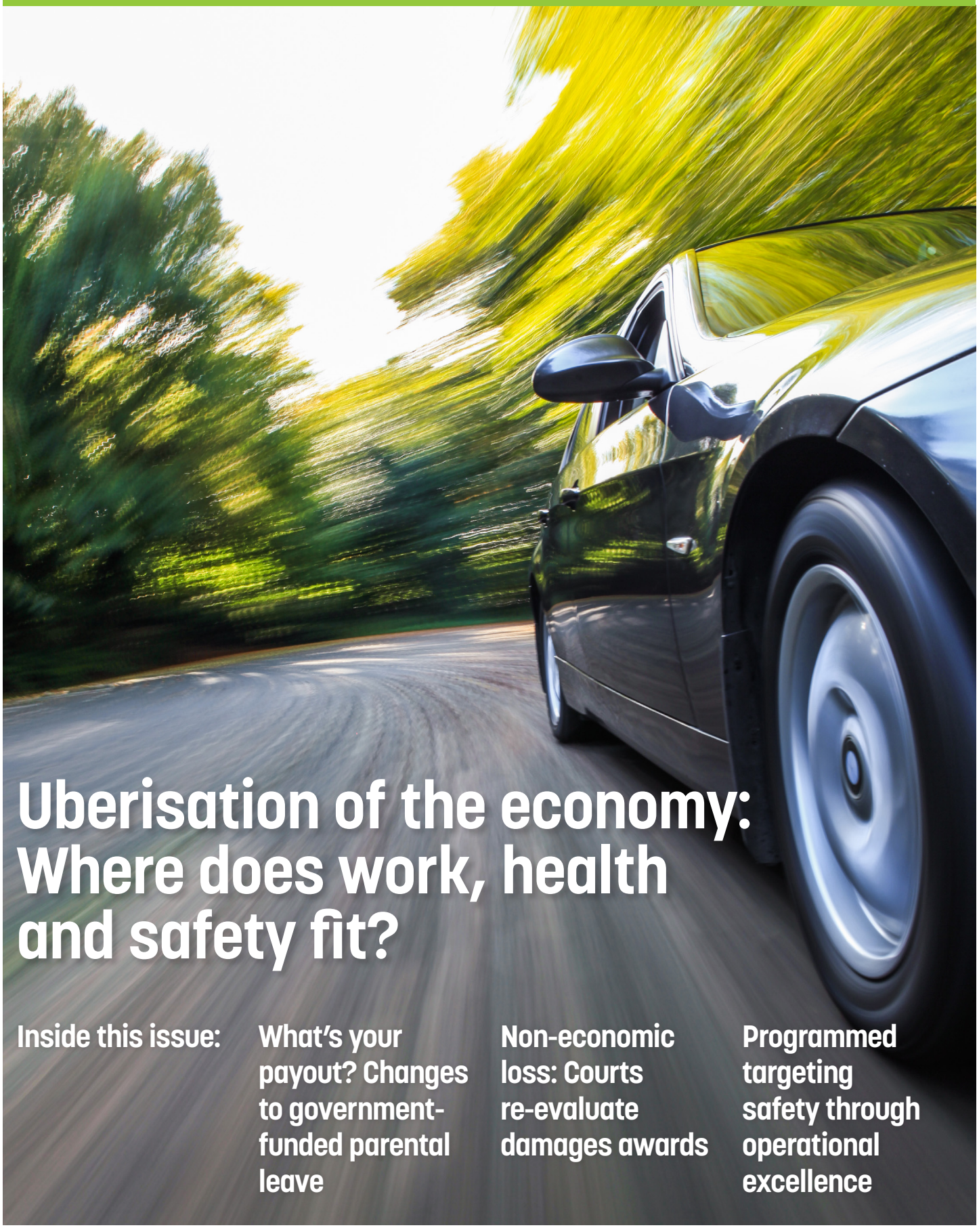
Workplace Matters

Sparke Helmore Lawyers

Issue 9 | December 2015



Uberisation of the economy: Where does work, health and safety fit?

Inside this issue:

Contents

If you have any questions or suggestions about *Workplace Matters* contact the editor, Matthew Smith, on +61 7 3016 5027 or matthew.smith@sparke.com.au

If you would prefer to receive a soft copy of future issues, or no longer wish to receive this publication, please send an email to casey.cross@sparke.com.au or call us on +61 2 9260 2779

Looking over the horizon

In the last edition of *Workplace Matters* for 2015, we consider the application of work health and safety laws to the sharing economy and what employers need to think about if allowing their employees to use services such as Uber.

We look at the amendments proposed to be introduced by the *Fairer Paid Parental Leave Bill 2015*, if it is passed, and the impact it will have on employee entitlements and workplace parental leave schemes.

We speak with Malcolm Deery, Group General Manager of Health, Safety and Environment at Programmed, about the organisation's safety culture and achieving its Zero Harm target.

We also examine the emerging trend of courts and tribunals considering more substantial awards for non-economic loss in discrimination cases, flowing from the decision handed down in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

In preparation for the Christmas and end-of-year celebration season, we also give you some tips on how to address work health and safety risks so that you and your workers can enjoy the festivities safely.

If there are any other topics you'd like us to explore in 2016, please send an email to me at matthew.smith@sparke.com.au

I hope you enjoy this issue of *Workplace Matters* and have a safe new year.

Sincerely,

Matthew Smith
Workplace National Practice Group Leader
Sparke Helmore Lawyers

Uberisation of the economy: Where does work, health and safety fit?

By Nicole Fauvrelle and Sam Jackson

The sharing economy continues to expand; companies such as Uber offer transport services without owning vehicles and Airbnb provides accommodation without owning real estate. It's a new economy—but still subject to many old economy rules and regulations.

It is clear that work health and safety (WHS) obligations continue to apply to those who participate in the sharing economy, including those who set up sharing "hubs", such as Uber and Airbnb, and those who provide services through those hubs. Likewise, employers who allow their workers to use services through the sharing economy will also be subject to the same WHS obligations that normally apply when their workers are at work in their business or undertaking.

With WHS obligations applying in what is, at least for now, a largely unregulated marketplace, hub operators, providers of services and employers alike must exercise extreme caution and apply a traditional WHS risk management approach to ensure they are providing a workplace that is, as far as reasonably practicable, safe and without risks.

The sharing economy's expansion: Governments and regulators struggle to keep up

A recent survey of Australian consumers reported that one in eight Australians have used a sharing service, while almost 7% of Australians have offered their services or property through the sharing economy. It is estimated UberX alone has been used in excess of 5 million times since its introduction in Australia in April 2014.

Indeed, there are compelling reasons for increasingly using the sharing economy. For example, a recent Choice study found that UberX was around nine times out of ten cheaper than a taxi, with taxis generally 40% more expensive than UberX. Given this impressive cost saving, many employers are considering whether to allow their workers to use UberX instead of conventional taxis as a way of reducing their worker transport costs.

As the sharing economy expands, governments and regulators are trying their best to keep up. On 30 October 2015, the ACT became the first to legalise the use of UberX. It seems inevitable that other Australian states and territories will eventually follow, but for now UberX remains illegal everywhere other than the nation's capital.

Of note, in NSW, the Roads and Maritime Services recently suspended the registration of 40 vehicles used to provide transport through UberX, while in Victoria the Taxi Services Commission issued fines totalling approximately $600,000 to individuals providing UberX services.

Applying work health and safety duties to the sharing economy

Debates continue to rage over the way responsibilities and liability are carved up in this new marketplace, particularly given its unregulated and illegal nature. One thing is clear, responsibility and liability cannot be shirked, particularly when it comes to WHS.

In the unfortunate event of an incident occurring where the services were provided through the sharing economy, WHS regulators won't be deterred from conducting a comprehensive investigation of all parties involved, including the operator, the provider of services and any employer of a worker who may be using these services while at work.

Hub operators and providers of services

In states and territories other than Victoria and Western Australia, the harmonised safety legislation has replaced the concept of "employment" with "a person conducting a business or undertaking" (PCBU). The fact that there may be no traditional employment relationship in these sharing economy businesses doesn't present a barrier to liability or prosecution. Hub operators, drivers and landlords who use the hub to provide services, will be considered a PCBU and WHS duties and obligations will likely apply.

Even in Victoria and Western Australia, the existing laws impose duties and obligations that apply to the sharing economy. For example, in Victoria the *Occupational Health and Safety Act 2004* imposes duties upon "persons who manage or control a workplace to any extent" which, in many respects, mirrors the concept of a PCBU. The Act also imposes duties upon "self-employed persons", clearly capturing those providing services through the sharing economy.

Employers

An area that has attracted little attention during the sharing economy's rapid growth, is whether it is appropriate for employers (or PCBUs in harmonised jurisdictions) to allow their workers to use the sharing economy from a WHS perspective. For example, should workers be permitted to use UberX instead of a traditional taxi to travel to a work meeting or to use Airbnb instead of a traditional hotel during a work trip? Both may be attractive to employers because they are cheaper than traditional options. However, in the largely unregulated sharing economy, how can an employer be certain it has systems of work in place to ensure the safety of its workers while they are using these services?

WHS legislation requires an employer to have systems of work in place that are, as far as reasonably practicable, safe and without risks to health. For example, this would involve:

- Verifying that any vehicles or accommodation facilities used by workers while undertaking work for the employer are safe. For UberX, this would include being satisfied that the vehicle being used to provide services has been appropriately maintained and is roadworthy. In terms of Airbnb, it would include ensuring the physical building is safe from hazards such as asbestos or that the landlord has a fire evacuation and emergency plan in place.
- Verifying the drivers are appropriately licensed and qualified to carry out the work, and have been provided necessary information, instruction and training to perform their work in a safe way.

In the traditional marketplace, an employer can generally be satisfied of the above by requiring their workers to use licensed and regulated providers such as taxis and hotels. However, in the unregulated sharing economy, serious doubt remains as to whether this can be achieved.

Way forward

Clearly the sharing economy has taken hold both in Australia and internationally and is prompting action from governments, taxation departments and regulators equally. There are two routes to greater clarity of the WHS issues involved in the sector.

Firstly, the public may approach a safety regulator to investigate and possibly prosecute parties involved in the sharing economy, as WHS legislation is risk-based legislation not incident-based legislation. That is, the regulator is able to investigate and prosecute individuals or companies based on any uncontrolled risk to health and safety, even without an incident occurring. Secondly, and more likely, an incident may occur and the safety regulator will be called upon to investigate and possibly bring charges against the hub operator, the provider of services or, if relevant, the employer of a worker using the services while at work.

The prudent hub operator will in the meantime set up a system to ensure the bona fides of insurances, licences, qualifications and the like throughout the hub. While the prudent provider of services will have all those systems in place, ensure all qualifications and licences are up-to-date and deliver services well and safely, understanding that they have their own WHS obligations.

In the meantime, if employers permit their workers to use the sharing economy to replace traditional options, they must remember that WHS duties and obligations apply and they must be satisfied that use of these services is as safe as reasonably practicable. Regardless of the choice made, employers will need to update their policies and procedures to deal with the use of the sharing economy by their workers during their normal working day. As long as UberX and Airbnb remain largely unregulated, there is serious doubt whether it is appropriate to allow workers to use such services.

What's your payout? Changes to government-funded parental leave

By Felicity Edwards and Julie Kneebone

Changes to the Government's paid parental leave scheme are one step closer. On 15 September 2015, the Senate Standing Committee on Community Affairs (Senate Committee) recommended the Government pass the *Fairer Paid Parental Leave Bill 2015*.

If passed, the new paid parental leave scheme will bring changes for many new parents and employers alike from 1 July 2016. Employers who offer paid parental leave entitlements should familiarise themselves with the impacts of the proposed scheme, to ensure their benefits remain an effective employee engagement and retention tool.

What are the current entitlements?

The *Paid Parental Leave Act 2010* was introduced five years ago by the then Labor Government. It was intended to improve family wellbeing, encourage a lifetime attachment to the workforce for women of reproductive age and acknowledge the value of children in our community.

This scheme provides eligible persons with a maximum of 18 weeks' pay at the minimum wage. Key eligibility criteria include, that the worker:

- be a primary carer of a newborn or adopted child
- earns less than $150,000 per annum, and
- has held paid employment for at least 10 of the 13 months (and has worked 330 hours or more during that period) before birth or adoption.

If eligible, employees can access both the government's paid parental leave and any employer-funded parental leave scheme offered by their employer.

What entitlements are provided under the proposed system?

On Mother's Day this year, the Liberal Government announced a system to replace Labor's policy.

The new scheme was said to address "double-dipping", that is, employees obtaining the benefit of both paid parental leave from the government and their employer, which brought widespread media attention. The core changes under the new scheme include:

- Employer-funded parental leave pay will be deducted from government-funded entitlements. If employer-funded entitlements are the same or more beneficial than government-funded entitlements, then employees are not eligible for the government-funded entitlements.
- Employers won't be obliged to manage government-funded parental leave payments.
- There is a greater ability to backdate claims by providing parents with 28 days to lodge an application.
- The new scheme will result in almost $1 billion in savings by:
  - excluding approximately 20% of people who currently have access to government-paid parental leave, and
  - reducing coverage for a further 30%.

The Senate Committee anticipates those most affected will be employees of public sector or large employers, or those who have a median income of $73,000 per year.

Labor has objected to the proposed changes, arguing their scheme provides a safety net where employees can top up government-funded pay with employer-funded leave to spend more time at home caring for their children. Labor's position, outlined in the Senate Committee's report, is that removing this ability will not achieve the significant savings hoped for and will force young parents back to work before they are ready.

Labor's opposition is backed by the Greens who state in the Senate Committee report that the policy "goes against international trends towards more generous parental

leave, the government's own pre-election policy and the economic advice of the Productivity Commission".

How will these changes impact employers?

Since the first announcement in May, there has been significant debate among prospective parents and IR professionals about paid parental leave entitlements. It has long been accepted by Australian businesses that paid parental leave is a valuable HR tool to attract and retain experienced employees and obtain a competitive business advantage. If passed, the Government's plans will affect employers who have policy, contractual or industrial arrangements for employer-funded parental leave.

The Senate Committee's recommendation, provided on 15 September 2015, that the Bill be passed, is a key milestone in the progression of the Liberal policy. With so few sitting dates left in 2015, passage of the Bill may not occur until 2016.

If the Bill passes, one key change is that any payment an employer "is legally obliged to pay an employee, under the terms of the employee's employment, because the employee is on primary carer leave for the child" will reduce government benefits.

Employers will have to think carefully about whether their schemes will need to be amended in response to the legislative changes, so that these schemes continue to meet their purposes. For example, employer policies and enterprise agreements that provide an equal benefit or "top up" of the government scheme, may stop being effective retention and engagement tools as they will leave the employee no better off. It is not clear if a return-to-work bonus or a discretionary bonus will impact the payment of government entitlements. The Senate Committee has recommended the Government undertake consultation to clarify the impact of such bonuses. If the payment of these bonuses does not impact an employee's entitlement to government-funded entitlements, employers may choose to offer such bonuses to replace their current schemes.

What's next?

Employers may already be facing tough questions from employees who are anticipating having children born or adopted after the 1 July 2016 cut-off date. To prepare for the potential changes brought about by the anticipated enactment, employers should now be analysing how the changes will affect their staff and business. If this includes considering whether alternative pay structures such as return-to-work bonuses provide a competitive advantage, it will be vital to maintain a careful watch on the Bill's passage to ensure your business is best placed come 1 July 2016.

Non-economic loss: Courts re-evaluate damages awards

By Catherine Wilkinson and Matthew Parker

A trend is emerging a year on from the landmark *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 (*Oracle*) decision. Courts and tribunals appear willing to consider more substantial awards for non-economic loss in discrimination cases. The principles set down in *Oracle* are also flowing into the calculation of damages for other types of claims where non-economic loss is relevant.

In mid-2014, the Full Federal Court handed down the *Oracle* decision and made a clear statement, that the previous approaches taken by courts and tribunals for calculating non-economic loss awards in sexual harassment and sex discrimination cases needed to be re-evaluated.

What is non-economic loss?

Non-economic loss, also referred to as general damages, is a head of damage generally awarded for the pain, suffering, disability and loss of amenity/enjoyment of life (past and future) suffered by a person as a result of somebody else's conduct.

Previously, courts had developed an accepted range for non-economic loss awards. More serious matters were awarded damages at the top of the range (around $20,000) and less serious matters at the lower end (approximately $12,000 or less).

Departure from this range was usually limited to particularly serious circumstances.

Oracle–what changed?

Oracle involved a claim made by Ms Rebecca Richardson, a senior employee of Oracle Australia Pty Ltd (Oracle), under the *Sex Discrimination Act 1984* (Cth). Her claim relied on a number of serious allegations of sexual harassment made by her against a male colleague, Mr Randol Tucker.

In its submissions on damages, Oracle argued that there was a generally accepted range for general damages in sexual harassment cases, falling between $12,000 and $20,000. Considering the approach developed over the past 15 years, Oracle submitted that an award of $18,000 was appropriate. The Court agreed.

However, on appeal, the Full Federal Court held an award of general damages should not be determined based on the accepted range. Rather, the Full Federal Court determined that a general damages award of $100,000 was more appropriate and in doing so, observed:

- community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before
- academic commentary had indicated that a conservative approach to assessing damages awards in discrimination cases impeded the "deep social reform" that anti-discrimination legislation was designed to implement, and
- awards for general damages in discrimination matters should be consistent in comparable personal injury and workplace bullying matters.

The *Oracle* decision was lauded by unions and employee groups for recognising changing views toward sexual harassment and acknowledging its long-term impact on victims.

Twelve months on–where are we now?

For employers, the *Oracle* decision raised concerns about an increase in sexual harassment claims due to the prospect of significantly increased damages. In addition, Justice Kenny noted that the Full Federal Court's approach to general damages in *Oracle* had a "broader application". This was interpreted to mean that the approach in *Oracle* to assessing general damages could also apply to other discrimination claims and even general protection claims for discrimination under the *Fair Work Act 2009* (Cth).

While the feared avalanche of sexual harassment claims did not eventuate, a trend has emerged in the approach taken by courts and tribunals in assessing awards of general damages. It seems the broad approach espoused by Justice Kenny has rung true, with *Oracle* being applied in various jurisdictions and other types of discrimination claims. For example:

- In *Dziurbas v Mondelez Australia Pty Ltd (Human Rights)* [2015] VCAT 1432, the Victorian Civil and Administrative Tribunal (VCAT), considered a claim for disability discrimination involving a worker's return to work following an injury. The *Oracle* approach to the assessment of damages was applied for distress, upset and humiliation for a claim made under the *Equal Opportunity Act 2010* (Vic.). In awarding the Applicant $20,000 in general damages, VCAT quoted the judgment in *Oracle*: "compared to the past, modern society places a higher value on the loss of enjoyment of life and the compensation of pain and suffering".
- In *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827, the Court determined—in the context of the *Disability Discrimination Act 1992* (Cth)—the Respondent's discriminatory conduct had "contributed to" the trauma, pain and suffering experienced by Ms Huntley and awarded her $75,000 in general damages.
- In *Power v Bouvy and Bouvy v Power* [2015] TASADT 2, the Anti-Discrimination Tribunal of Tasmania awarded the Applicant $25,000 in a claim for sexual harassment under the *Anti-Discrimination Act 1998* (Tas.) and stated: "[*Oracle*] has radically affected the quantum of compensation that is appropriate in anti-discrimination matters and brought it into closer alignment with that awarded in breach of confidence matters not involving psychiatric injury… All in all, the aggravating factors in this matter are of greater gravity than the conduct in *Houston v Burton* and deserving of a greater award of compensation adjusted appropriately in light of *Richardson v Oracle*."

Where to from here?

These decisions demonstrate a changing approach to general damages in discrimination cases. State jurisdictions may not be as affected, as some jurisdictions (such as NSW) are capping awards that can be made.

Oracle and its impact suggests the stakes may be getting higher for discrimination and employment-related claims.

However, it remains to be seen whether the general damages award of $100,000, as made in *Oracle,* sets a new benchmark. In any event, employers should be wary that the decision in *Oracle* may not represent the upper limit of general damages awards, with the Court acknowledging Ms Richardson's complaint was not an example of the worst conduct brought before the Court.

Oracle's reach has extended beyond sex discrimination and harassment cases, with other courts and tribunals appearing open to making higher awards for general damages for "distress, hurt and humiliation" arising from discrimination. It is also possible *Oracle* will be considered in adverse action/general protections or victimisation claims, should other courts and tribunals share the view that previous approaches to general damages are "out of step" with modern community expectations.

What to do next?

Oracle and its impact suggests the stakes may be getting higher for discrimination and employment-related claims. Employers should be conscious of the potential for substantial general damages being ordered for "distress, hurt and humiliation" in addition to other heads of damage (such as economic loss).

As ever, prevention is better than cure and employers should focus on ensuring standards of workplace behaviour are clearly articulated to employees. This includes updating policies and providing regular training to employees.

Employees with management responsibilities should also be trained in how to respond to complaints about workplace behaviour. This includes understanding the importance of sound investigations, fairness and managing risks of victimisation.

Workplace Matters | Issue 9

Programmed targeting safety through operational excellence

By Alistair Talbert

Malcolm Deery is the Group General Manager of Health, Safety and Environment at Programmed, which provides a range of services including recruitment, facility management, maintenance services management as well as marine operations to the offshore oil and gas industry.

Malcolm, a highly experienced safety professional, has been at the safety helm of Programmed since 2010 and is responsible for the organisation implementing its Zero Harm target. We met with Malcolm to find out more about Programmed's Zero Harm target and general approach to safety.

We hear a lot from organisations on safety culture and statements such as Zero Harm, but Programmed has continually achieved steady declines in lost time injury to a figure below 1.5.

The starting point was at the most senior level of the organisation, holding the belief that all injuries are preventable. Once this belief is internalised, a raft of actions necessarily follow. Work is planned and undertaken knowing it can be done free of injury. When an injury does occur it is investigated and reviewed. We know it didn't have to happen and look to understand what has to be done to prevent a recurrence. And, most importantly, people are engaged in a conversation that asks, "What work are you doing here today? What could go wrong and how could you or anyone else be injured as this work is done? What needs to be done to make sure this doesn't happen?". These three questions are asked formally and informally across Programmed today.

We also redesigned our culture—inclusive of language, tools and processes—to support Zero Harm. We did this because at the core of our culture we positioned the "all injuries are preventable" belief. Everything is now aligned so that we plan to make each day injury free. Two examples of how we redesigned our culture are:

1. Our definition of an incident/injury being—once we have managed the human side of the event—an unplanned event. Of course, who wants unplanned events when you are looking to run an efficient business? If we ask our people about where they can be injured and to take steps to remove these possibilities, we have enhanced the efficiency of the work being done.

2. Our definition of behaviour being "What we do or what we don't do". We explain that it is always easy to see what the individual has done when an injury occurs but if Zero Harm is to be achieved, we have to first ask "Has the organisation behaved safely?" before we look at what people might have done unsafely. The outcome of this is that, organisationally, we are forced to ensure we have provided the correct tools, equipment, processes, leadership and supervision.

As a result of designing a Zero Harm culture, we have many examples where improved safety performance has increased staff engagement as well as significantly increased revenue and profitability. This is the benefit of removing unplanned events. A key point is that it is the "looking after people" that has delivered our injury reduction.

What are the challenges of operating and implementing safety across the five Programmed divisions?

Our facility management, property services, workforce, marine and technical divisions face different safety issues. Both in the nature of the work they do and also in the fact that all of our people are on a customer's site somewhere across Australia and New Zealand. However, each of these divisions have systems and processes in place that assume the work can be done free of injury. At a group level, we have a set of critical risk standards or risk protocols, which ensure there is a Programmed way of managing known high-risk exposures across all business units. For instance, we have a universal approach to managing work at heights, asbestos and contractors. So, although there are five divisions with 14 different business streams, there is still a commonality in the way we think about workplace injury behaviourally and how we manage high-risk work, which has its roots in our Zero Harm objective. I think a good way of describing our integrated systems approach is to say we don't do safety, rather, we deliver our services safely. This might appear to be a subtle play on words but it is a very significant description of how we see ourselves.

How important is it to have leadership from the top on safety?

Safety is our Managing Director Chris Sutherland's first business imperative. This is essential to developing a Zero Harm safety culture. Chris understands that looking after people, eliminating unplanned events that will require operational discipline and in turn affect operational excellence, is a point of difference for our customers and a smart way to run a business.

We have more than 25,000 employees working at more than 10,000 customer sites. While our Zero Harm standards don't waiver, sometimes we do find ourselves at odds with the culture of some of our customers. Walking away from a contract of $20 million because of a conflict around the value of people demonstrates the exceptional leadership and personal value Chris has for people.

How did Programmed manage the challenges of adapting to the harmonised WHS legislation, particularly given you operate in WA and Victoria, which are yet to harmonise?

We have always endeavoured to operate to the highest compliance expectation, which allows for standardisation of practices. Without diminishing compliance to any degree at all, we believe the constant focus on Zero Harm keeps our vision considerably above the detail of compliance on a day-to-day basis.

Harmonisation has been a useful tool in achieving buy-in on our safety approach from the business. We used due diligence officer obligations as an opportunity to rewrite position descriptions (with guidance from Sparke Helmore) and produced a series of

actions our officers were required to undertake regarding safety. This includes going out into the field and having safety conversations, chairing safety review meetings, leading incident investigations (to ensure our officers understand our hazards) and implementing quarterly Board safety review meetings. These measures were all implemented before the legislation commenced in January 2012.

Programmed bought Skilled Group Limited in October 2015, which is an exciting move for you. What challenges and opportunities do you see from a safety perspective with this acquisition?

The merging of the two businesses allows for the best practices to be adopted, which has provided for a richness of tools and practices to be worked with. There is an expectation that Programmed's safety conversation process is used broadly across the extended business. Safety conversations are where every manager and board member asks employees, "What work are you doing?", "What could go wrong?", "How could you or anyone else be injured doing this work?" and "What needs to be done to avoid that?". These open questions engage those doing the work and address unplanned events. One of the challenges we have in the merged business is ensuring new hazards are understood and the controls around these hazards are robust. The one thing that won't change is our organisational culture designed to deliver Zero Harm.

In what direction do you see the business growing in the coming years?

We are seeing a huge growth in the area of public private partnerships. Just as an example, we are part of the consortium rebuilding the Federal Courts in Canberra, which will involve us maintaining the facilities for 25 years. We're part of a consortium that's building a 1,000 bed accommodation at the University of Wollongong, which we'll maintain for 35 years, and building Government schools in New Zealand under the same arrangements. Our Grounds team continues to maintain more and more public spaces and retirement villages and the like, and our Painting group is called on for its expertise and skills around large complex and abseiling jobs. We're also setting up a safety consulting business that is being born out of the approach we've taken, in response to so many people asking us about our safety improvement journey and what we have done to capture the resulting improvements.

Office Christmas parties…'tis the season to think before you drink

By Daria McLachlan

It's beginning to look a lot like Christmas…and office parties are in full swing! Unfortunately Santa's gift to employers tends to be an increase in workplace claims arising from sexual harassment, bullying, discrimination and work health and safety breaches. This is unlikely to make any employer jolly, but there are steps you can take to reduce the risk of such claims arising.

The obligations of employers

The legal obligations of employers continue to apply during work Christmas parties. Employers owe a duty of care to their employees and must take reasonable steps to reduce potential risks to their health and safety. This includes protecting them from the heightened likelihood of sexual harassment, bullying, discrimination and safety breaches that tend to come hand-in-hand with alcohol consumption.

The general position is that employers will be vicariously liable for employees' misconduct unless the employer can show it has taken all reasonable steps to prevent the conduct from occurring. The case law makes clear that this obligation extends to work Christmas parties and other work-related functions.

Tips to reduce your risk

To avoid a Christmas party legal hangover, we recommend the following:

1. Before your function, remind your employees that it is a work event and that appropriate standards of behaviour, as set out in your workplace policies, are expected.
2. Identify any potential hazards by performing a risk assessment of the party venue.
3. Warn employees about the potential consequences of inappropriate behaviour.
4. Set a start and finish time for the function and make it clear that events/activities that occur outside of this time frame are not endorsed by the employer.
5. Ensure a senior employee is assigned to stay sober and monitor behaviour and alcohol consumption. This role may require taking action to address escalating behaviour, such as sending someone home or closing the bar.
6. Comply with responsible service of alcohol requirements and provide sufficient food and non-alcoholic drinks at the event. If an employee is visibly intoxicated then cut off their alcohol supply.
7. Ensure you have up-to-date policies and procedures on bullying and harassment, discrimination, social media, work health and safety, and drug and alcohol use. You should also have policies that set out your complaints process so that any incidents can be swiftly and appropriately addressed.
8. Communicate your policies and procedures to your employees and ensure appropriate training is provided.
9. Immediately deal with all complaints in a professional and confidential manner.
10. Review your applicable insurance policy to assess whether the proposed Christmas function is covered.

There is no need to be a grinch when it comes to your Christmas party. It is simply a matter of being prepared and having systems in place to ensure you can manage and address any issues that may arise during your event.

We wish you a happy and liability-free Christmas!

Recent developments

There have been a range of recent legal developments that affect safety and human resources decision-makers.

Project manager not an "officer" in due diligence test case

The ACT Industrial Court's decision in *Mckie v Al-Hasani and Kenoss Contractors Pty Ltd* [2015] has clarified the definition of an "officer" under the new work health and safety (WHS) laws. It determined that a project manager's role does not fall under the definition of "officer" because the role's responsibilities are primarily operational, rather than organisational. This provides further certainty surrounding who owes a duty of care within workplaces and has reaffirmed existing concepts of due diligence under the laws. *Click here to read more...*

Unfriending on Facebook can be bullying

The Fair Work Commission has held that an employee unfriending a co-worker on Facebook contributed to workplace bullying. This expands the impact of employees' social media conduct on employers once again. The decision emphasises the need for employers to ensure that appropriate standards of conduct are upheld in the workplace and also on employees' personal social media accounts where there is a link to the employment relationship. *Click here to read more...*

NSW Govt announces $1 billion reform package to NSW workers' comp scheme

The NSW Minister for Finance, Services and Property, Dominic Perrottet, announced a $1 billion workers' compensation reform package on 4 August 2015.

The reform package aims to increase worker benefits (particularly for those with the highest needs), reward and encourage employers that have good safety records and systems, and introduce a simpler, more transparent structure for the Scheme's operation and regulation. *Click here to read more...*

Right to silence back on the WHS agenda?

The Australian Law Reform Commission's (ALRC) interim report has called into question the suitability of provisions under the *Work Health and Safety Act 2011* (Cth). The provisions of concern include the provision excluding the right to silence and the provisions reversing the legal burden of proof.

The report was produced in response to Attorney-General George Brandis' direction to identify and examine Commonwealth laws that encroach upon traditional or common law rights, freedoms and privileges. The ALRC has sought submissions from organisations with a special interest in the identified areas, which may prompt further review by the ALRC before the final paper is presented to the Attorney General in December 2015. *Click here to read more...*

Queensland fire authority protected from negligence claim

Most Queensland statutes protect the State and its officials to varying degrees for actions or omissions taken in good faith and/or without gross negligence. The interpretation of these so called "immunity" provisions has received some helpful analysis in the Queensland Court of Appeal's decision in *Hamcor Pty Ltd & Anor v The State of Queensland* [2015] QCA 183.

The *Hamcor* decision examines immunity provided to state authorities, such as the Queensland Fire & Rescue Service, under s 129(1) of the *Queensland Fire and Rescue Service Act 1990* (QFRA). The *Hamcor* decision highlights the need for decision-makers to consider the immunity provisions of state legislation when going through decision-making processes. *Click here to read more...*

About the contributors

Catherine Wilkinson, Partner

Catherine advises on employment and safety issues in the workplace, including discrimination, unfair dismissal, bullying, grievance procedures, sexual harassment, managing injured workers and contractual issues. She has extensive experience advising clients on work health and safety responsibilities, incident response, investigations and court proceedings.

Nicole Fauvrelle, Partner

Nicole's career spans 15 years and her work health and safety expertise has been built on an extensive background in criminal law. Her clients benefit from her insights gained during her role as a Senior Lawyer with Worksafe Victoria, the State's work health and safety regulator.

Alistair Talbert, Special Counsel

Alistair is an experienced employment, industrial relations, occupational health and safety and discrimination lawyer. He helps CEOs, executives and legal counsel in the mining, logistics, retail, manufacturing and government sectors. Alistair is based in our Perth office.

Sam Jackson, Senior Associate

Sam advises on WHS and employment law. His safety experience includes incident response and management and defending companies prosecuted by health and safety regulators. Sam also advises on employment issues, including enterprise bargaining and employment contracts, and has extensive experience defending unfair dismissal and general protections applications.

Daria McLachlan, Senior Associate

Daria is an employment and work health and safety lawyer who assists CEOs, senior managers, claims managers and HR representatives in the entertainment, mining, retail, insurance, manufacturing, financial, government and education sectors.

Felicity Edwards, Senior Associate

Felicity is an experienced workplace lawyer who assists clients in the private and public sector with privacy and employment-related issues. She has seen matters through to state and federal courts and tribunals including unfair dismissals, general protections claims and contractual disputes.

Julie Kneebone, Lawyer

Julie is an employment lawyer who advises and represents employers in the local and state government, utilities, retail and manufacturing sectors. She assists employers with legislative and award compliance, terminations, workplace investigations, bullying and harassment, industrial disputes, performance management and breach of contract matters.

Matthew Parker, Lawyer

Matthew assists a range of clients with employment and work health and safety issues, such as discrimination and performance management matters, unfair dismissal, incident response and managing investigations.

sparke HELMORE LAWYERS

Key contacts

Adelaide: Luke Holland, Partner | t: +61 8 8415 9875 | e: luke.holland@sparke.com.au

Brisbane: Matthew Smith, Partner | t: +61 7 3016 5027 | e: matthew.smith@sparke.com.au

Melbourne: Brendan Charles, Special Counsel | t: +61 3 9291 2352 | e: brendan.charles@sparke.com.au

Melbourne: Nicole Fauvrelle, Partner | t: +61 3 9291 2378 | e: nicole.fauvrelle@sparke.com.au

Melbourne: Joanne Flitcroft, Partner | t: +61 3 9291 2384 | e: joanne.flitcroft@sparke.com.au

Melbourne: Penny Stevens, Partner | t: +61 3 9291 2315 | e: penny.stevens@sparke.com.au

Newcastle: Catherine Wilkinson, Partner | t: +61 2 4924 7212 | e: catherine.wilkinson@sparke.com.au

Perth: Alistair Talbert, Special Counsel | t: +61 8 9288 8040 | e: alistair.talbert@sparke.com.au

Sydney: David Davies, Partner | t: +61 2 9373 1431 | e: david.davies@sparke.com.au

Sydney: Roland Hassall, Partner | t: +61 2 9260 2449 | e: roland.hassall@sparke.com.au

Sydney: Carlie Holt, Partner | t: +61 2 9373 1412 | e: carlie.holt@sparke.com.au

Sydney: Bill Kritharas, Partner | t: +61 2 9373 1423 | e: bill.kritharas@sparke.com.au

Sydney: Janice Nand, Consultant | t: +61 2 9373 3517 | e: janice.nand@sparke.com.au