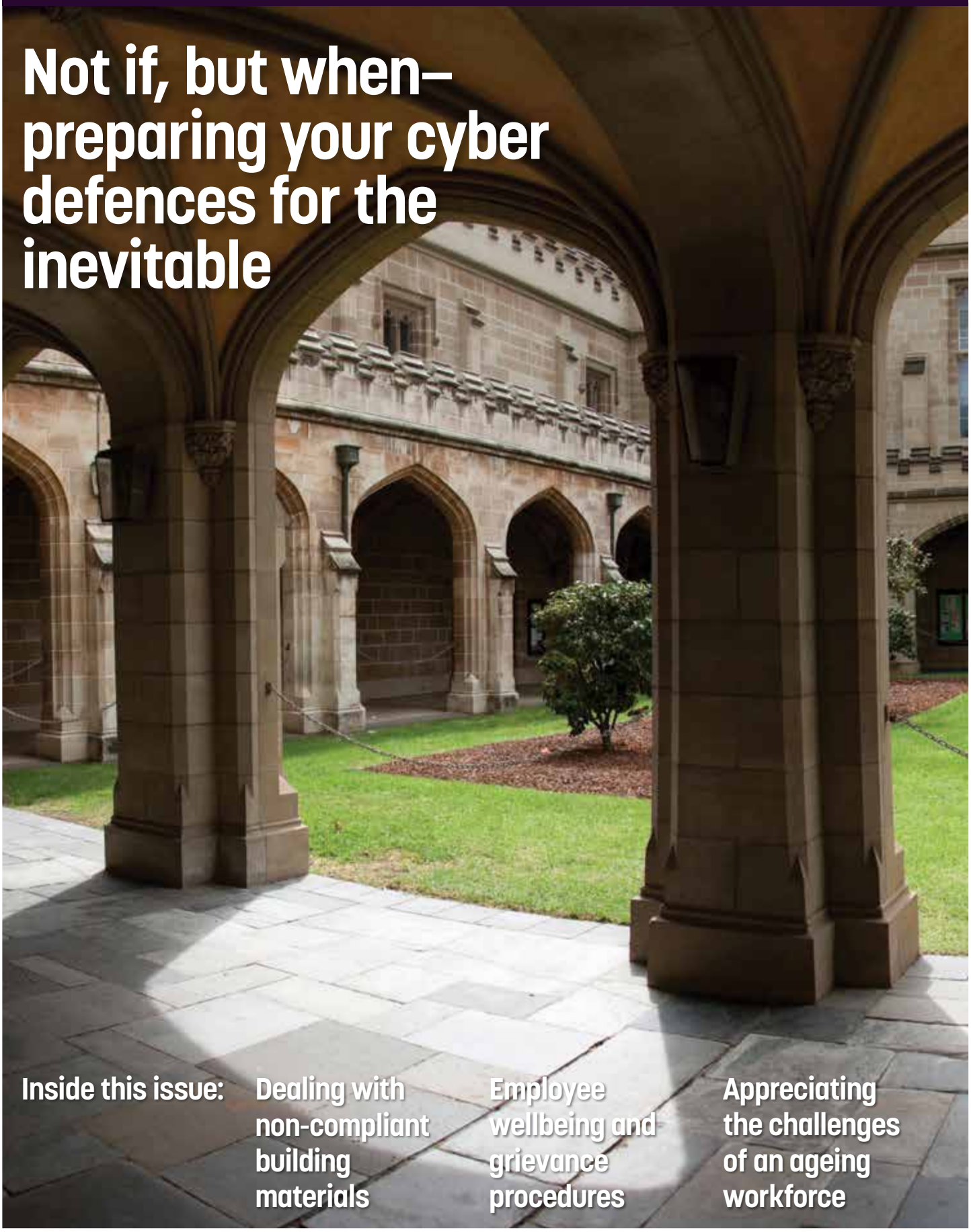
University Matters

Sparke Helmore Lawyers

2017 SOUL Annual Conference special edition



Not if, but when– preparing your cyber defences for the inevitable

Inside this issue:

Contents

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Cover: Pictured on the cover is the Old Quadrangle of the University of Melbourne—the location of this years' SOUL Conference.

Looking over the horizon

Welcome to *University Matters* for the 2017 Society of University Lawyers (SOUL) Annual Conference. We bring you this publication to specifically address legal issues affecting the university sector in Australia, which Sparke Helmore has a long history of working with.

Cyber security is an increasingly prevalent risk across all sectors. In this issue, we look at how a university can properly size up the risks to prepare, as best as possible, for an inevitable cyber breach.

We discuss the issues surrounding non-compliant building materials that have been sourced outside Australia and the effect this can have on universities when establishing new buildings and facilities or taking over existing ones.

Dealing with grievances in the workplace is rarely straightforward, however, it's even trickier when an employee has sustained a psychological injury. We consider a recent case example to help employers navigate such situations and make sure their grievance procedures are up to scratch.

On the topic of university buildings, we take a closer look at how developers and financiers who have been traditionally involved in the public-private partnership (PPP) space are addressing the student accommodation shortage in Australia.

With the number of older workers in the university sector expected to rise, we go through what you need to do to adapt your workplace to an ageing workforce and meet legal expectations.

Finally, to help university staff briefly communicate the often complex process of applying for a student visa, we have put together a one-page summary that covers the steps and considerations for international students who want to study here.

Sparke Helmore is delighted to be involved in the 2017 SOUL Conference, not just by providing this publication, but with presentations from our Partners Richard Chew and Catie Moore, Senior Associate Calvin Tay and myself.

I hope you enjoy reading this edition of *University Matters* and welcome your feedback.

Sincerely,

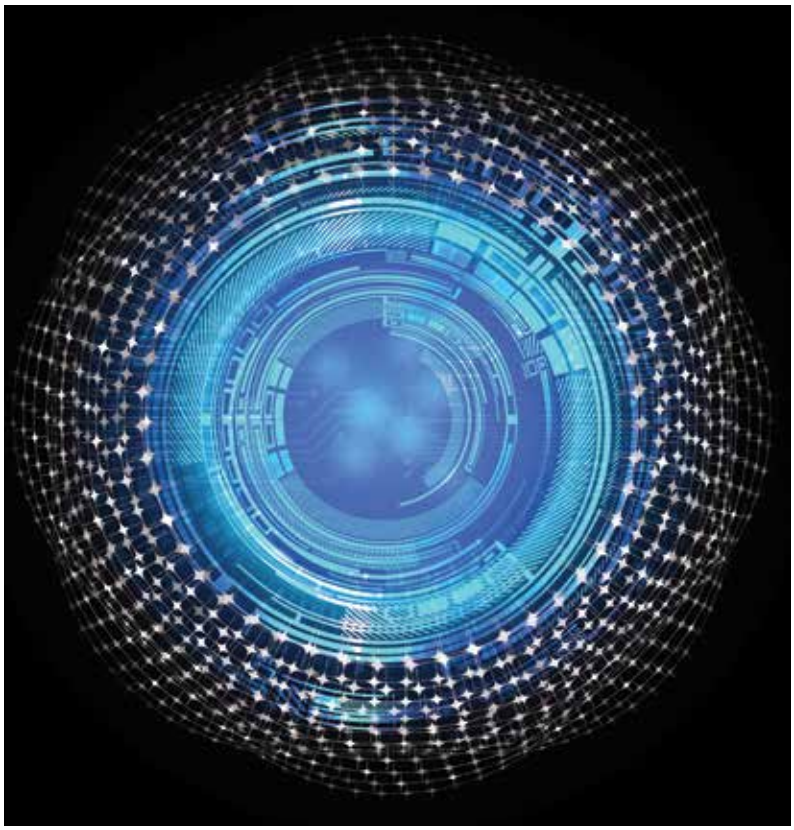
Grant Parker
Partner
Sparke Helmore Lawyers

Not if, but when–preparing your cyber defences for the inevitable

By Colin Pausey and Mark Doepel

Universities, hospitals, corporations, information technology companies, law firms, small to medium-sized enterprises, chocolate factories and government organisations—no one is immune from cyber criminals and a potential cyber breach. There has been an exponential increase in the number of cyber breaches recently, not to mention ransomware attacks, which are becoming more targeted and demand more significant amounts. In June this year, for example, a South Korean web hosting company was affected by the Erebus ransomware attack and had to pay US$1 million in ransom following an eight-day outage.

Universities hold a wealth of information about previous and current students and staff—birth dates, tax file numbers, addresses, bank details and, of course, academic records. This type of information is highly sought and often sold on the black market for identity theft. Like so many other organisations, a university's database is its lifeline, which makes it a major ransomware target.



Cyber risk is real

The WannaCry cyber breach in May 2017 gained attention because of the number of inadequately protected systems and the failure of many organisations to have the basics in place, such as applying patches to their systems. The Petya virus (and the NonPetya variant) struck six weeks after WannaCry. Last month, American credit reporting agency Equifax announced a data breach involving the potential exposure of 143 million peoples' personal information, including social security numbers, financial information, licences, addresses and names.

There is no shortage of evidence of cyber breaches in the United States (US) to illustrate that universities are just as vulnerable as other organisations. In 2014, university cyber breaches notably increased. Then, on 13 November 2016, Michigan State University's records of 400,000 students (former and current) were breached by a cyber attack. Have universities changed their cyber security since then?

Most universities use open Wi-Fi networks and generic passwords, leaving them highly vulnerable to attack. The extent of a university's cyber security and resilience framework is critical in case open Wi-Fi is hacked and access to information held by the university is obtained. These frameworks, however, are a balancing act of keeping certain information safe and secure, while promoting access to other information. Universities need to filter and audit their data, then segregate and secure it based on the sensitivity of, and the need to use, the data—some data should be encrypted, other data completely restricted.

It is not only Wi-Fi and computers that create risk. The internet-of-things (IoT) allows interconnectivity with all devices. Anything can be hacked if it is connected to or operates on the IoT—take printers, for example.

In 2016, printers at various universities in the US were breached and used not as a jump point to access the university network but to print white supremacist flyers. The management of interconnectivity poses yet another challenge to university cyber security.

Sophisticated systems and security helps, but it does not always completely prevent a breach. In the digital age, when all institutions are a target, the mitigation of loss is also important. The University College London (UCL), recognised as a leading university globally and academic centre of excellence in cyber security research, was recently affected by a ransomware attack causing substantial disruptions. The UCL, however, was able to mitigate loss through its very quick response team.

Mandatory data breach legislation–are universities affected?

In February 2017, the Commonwealth Government passed a bill amending the *Privacy Act 1988* (Cth), which requires mandatory notification of data breaches for entities **governed** by the Act. The amendments will apply to eligible data breaches that happen after 18 February 2018.

As a general rule, the legislation does not apply to state government agencies, including universities, although some have opted into the Act. For those universities, it's worth considering what to do if there is a serious privacy breach. Will you notify affected people if you are not compelled to do so by legislation?

Every entity should have a process in place to respond to a serious cyber breach, as well as an agreed plan for notifying affected people following a breach. As the UCL example highlights, a response protocol can help you significantly mitigate loss.

Is insurance a solution?

"Just as the process of obtaining home insurance can incentivise home owners to invest in alarm systems, smoke detectors and better locks, the same could be true for companies seeking to obtain cyber insurance," said ASIC Commissioner John Price recently at the Cyber Insurance Forum in Sydney. "Cyber insurance providers can potentially contribute to the management of cyber risk by promoting awareness, encouraging measurement and by providing incentives for risk reduction."

Insurance alone is not the solution to cyber security; rather cyber resilience and insurance form a solution together. As the local cyber insurance market matures, the underwriting process and requirements should assist organisations to achieve resilience goals. Cyber resilience and insurance should complement each other.

The 2017 report on data breaches in Australia by Ponemon Institute estimates a cost of $140 per capita to effectively notify affected people following a cyber breach—insurance can assist in funding this cost. While cyber insurance policies in the market vary, they generally cover breach response costs (including notification costs), business interruptions costs and some third party liability following a breach.

The other benefit of insurance is that it assists affected organisations to respond to a cyber breach. Promptly responding to a breach and mitigating loss is paramount—an insurance response team will work closely with your cyber security team to achieve this.

So what should you do to be prepared?

Every organisation must recognise, no matter how sophisticated or resilient its system, that it isn't invincible and that human users often are the weakest link when it comes to maintaining a robust defence.

Manage your data effectively and be more cyber resilient through data retention practices, cyber security and training your employees. A cyber breach is just a matter of when, so make sure you are ready to respond by having a protocol in place, seeking professional advice on that protocol if necessary or working closely with your insurer's response protocol.

We would like to acknowledge the contribution of Dylan Moller to this article.

Universities may not be immune from non-compliant building materials

By Cameron Scholes and Grant Parker

The fire in the Lacrosse apartment building in Melbourne in 2014 and, more recently, the devastating fire in the Grenfell Tower in London, have brought the consequences of using non-compliant building materials into stark relief. However, these were not isolated incidents. Since 2005, there have been at least 19 fires worldwide involving cladding material alone (Senate—Economics References Committee, September 2017, *Interim Report: Aluminium Composite Cladding*, para 2.22).

The decline in Australia's manufacturing base means the majority of the products now used in the domestic building market are imported from overseas. The biggest risk associated with importing construction materials is that they may not be compliant with the relevant Australian standards.

This, combined with the exponential growth in the residential building market—particularly the growth of high rise apartments in the eastern states and the rapidly increasing student accommodation market—means the likelihood of non-compliant building materials having been used in recent residential and commercial developments is high. In New South Wales (NSW) alone, it is estimated that approximately 1,000 buildings have aluminium and other types of non-compliant cladding installed, which might pose a fire risk.

Governments and other regulatory bodies across Australia are implementing significant reform agendas around building regulation to address the issues relating to non-compliant building products (such as temporary bans on flammable aluminium cladding products with polyethylene cores and the recent Queensland chain of responsibility legislation). Such reforms may provide little assistance to owners of existing buildings who may face the prospect of:

- investigating the extent of any non-compliant building materials installed in their building
- having to alter or replace non-compliant building materials installed in their building, and
- increased insurance premiums, due to insurers having greater difficulty establishing their risk profile because of the prevalence of non-conforming building products.

While Australia's current reform environment is likely to impact the whole supply chain (including importers, manufacturers, builders, certifiers, owners and occupiers) and related industries, such as the insurance and finance sectors, this article expands on the issues facing universities as owners of existing buildings and the risk that non-compliant building products may have been used in the construction of their buildings.

Importance of having investigations carried out

Importantly, the use of non-complying building products might not require wholesale changes to be carried out. However, the extent of any necessary rectification works can only be determined by a suitably qualified engineer and only after a comprehensive inspection has been carried out.

With the risk of non-complying building materials presently front of mind, universities should undertake an audit of their building and safety systems to ensure they are compliant with the relevant codes and regulations.

If a building has non-complying building materials and requires these materials to be replaced or repaired, the university may look to recover costs from another party, such as the designer or the builder. However, this is not always a straightforward process.

Recovering the cost of rectification

If the university is the original owner (that is, the original contracting party with the builder), it might have a number of legal avenues for recourse against the builder to recover the

costs of repairing or replacing any non-compliant materials.

The most obvious is a claim for breach of contract. However, limitation periods may prevent owners of older buildings from bringing such claims. For example, in NSW, a building action must be brought within 10 years of the final occupation certificate being issued or the last day on which the building work was inspected by a certifying authority (s 109ZK of the *Environmental Planning and Assessment Act 1979* [NSW]). A similar provision applies for building disputes in Victoria.

For student accommodation, a university might also have the benefit of warranties implied in the building contract for residential building work under the relevant state legislation, for example, s 18B of the *Home Building Act 1989* (NSW). However warranties are not implied in all building contracts. For instance, on-campus student accommodation does not fall within the definition of a dwelling under the *Home Building Act 1989* and the statutory warranty scheme would, therefore, not apply in respect of on-campus accommodation. In contrast, a university might have the benefit of implied statutory warranties in respect of non-compliant building materials used in the construction of off-site student accommodation, depending on the particular facts and circumstances.

If the university is a subsequent purchaser of a building, recovering the cost of repairing or replacing non-complying building products can be more difficult. This is because without a claim in contract or under the Australian Consumer Law, the university will have to resort to a claim in tort.

It is well known that such claims are difficult to successfully prosecute. As cases such as *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 (*Woolcock*) and more recently *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (*Brookfield Multiplex*) have shown, a duty of care from the builder to the subsequent purchaser will not be readily found to exist. This is particularly so if the building in question is a commercial building (such as in *Woolcock*) or is a large strata scheme intended mostly as a commercial arrangement (such as in *Brookfield Multiplex*).

Take action

In this time of heightened awareness of non-complying building products, universities should not delay in taking steps to investigate and understand their potential exposure to the risk of such products having been used in their buildings. This is important not only from a health and safety perspective but because recovering any costs or losses associated with this issue might be difficult and those limited rights could be further eroded through the expiration of limitation periods.

Balancing employee wellbeing during grievance procedures

By Chris Rimmer and Heather Osborne

Disciplinary action and dealing with grievances are tricky at the best of times for employers. This is even more complicated when employees are suffering from a mental health issue or illness. In such circumstances, considerable care needs to be taken in deciding how, if at all, to proceed with disciplinary or grievance procedures.

The case of *Christos v Curtin University of Technology* [2017] WASCA 110 highlights the difficulties that can be faced by universities (and employers generally) in managing grievance processes or disciplinary procedures in circumstances where the employee is, or reasonably may be, suffering from a psychiatric injury—whether connected to the employment or not.

Background

The Plaintiff was employed by the University as an applied mathematics lecturer in January 1991, obtaining permanent tenure on 12 June 1992. Shortly thereafter, he came into conflict with staff members. Years later, in 2003, the Plaintiff lodged a workers' compensation claim for a psychiatric condition allegedly suffered in the course of his employment as a result of being bullied, victimised and harassed by various colleagues—the claim was denied.

On 20 February 2009, the Plaintiff issued a writ against the University seeking an award of damages on the basis the University had breached its duty of care, causing him to suffer psychiatric disability.

He provided a 309-page witness statement at trial, outlining numerous alleged incidents and events, including:

- The handling of a formal written grievance submitted by the Plaintiff in May 2002, which was not resolved in the requisite time frame.
- The University's response to around seven student complaints lodged against the Plaintiff, eventually leading to him being stood down on 2 September 2002. Most complaints were not sustained, but the Plaintiff was counselled for one matter and reinstated, which was determined as a lawful suspension.
- Termination of the Plaintiff's employment on 28 October 2004 due to material found on his work-issued computer. The Plaintiff was unsuccessful in unfair dismissal proceedings, which progressed to the Full Bench of the Australian Industrial Relations Commission.

Under the *Limitation Act 1935* (WA), any events before 20 February 2003 were statute barred from consideration. Nevertheless, it was found that the Plaintiff suffered an adjustment disorder on or around 2 September 2002 and that the failure to progress his grievance complaint was a contributing cause of his psychiatric condition. However, the suspension, decline of his workers' compensation claim and termination of his employment dwarfed any contribution to his present disability made by the failure to expeditiously resolve the grievances.

Justice McKechnie dismissed the Plaintiff's action following the 19-day trial, determining that:

- the University acted reasonably at all material times and did not breach any implied or incorporated term in its contract with the Plaintiff
- the specific risk of psychiatric injury was not foreseeable, and
- the actions of the University's staff did not materially cause or contribute to the Plaintiff's psychiatric disability.

Was there in fact a failure on the University's part?

The Plaintiff appealed to the Full Court of the Supreme Court regarding the University's failure to assess and resolve the formal written grievances he submitted between 20 February 2003 and 28 October 2014.

He alleged it was foreseeable that the University's conduct in dealing with the grievances would cause or aggravate a psychiatric injury and that, to avoid the risk, a reasonable person in the University's position would have progressed and sought to resolve the Plaintiff's grievances in line with their grievance resolution policy. It was submitted that the University failed to do so, which materially contributed to the Plaintiff's recognised psychiatric injury.

The Court dismissed the appeal, however, Justices of Appeal Mitchell, Beech and Murphy questioned whether the Trial Judge had applied the correct test for reasonable foreseeability in coming to a finding.

Justices Mitchell and Beech held the Judge did not address whether there was a reasonably foreseeable risk that the University's conduct in dealing with the Plaintiff's grievances would cause or aggravate a psychiatric injury, having regard to what the Defendant knew about his psychiatric state. In their view the University would have foreseen a risk that its conduct, in dealing with the Plaintiff's grievances, could aggravate his existing psychiatric condition. Significantly, the University was in possession of a report from a consultant psychiatrist dated 26 June 2003, which put it on notice that the Plaintiff was suffering from psychiatric illness that had been triggered by events at work.

Justice Murphy was prepared to accept that the Trial Judge had considered the question of foreseeable risk (referencing the correct test) and correctly concluded that it was not foreseeable that the University's conduct would pose the risk of a new psychiatric injury or the exacerbation of an existing one—particularly when none of the University's witnesses had been cross-examined regarding whether they knew or had cause to suspect the Plaintiff would suffer a psychiatric injury.

His Honour observed that Justice McKechnie concluded the grievance process ultimately did not proceed because it required the Plaintiff's cooperation, and he was unable or unwilling to participate, or (if he was) he was unable to do so in an orderly or meaningful way. For example, the Plaintiff:

- refused to participate unless an independent legal investigator was appointed
- refused to cooperate while he was not being paid
- did not set out a comprehensive or coherent set of submissions
- advised he did not feel he was in a fit state to pursue the grievance complaints, and
- continued to add more grievances against different people.

Justices Mitchell and Beech, however, disagreed and held the Trial Judge had not applied the correct test for foreseeability. The University knew in June 2003 that the Plaintiff was suffering from a psychiatric illness and that student complaints were causing him stress. Being on notice of the Plaintiff's psychiatric condition, the University ought to have foreseen a risk that its conduct in dealing, or not dealing, with the Plaintiff's grievances could aggravate his psychiatric condition. Like Justice Murphy, their Honours agreed a reasonable person would not have attempted to complete the grievance resolution procedure during the relevant period even where the hypothetical reasonable employer would foresee a risk that not progressing the Plaintiff's grievances might aggravate his condition. Further, if the only outcome to the grievance procedure that would have satisfied the Plaintiff was a resolution he favoured or one which exonerated him, they did not consider that a failure to undertake the grievance resolution process materially contributed to his psychiatric injury (on the balance of probabilities).

Make sure you have a robust procedure

This decision highlights the importance of universities having appropriate procedures in place to address grievances and that they are responsive to workers experiencing a psychiatric injury. The system should include obtaining expert medical opinion on the worker's condition throughout the grievance process, if and when it is necessary.

No room at the...uni

By Catie Moore

It is widely known in the higher education sector that the shortage of student accommodation in Australia is a major issue for all universities—in capital cities and regionally. This acute shortage of accommodation significantly impacts attracting and keeping international students as well as the broader rental market. The gap in the market has created opportunities for developers and financiers who have traditionally been involved in the social infrastructure public-private partnership (PPP) space.

The Jones Lang Lasalle report on student accommodation in Australia published in November 2016 (JLL 2016 Report) notes that while there has been an increase in supply of purpose built student accommodation (PBSA) in most major capital cities, the demand continues to outrun it. Much of the new PBSA in capital and regional cities has been supplied by transactions involving property developers and infrastructure financiers.

If it looks like PPP...

There are currently a number of transactions in the PBSA market that bear similar characteristics to social PPP transactions. Transactions, such as the recent PBSA built at the Australian National University, are analogous to the public housing PPPs that have been refined and sophisticated in the United Kingdom (UK) for decades, and led to social housing developers and investors in the UK moving into the PBSA market (for example, Balfour Beatty and Laing O'Rourke). The similarities between the Australian PBSA market and transactions undertaken in places like the UK, enhance the bankability of these projects for Australian investors in economic and social infrastructure such as Macquarie Capital, Capella, John Laing, AMP Capital and Plenary.

Further, the use of these PPP-like structures opens the door to international investors such as the British student accommodation company, GSA Group. In 2016, the GSA Group made its first Australian acquisition and continues to have a solid development pipeline, including a site near the University of Melbourne. A growing list of offshore funds and real estate investment trusts (REIT's) are responding to the supply and demand imbalance in student accommodation. This includes entities like Balfour Beatty from the UK, which leads the Learning + Living consortium and Redefine Properties, and a South African REIT who owns a controlling stake in South Africa's Respublica Student Accommodation, which is investing in PBSA in Australia through this entity.

How these transactions are structured

Like a UK social housing project, PBSA projects generally involve an upfront fee paid by the special purpose vehicle project company to the university. In return for the upfront payment, the project company receives, amongst other things, the rental income paid by the students over the life of the concession. The life of the concession varies from project to project but is generally around 30 to 40 years. Along with constructing the PBSA, the project company usually undertakes and receives income from the university for providing facilities management services at the new residences. Where there is an existing PBSA, the facilities management arrangement may include maintaining the existing, as well as the new, residences. The recent Pendleton Social Housing Project—one of the first to reach

"As PBSA demand continues to outstrip supply, there will continue to be opportunities for building and maintaining PBSA by local and international infrastructure developers and investors."

financial close following the Global Financial Crisis (GFC)—required the project consortium to deliver 1,600 new homes and refurbish 1,200 existing homes via a hybrid PPP model. In addition to the refurbishment requirements, the consortium was required to provide facilities maintenance services.

There's a lot to be learnt in the Australian PBSA market from projects of this nature. As previously mentioned, the Pendleton Social Housing Project was the first of its kind to be delivered post–GFC and required the financiers to think outside the box to obtain the requisite funding. It was unique in its funding method, using a non-monoline wrapped bond with a subordinated "first loss" tranche, providing the credit enhancement to the project instead of the wrap. The 30-year project secured £82.6 million of funding through the first unwrapped two-tranche listed bond structure for a new project.

In a PBSA transaction there is no direct support provided by state or Commonwealth governments as there is for other social infrastructure PPPs. A PBSA transaction is more of a hybrid PPP and, therefore, similar to a UK social housing PPP because one of its key drivers is the financial standing of the university involved. Other key considerations for investors include:

- a university's ability to attract students
- the location of the university (i.e. major capital city or regional town)
- the reputation and worldwide standing or ranking of the university, and
- the demand for accommodation at that university.

Unless a university can show that levels of demand for student accommodation at its facility continue to outstrip supply, it will be very difficult to run a successful tender process with maximum bidders, providing the best outcome for the university.

Where to from here?

As PBSA demand continues to outstrip supply, there will continue to be opportunities for building and maintaining PBSA by local and international infrastructure developers and investors. As the industry develops and becomes more sophisticated, we can expect to see more creative ways to finance these projects and more overseas players taking advantage of the situation in Australia.

Appreciating the value (and challenges) of an ageing workforce

By Ian Bennett and Josephine Lennon

Australia's ageing population, coupled with other economic factors, means many Australians are remaining in the workforce longer than previous generations. These changing workplace demographics have, and will continue to have, a substantial impact on employers, who have to adapt to the requirements and needs of their workforce.

According to a 2015 Commonwealth Government report, the number of workers over 65 will increase from 12.9% to 17.3% by 2023. Further, it has been predicted that Australian workers born between 1960 and 1980 will now (on average) continue working well into their 70s. Reflecting this trend, recent figures released by the Department of Education and Training show that more than half of workers in the higher education sector are aged over 45. This proportion of older workers is expected to increase, which means employers in the university sector must be aware of, and work to address, the specific kinds of issues or challenges that result from an ageing workforce. These issues are often exacerbated by misconceptions about the value and capacity of older workers to perform their roles safely and efficiently in a modern workplace.

Recent studies, including "Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability" conducted by the Australian Human Rights Commission, have highlighted a number of challenges confronting older workers in entering or maintaining their positions in the workforce including work health and safety (WHS) obstacles and discrimination.

WHS

Under WHS legislation, employers must ensure the health and safety of all workers while they are at work, so far as is reasonably practicable. To do this effectively, it is important for employers to understand the needs of their specific workforce and the associated risks. All individuals age differently and, in turn, it can be difficult to adopt a "one size fits all" approach to managing an ageing workforce. Employers should, however, take a proactive approach to managing WHS within their enterprise by identifying and assessing the risks that may arise based on their particular circumstances.

Recent guidance materials published by WHS regulators have highlighted that the most common workplace injuries for older workers relate to muscular stress (sprains and strains), bone fractures, spinal disorders and slips or falls. In many instances, these risks can be mitigated or eliminated by:

- assessing the potential risk of such injuries occurring within the particular work environment
- implementing reasonably practicable control measures to manage these risks, and
- fostering a culture that encourages individuals to talk about concerns they may have about their wellbeing or their capacity to perform their work safely.

It's important to understand a person's age does not of itself give rise to a risk to health and safety. There is no prescribed age where a worker becomes incapable of working safely, nor is there a legal requirement for a worker to retire at a certain age.

Any queries that are raised about a worker's ability to continue employment must arise from the worker's capacity to perform their role's inherent requirements and not simply their age. If, for whatever reason, a worker is unable to perform the inherent requirements of their role, an employer must still assess whether it can implement any reasonable adjustments that would allow the employee to perform these inherent requirements before contemplating any significant changes to their employment status.

Unlawful discrimination

In all Australian jurisdictions it's unlawful to discriminate against a worker on the basis of age. This means a worker can't be treated less favourably or not given the same opportunities as others in a similar situation because they are too old or too young.

Age discrimination may occur during the recruitment process or in decisions giving rise to termination. However, it may also occur in circumstances where a worker is denied a promotion or career progression, or is subjected to adverse or less favourable treatment in the workplace (such as isolation and the unfair allocation of tasks). By way of example, in *Fair Work Ombudsman v Theravanish Investments Pty Ltd & Ors* [2014] FCCA 1170 an employer terminated the employment of one of its workers when he reached 65. In doing so, the employer acted on the advice of their accountant and advised the employee that it was company policy not to employ workers over 65. The Court reflected on age-related stigma and observed the age at which a person qualifies for the pension is misconceived as the age for mandatory retirement. It found there was no legitimate basis for the employer to believe the worker could not perform his role's inherent requirements and awarded him compensation and pecuniary penalties totalling almost $40,000.

Risks and impacts

Failing to appropriately respond to challenges presented by an ageing workforce can expose an employer to significant risk. Legal claims can be commenced, which may result in the employer being ordered to pay compensation for the loss and damage suffered by the worker and pecuniary penalties of up to $63,000 per contravention for a corporate entity. Individuals who are involved in any breach of discrimination laws can also be held liable for the contravention. Further, if a breach of WHS legislation is alleged, employers risk regulatory investigations and significant criminal sanctions.

From a non-legal perspective, there's also the potential for reputational damage, the development of a harmful workplace culture, increased absenteeism, a disengaged workforce and an impact on the health and wellbeing of employees. This can have flow on effects to commercial relationships and arrangements.

Take home messages

Employers, such as universities, should ensure they adapt to their changing workforce to mitigate potential commercial and legal risks that may eventuate. Take appropriate action to facilitate and encourage the longevity of your workforce by:

- identifying, assessing and implementing appropriate controls to assist in managing risks and challenges experienced by older workers
- understanding workers' long-term goals and ensuring older workers who wish to stay in the workforce are provided appropriate support (i.e. flexible work arrangements and/or skills training)
- conducting regular risk assessments to identify any foreseeable WHS risks and implementing reasonably practicable strategies to mitigate these risks, for example, by:
  - conducting ergonomic assessments and training around sedentary work
  - providing training to minimise age-related injuries
  - ensuring the workplace is accessible (ramps and hand rails)
  - encouraging employees to engage in regular exercise through employee benefit programs
  - implementing suitable workplace policies that emphasise inclusiveness and eliminate discriminatory conduct (particularly with a focus on recruitment and retention)
  - creating a positive workplace culture that emphasises inclusivity and encourages participation by older workers, and
  - providing a work environment that fosters open communication, education, training and workplace flexibility on equal employment opportunity principles.

We would like to acknowledge the contribution of Matthew Parker and Ben Gottlieb to this article.

An overview of the student visa

By Arathi Tekkam

Each year, thousands of international university students come to Australia to study. The student visa application process can be daunting and tricky for students, so it's helpful for university staff to have an understanding of the process.

The Australian student visa (subclass 500) allows an individual of at least six years of age to study full time in Australia in a recognised education institution.

The individual must already be accepted to study at an institution and enrolled in a course of study that is registered on the Commonwealth Register of Institutions and Courses for Overseas Students before applying for the visa, which has a maximum length of five years.

Visa applicants are required to review the appropriate student document checklist located on the Department of Immigration and Border Protection's website based on the country of their passport and education provider before lodging an application. It is important to note that each country has different evidence requirements to be met, such as:

- English language proficiency
- financial capacity requirements, i.e. having enough money to pay for course fees, travel and living costs while in Australia
- health requirements
- medical and hospital insurance in Australia
- character-related questions, and
- holding a current relevant temporary substantive visa (applicants applying within Australia only).

All applicants must also evidence that they are a genuine temporary entrant (GTE). The GTE is an integrity measure to ensure the student visa programme is used as intended and not as a way for international students to continue ongoing residency in Australia. This requirement is not designed to exclude students who, after studying in Australia, go on to develop the skills required by the Australian labour market and apply to become permanent residents.

Steps for students to apply for a visa

1. Complete an online application form, available at **www.border.gov.au**.
2. Provide an original letter from the university or recognised education institution confirming admission as well as duration of the course.
3. Provide proof of financial standing.
4. Provide proof of character clearance (as required).
5. Submit one recent photograph.
6. Submit a current passport (original or copy, depending on location).
7. Be ready with the appropriate payment method.

Processing timeframes for student visa applications are on a case-by-case basis. The current published timeframes for different student visa subclasses are approximately between 15 to 81 days from the date of the application's lodgement. Timeframes will also depend on whether the application is lodged as a complete submission with all the required supporting documentation and information.

To find out more information on the visa process, visit www.border.gov.au

About the contributors

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Mark heads up the firm's national cyber practice and has extensive experience in professional indemnity litigation, directors' and officers' liability and reinsurance. He has practised in these areas for more than 25 years in London and Sydney. Mark is also adjunct Associate Professor of Law at Notre Dame University.

Catie Moore, Partner

Catie has 25 years' experience advising both the public and private sectors on transport, energy, infrastructure and housing projects in Australia, the UK, the US and the Middle East. She specialises in advising on large construction, procurement and outsourcing projects, including those delivered as PPPs, and on M&A and capital raising transactions.

Grant Parker, Partner

Grant has more than 25 years' experience in contract drafting, negotiation and administration, including to the university sector, often on innovative projects involving emerging forms of contracting. He also works on projects seeking environmental sustainability outcomes and has worked in sectors transitioning to greater private sector provision of infrastructure.

Chris Rimmer, Partner

Chris is an experienced insurance lawyer with expertise in public and product liability, workers' and common law compensation, and motor vehicle and personal injury. He acts for a number of clients with significant retained deductibles on their liability policies and represents London market syndicates in liability and property claims.

Colin Pausey, Consultant

Colin is part of our growing cyber insurance team advising insurers on policy wordings and claims. He works with life insurers, and accident and health underwriters advising on claims, policy wordings and compliance-related issues. He also has senior insurance operational management experience.

Cameron Scholes, Special Counsel

Cameron is an experienced construction lawyer who provides risk management and dispute resolution services to clients in the building and construction industry. He has extensive experience in litigation and all forms of alternative dispute resolution, including mediation, conciliation, arbitration, expert determination and adjudication.

Heather Osborne, Special Counsel

Heather advises clients on workers' compensation, public liability, product liability and fatal incidents. She represents insurers and insureds before the Magistrates, District and Supreme Courts, and at the Conciliation and Arbitration Service.

Ian Bennett, Senior Associate

Ian helps clients solve complex workplace issues and has particular skills in defending WHS prosecutions, unfair dismissal and adverse action claims. He assists to effectively manage issues and develop strategies that look at the bigger picture, mitigating potential flow-on effects (such as public relations, commercial arrangements, insurance and regulatory compliance).

Arathi Tekkam, Senior Immigration Services Manager

Arathi is an experienced immigration agent specialising in corporate migration and advises on all Australian temporary and permanent visas such as business innovation and investment visas, temporary work visas, student visas, business sponsorship and permanent residence pathways.

sparke HELMORE LAWYERS

Want to know more?

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