Royal Commission, and has warned that disclosures outside of this forum may still potentially give rise to a breach.

Outside the Big 4, the position of other financial institutions, including regional banks and life insurance companies, is not as clear. In response to this, the Commissioner, the Honourable Kenneth Madison Hayne AC QC, reminded financial institutions of the Commission's power to secure information:

> "*First, the commission would be very likely indeed to exercise its compulsory powers to secure the information in question…. Second, the very fact that an institution sought to inhibit or prevent the disclosure of the information would excite the closest attention, not only to the lawfulness of that conduct but also what were the institution's motives for seeking to prevent the commission from having that information.*" [4]

Key takeaways

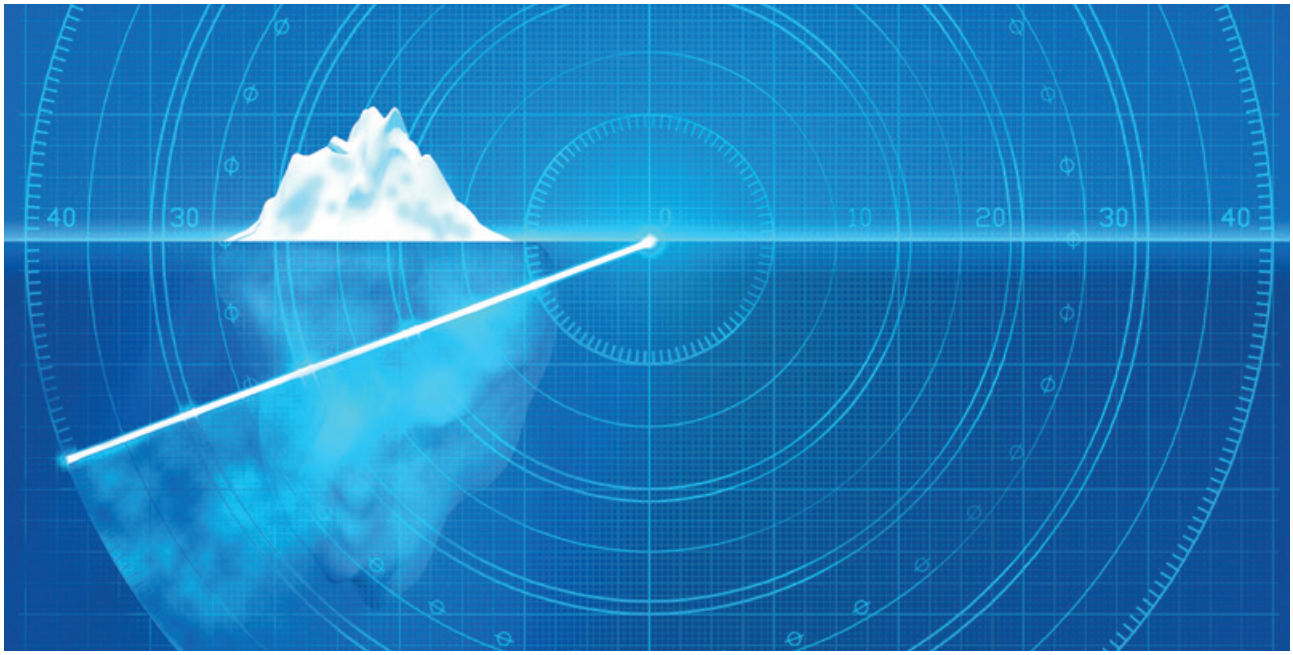
While recent developments show that courts may be reluctant to interfere with private agreements that have been made for consideration, caution needs to be exercised. There is still the risk that the information may eventually come to light at some point in time, and the enforcement of strict non-disclosure obligations where wrongdoing is systemic can have considerable reputational consequences.

Factors to consider in framing non-disclosure terms include:

1. What are the legitimate interests of the parties that should be protected?;
2. Would a non-disclosure term simply conceal a culture that will do long term damage to the organisation?; and
3. Does the agreement contemplate limited circumstances where disclosure may be permissible to further the public interest?

PCS strongly recommends that you seek advice when preparing documents containing confidentiality obligations.

[4] Sue Lannin, 'What we did (or didn't) find out about the banking royal commission', *ABC News* (online), 12 January 2018 <http://www.abc.net.au/news/2018-02-12/what-we-learned-from-day-one-of-the-banking-royal-commission/9423444>.



On the radar for 2018:

A snapshot of 5 employment and labour law areas that may come across your desk in the coming year

David Weiler, Associate

1. Casual Conversion Model Clauses

The Full Bench of the Fair Work Commission ("**FWC**") approved a draft model casual conversion clause in July 2017. Some industrial instruments already contain this right, while it will be phased in across other awards. Hearings are underway on implementing this into each of the 85 modern awards that do not currently have such a provision.

The Full Bench's approval of a model clause was based on the view that "*the unrestricted use of casual employment without the safeguard of a casual conversion clause may operate to undermine the fairness and relevance of the safety net*".

In summary, the model clause:

- includes a qualifying period of 12 months;
- requires a pattern of hours that could be performed as full-time or part-time employment;
- requires employers to provide all casual employees with a copy of the casual conversion clause within 12 months of their initial engagement; and
- allows employers to refuse the conversion where:
    - it would require a significant adjustment to the casual employee's hours of work to accommodate them in full-time or part-time employment under the applicable modern award;
    - it is known or reasonably foreseeable that the casual employee's position will cease to exist;
    - the employee's hours of work will significantly change or be reduced within the next 12 months; or
    - on other reasonable grounds based on facts which are known or reasonably foreseeable.

In a recent decision on the right to convert to permanent employment, where the applicable industrial instrument provided such a right, the FWC emphasised that the right to convert is on a *like for like* basis.

2. Breach of Privacy Notifications

New privacy provisions came into force on **13 February 2018.**

These changes require an organisation to notify any individuals affected by a data breach that is likely to result in serious harm. This obligation is in addition to the current requirements to take reasonable steps to protect personal information from misuse, interference, loss, unauthorised access, modification, or disclosure.

When do you have to notify?

The obligation to notify only arises when there are reasonable grounds to believe that an "eligible data breach" has happened.

An eligible data breach occurs when:

- there is unauthorised access to, unauthorised disclosure of, or loss of the personal information; and
- **a reasonable person** would conclude that the access or disclosure would be likely to result in **serious harm** to any of the individuals to whom the information relates.

If there are grounds to suspect that an eligible breach may have occurred, the organisation must take all reasonable steps to carry out an expeditious assessment of whether there are reasonable grounds to believe that a breach has occurred, within **30 days** of becoming aware of the potential breach.

In determining whether a breach would be likely to result in serious harm, the following are some relevant considerations:

- the type of information (and the sensitivity of it);
- whether the information is protected by security measures;
- the persons or kinds of persons who have, or who could, obtain the information;
- the likelihood that any persons who have, or who could, obtain the information have, or are likely to have the intention to cause harm to the individuals to whom the information relates;
- the nature of the harm; and
- any other relevant matters.

Who should be notified?

If you suspect that there may have been a breach in data security (whether you think it is an eligible data breach or not), it is advisable to contact the heads of legal and IT at your organisation.

If there are reasonable grounds to believe an eligible data breach has occurred, individuals who have been (or are at risk of being) affected by the breach and the Office of the Australian Information Commissioner must be promptly notified.

3. When outside work social media activities impact on the work environment

Many employers find it difficult to judge when to step in regarding their employees' Facebook, Twitter or Instagram activities where these occur outside of work hours. A recent decision of the FWC found that an employer did not need to receive a complaint before it instigated an investigation an employee's activities and ultimately terminated the employee's employment where he had shared a pornographic video via Facebook Messenger with friends, including with 19 work colleagues.

One of the employees made it clear she did not appreciate receiving the video, telling him via messenger the following day: "*Are you serious? Mate don't send me that shit*". Commissioner McKenna agreed with this sentiment, and found that the video was objectively offensive.

However, in his application, the employee claimed there was not a sufficient connection to his work to justify the termination. Commissioner McKenna accepted there was "*a real, contestable issue*" as the conduct in question related to out-of-work behaviour, did not involving any work-related facilities, and the employees had all added each other as Facebook friends. Hence it could be argued that the conduct engaged in was outside the bounds of the employer's reasonable control.

Ultimately the Commissioner rejected that the conduct was outside the scope of the employer's policies on the basis that "*there was nothing to indicate that there was anything other [than] the cornerstone of the employment relationship which led to the applicant having 20 work colleagues as his Facebook friends and sending the video to 19 of them by Messenger.*"

This cornerstone created the relevant nexus between the out-of-hours conduct and the interests of the employer. Therefore, it could reasonably conduct an investigation into those matters and take disciplinary action, where appropriate. This was not a case of an employer "*seeking to intrude too far into the private lives of employees*" or "*attempting to exercise supervision over the private activities of employees*." Hence the resulting termination, which relied on the findings of the investigation, was found to be for a valid reason.

4. Long Term "Casual" Employment – Annual Leave

Generally, an employee engaged on a casual basis is not within the scope of annual leave obligations. But, where an employee is wrongly regarded as a casual, then the situation may be quite different.

In a recent decision, the Federal Circuit Court found that a casual employee was in fact a permanent, full-time employee and therefore was entitled to annual leave payments and payment in lieu of notice on termination.

The situation was not clear-cut, as there was no written record of the terms of the applicant's original engagement. Despite being described in the payroll system as a casual employee, his pay slips gave no express indication that he was paid on a casual basis, as they did not refer to a casual loading. However, it appeared that he was paid an amount in excess of award rates for permanent employees. He ordinarily worked at least 38 hours a week, and often worked many additional overtime hours. He was expected to be available every day, and his role was an integral and important part of the respondent's enterprise. However, he was treated as a casual employee for the 15 years of his employment in terms of a lack of access to annual leave, payment for public holidays, and sick leave.

The applicant's employment was initially covered by the *Quarrying Industry Award* ("**Award**"), prior to entering into an Australian Workplace Agreement ("**AWA**") in 2007. The question of whether the applicant was a casual or permanent employee turned on the construction of the AWA, and hence the objective intentions of the parties in signing that agreement.

The Court accepted that the AWA was ambiguous as to whether his employment was casual or permanent, and that it did not expressly, or by necessary implication, define the contract of employment as either casual or permanent. It found the subjective intentions and aspirations of the parties to be of limited value, and looked to the extrinsic evidence and the surrounding circumstances, including that he was:

a. deemed to be a permanent employee by the Award (as there was no written contract to the contrary) from the time he commenced employment until he entered the AWA in 2007.

b. consistently and regularly working at least 38 hours;

c. a skilled worker who performed an important and integral role;

d. never informed that he should not come to work or told that he was not required by the employer;

e. not paid annual leave or for working on public holidays, and did not believe he was entitled to such payments;

f. paid a wage that was above the standard, but there was no evidence that he was actually paid a "casual loading" of any particular percentage; and

g. told before signing the AWA that "it wouldn't change anything" and that his pay did not change substantially after signing it.

The court acknowledged that the parties may have been unaware that the employee was in fact a permanent employee and subjectively considered the employment to be on a casual basis, but that the correct characterisation of his employment was by reference to the AWA and the surrounding circumstances. This lead to the conclusion that the applicant's employment was permanent.

Although this case turned on its individual facts, it demonstrates how the subjective intention of the parties is not decisive in determining the nature of the employment relationship where it is not clearly stated in the contract of employment, and that where there is ambiguity, the surrounding circumstances will be considered to ascertain the objective intention of the parties.

5. Miscellaneous Award

As many experienced HR professionals know, determining which award applies to an employee can sometimes be a challenge, especially in cases where their work does not fit neatly into any existing award coverage. For that reason, a recent decision of the FWC is of interest, as it provides some clarity regarding the coverage of the Miscellaneous Award 2010 ("**Misc Award**").[1]

In its decision, the Full Bench held that the overriding purpose of the Miscellaneous Award is to provide minimum conditions of employment for a miscellaneous range of employers and employees not covered by any other award. The exclusion clause in the Misc Award provides:

> *The award does not cover those classes of employees who because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.*

In this respect, the Full Bench held that this means an employee must satisfy both aspects before being excluded.

That is:

1. the classes of employees must not have been traditionally covered by awards; and
2. this must have been because of the nature or seniority of their role.

An argument pressed by the employer was that the coverage of the Misc Award was limited to emerging industries and therefore was not applicable to its business or its employees that operated in an established industry. This was rejected by the Commission, which confirmed that long-standing businesses could be covered by the Misc Award, notwithstanding the absence of coverage in pre-modern awards.

Another interesting aspect of this decision is that the business operated in Queensland where such businesses were traditionally award-free, whereas in NSW and Western Australia this was not the case. Perhaps not surprisingly, the Full Bench found that employers could not rely on traditional treatment of certain industries on a state-by-state basis to establish the exclusion from the Misc Award in a federal system of modern awards.

While not common, it is important for employers to be aware of the possibility that the Misc Award could apply to those employees who at first glance might appear to be award-free. Where an organisation is looking to expand its operations or create a new business segment, it is essential to get a clear picture of award coverage correct from the outset. Businesses that are part of emerging industries (such as those in the "gig economy") should also be mindful of the potential to be covered by the Misc Award.

[1] *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort [2018]* FWCFB 128

Events

Cricket NSW and the Sydney Sixers

As a proud sponsor of Cricket NSW and the Sydney Sixers, the PCS logo was prominently displayed at the Sydney Cricket Ground for the Big Bash league in 2017/18. The firm was also delighted to have been involved in Jane McGrath day to raise much-needed funds around breast cancer awareness.

Shrek - The Musical

The PCS team celebrated family day this year by watching "Shrek - The Musical" hosted by Packemin Productions. A great day was enjoyed by all.

Events

NSW Waratahs Season Launch

The NSW Waratahs celebrated a win in the season opening game against the Stormers on Saturday, 24 February. The PCS team was joined by clients to support its first game as the Official People Partner. Our Founder and Managing Principal was recognised and thanked by the Waratahs at the Season Launch.

People + Culture Strategies

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