Workplace Matters

Sparke Helmore Lawyers

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A year in review and the end of harmonisation

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Looking over the horizon

Welcome to Issue 13 of *Workplace Matters*, our digital publication bringing you the latest legal updates in safety and employment directly from our experts.

In this feature-packed issue, we take a look back at some of the most significant changes and developments over the past 12 months, specifically the end of harmonisation following some significant changes in Queensland.

Workplace harassment cases and campaigns like #metoo are more prevalent than ever, so we clarify some of the misnomers and potentially blurred lines to make sure everyone feels safe and comfortable in the workplace.

We've seen general protections claims and vicarious liability claims on the rise, so over two separate articles, we review some cases that address these to help you navigate the complexities, should either come up.

Finally, we look at some recent developments that have impacted workplace law—read about workplace aggression, SafeWork prosecution guidelines and more.

I'm delighted to share with you that Sparke Helmore was named Law Firm of the Year at the Australasian Law Awards in May. Our Insurance Group also took home Insurance Specialist Firm of the Year for the third year running—these awards mean a great deal to our Firm and would not have been possible without your ongoing support.

In other exciting news for our Workplace Group, I'm thrilled to share with you that among the 50 Sparke Helmore lawyers included in the *Australian Financial Review's* Best Lawyers in Australia list, seven are from our Group. Of the seven, Partners Luke Holland (Adelaide) and Penny Stevens (Melbourne) were named Lawyer of the Year for Occupational Health & Safety Law for their respective states. On top of that, we were named Occupational Health & Safety Firm of the Year, which is a credit to the tireless efforts of every individual in our Group.

The good news doesn't stop there. Penny was also named a finalist in the *Lawyers Weekly* Partner of the Year Awards just after she was appointed to the firm's Board in June. Congratulations Penny!

If there are any other topics you'd like us to explore in *Workplace Matters*, please send me an email at catherine.wilkinson@sparke.com.au

I hope you enjoy this issue.

Sincerely,

Catherine Wilkinson
National Workplace Group Leader
Sparke Helmore Lawyers

Year in review

By Susan Withycombe-Taperell

Over the past 12 months we've seen significant legislative changes to the work health and safety (WHS) scheme in Queensland, heralding an end to the harmonised model. We also saw record safety fines handed down in multiple jurisdictions, foreshadowing that the courts may be more willing to impose higher range penalties for WHS breaches in line with the legislation in the future.

Statistics

SafeWork Australia's preliminary data on workplace fatalities in 2017 reported 174 Australian workers were killed in 2017 (compared with 182 workers in 2016). In its *Key Work Health and Safety Statistics Australia 2017* publication (released 18 October 2017 based on 2016 data), it indicated a decrease in work-related fatalities, with Queensland recording the highest fatality rate (1.9 fatalities per 100,000 workers), followed by NSW (1.4) and Victoria (1.0).

Vehicle collision has been the most common cause of incident since 2016, accounting for approximately 42% of worker fatalities, followed by falls from a height (14%), being hit by moving objects (9%) and being hit by falling objects (9%). The four mechanisms accounted for approximately 74% of worker fatalities.

The end of harmonisation

On 12 October 2017, the Queensland Government passed the *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld) (the Act). Its introduction to Parliament was preceded by mounting public pressure to crack down on the regulation of WHS following fatal incidents at Dreamworld and Eagle Farm in 2016.

The Act introduced a number of significant provisions, most notably the introduction on 23 October 2017 of an industrial manslaughter offence into the *Work Health and Safety Act 2011* (Qld) (WHS Act)—arguably the biggest change since harmonisation.

Under the offence, a person conducting a business or undertaking (PCBU) or a senior officer may be found guilty of industrial manslaughter where a worker dies, or is injured in the course of carrying out work and later dies, and:

- the officer or PCBU's conduct substantially contributed to the death of the worker, and
- they were negligent about causing the death of the worker by their conduct.

The maximum penalty for an individual found to have committed the offence is 20 years' imprisonment and body corporates could be fined up to $10 million.

Industrial manslaughter in other harmonised jurisdictions

The ACT was the first Australian jurisdiction to introduce an industrial manslaughter offence for employers and senior officers, with the jurisdiction introducing the charges into the *Crimes Act 1900* (ACT) on 1 March 2004. These offences attract a maximum penalty of 2,000 penalty units ($300,000) and/or 20 years' imprisonment. The Tasmanian and South Australian Labor parties have also indicated an intention to introduce similar manslaughter provisions in their WHS legislation.

Notwithstanding the above, in all jurisdictions, a charge of manslaughter is still open to the police when investigating a workplace incident. For example, in NSW SafeWork's compliance policy and prosecution guidelines, which outline the matters considered by the regulator when determining whether to prosecute, stipulate that where there has been a breach of the law leading to a work-related death, the police and SafeWork NSW need to consider whether the circumstances justify a charge of manslaughter under the *Crimes Act 1900* (Cth).

Legislative change in other jurisdictions

Other notable legislative changes introduced across the harmonised jurisdiction include:

- the *Work Health And Safety Regulation 2017* (NSW Regulation) replacing the *Work Health and Safety Regulation 2011*, and
- on-the-spot penalty offences introduced to the NSW Regulation for height-related offences.

In late-2017, SafeWork Australia released the terms of reference for a national review of the harmonised WHS Act. The review will be finalised by early 2019.

Trends across harmonised jurisdictions

Australian jurisdictions (with the exception of Victoria and Western Australia) adopted the model WHS legislation more than five years ago. In 2017, category two offences were the most commonly prosecuted, which involve a failure to comply with a WHS duty, exposing an individual to a risk of death, serious injury or illness. By comparison, category one offences are more severe and involve a person acting recklessly. Category three offences are lesser offences, with no risk of death, serious injury or illness.

Despite this, we have seen harmonised jurisdictions (South Australia, Queensland and NSW) commence proceedings against PCBUs and their officers for category one offences.

The regulators have also commenced proceedings for other offences under alternative provisions of the WHS Act and WHS Regulation:

- an individual was charged under clause 46 of the WHS Regulation for failing to wear personal protective equipment (a seatbelt) when operating a forklift in NSW, and
- a PCBU was charged with failing to consult with other duty holders (the first of the harmonised jurisdictions to commence these proceedings) in Queensland.

Enforceable undertakings (EU) are increasingly being used across jurisdictions to address safety breaches in lieu of prosecutions. In 2017, we observed large increases in the value of EUs, with SafeWork NSW entering an EU with Borg Manufacturing valued at more than $1.5 million.

Largest penalties on record

Monetary penalties for failing to ensure the health and safety of workers have also significantly increased. In particular, recent decisions in the Commonwealth, NSW and South Australian jurisdictions indicate a trend of courts imposing higher range penalties for WHS breaches, in line with the higher maximum penalties provided for under the model WHS legislation.

- On 19 April 2017, the South Australian District Court convicted and fined a cleaning company $650,000 in relation to an incident at a chemical waste processing plant. This represents the largest penalty imposed to date under the *Work Health and Safety Act 2011* (Cth), and almost $300,000 more than the highest penalty awarded under the previous legislation.
- The largest penalty handed down in NSW under the harmonised *Work Health and Safety Act 2011* (NSW) on 5 May 2017 in the case of *SafeWork (NSW) v WGA Pty Ltd*. WGA Pty Ltd was convicted and fined $1 million for failing to ensure the health and safety of a worker, so far as reasonably practicable, having exposed them to a risk of death or serious injury or illness.
- In South Australia, *Boland v BHP Billiton Olympic Dam Corporation Pty Ltd* [2017] SAET 165 saw the largest penalty ($390,000) under the *Work Health and Safety Act 2012* (SA) handed down in relation to a fatal incident where worker was crushed by two slabs of rock while drilling holes in a development face at an underground mine in Roxby Downs.

Looking ahead

While it remains to be seen whether the legislative changes in Queensland will be adopted in other states, it is clear that in all jurisdictions the courts will continue to impose high range penalties for flagrant safety breaches.

We would like to acknowledge the contribution of Mason Fettell and Kate Archibald (previously of Sparke Helmore) to this article.

Reducing the risks of workplace sexual harassment

By Daria McLachlan

Sexual harassment has become a worldwide headline in the last 12 months. Allegations have been rife—from Hollywood to politics, backyards to musical theatre productions. It even has its own hashtag. It is, therefore, unsurprising that a national survey conducted by the Australian Human Rights Commission (AHRC) revealed that 25% of women and 16% of men aged 15 years and older have experienced sexual harassment in the workplace.

Sexual harassment generally has an oppressive effect on victims and poses a genuine risk to work health and safety. Community standards are changing and the Australian community has a heightened appreciation for the impact of sexual harassment on victims, as was recognised by the judiciary in *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102.

Employers must adapt to these changing standards and adopt appropriate control measures with respect to sexual harassment. Failing to appropriately address sexual harassment exposes employers to a range of risks, including diminished productivity, poor workplace culture, legal liability (compensation and civil penalties), reputational harm, and health and safety breaches.

What is sexual harassment?

Sexual harassment is defined in legislation by way of the following test:

- the victim is subjected to conduct of a sexual nature
- the conduct is unwelcome to the victim, and
- it is reasonable for the victim to be offended, humiliated or intimidated by the conduct.

The courts interpret conduct of a sexual nature broadly. It can include jokes, taunts, kissing, touching and sexual advances. Factors such as gender, age and relative positions of power also impact whether conduct is held to be of a sexual nature.

The following are some practical examples of sexual harassment in the workplace.

Sexual comments and horseplay

In *Horman v Distribution Group Limited* [2001] FMCA 52, the Court accepted that the victim participated in a workplace culture of drawing on each other, obscene sexual comments and derogatory comments about women. Despite an argument that the conduct was, therefore, not unwelcome and often instigated by the victim, the Court found the victim had been subjected to sexual harassment based on a letter expressing she was upset by the treatment.

Hugs, massages and nicknames

In *Dee v Commissioner of Police & Anor (No 2)* [2004] NSWADT 168, the Tribunal accepted there was a workplace culture of consensual jokes, hugging and familiar touching. Notwithstanding this, the perpetrator calling the victim "babe" and "baby", rubbing her arms and bringing his groin into contact with her buttocks when hugging her, was found to be sexual harassment. Key factors in this decision were that the conduct continued after repeated anonymous complaints and that the perpetrator did not treat male colleagues in this manner.

Placing arms around shoulders

In *Smith v Hehir and Financial Advisors Aust Pty Ltd* [2001] QADT 11, the Tribunal took into account the victim being a young woman and the perpetrator being an older man she did not know well, when making a finding that it was reasonable for the victim to be offended, humiliated or intimidated by having his arm around her when she was upset.

Sex-based hostility

In *Djokic v Sinclair (1994) EOC 92-643,* the victim was subjected to aggressive treatment and occasional abusive language relating to

her gender by her supervisor. The Court categorised this as oppressive "sex-based hostility", which amounted to conduct of a sexual nature.

Sexually hostile environment

In *Horne v Press Clough Joint Venture* (1994) EOC 92-556, two women complained of pornographic posters in their workplace. The workplace was male dominated and, following the complaint, the women were vilified, exposed to more explicit posters and the subject of abusive graffiti. The Court held that this amounted to conduct of a sexual nature.

It is clear that the type of conduct that may constitute workplace sexual harassment is broad…so what are the consequences for employers?

Liability for sexual harassment

Employers are at risk of vicarious liability for sexual harassment carried out in connection with employment—and conduct that occurs in the workplace will almost always be connected to employment. The position is less clear when it takes place outside of the workplace. In such situations, the court assesses how the sexual harassment came about and whether the employer played a role in creating or allowing it to occur.

In *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130, the employer was liable for sexual harassment that occurred in staff accommodation. The finding hinged on the fact that the employer created the situation in which the conduct occurred, given the presence of those involved was a result of their mutual employment.

Similarly, in *Lee v Smith & Ors* [2007] FMCA 59, the employer was liable for sexual assault that occurred outside of work hours at a private home. In concluding that the assault occurred in connection with employment, the Court emphasised the workplace culture and lack of training that allowed for unrelenting sexual harassment that ultimately led to assault.

Although the circumstances in which vicarious liability may arise are broad, it is possible for employers to defend claims if they can demonstrate having taken all reasonable steps to prevent sexual harassment from occurring.

Minimising the risk

We recommend employers follow the AHRC publication, *Effectively preventing and responding to sexual harassment: A Code of Practice for Employers (2008 edition)* (Code), for a best practice approach. It is unlikely an employer will be held liable in circumstances where they have complied with the Code.

The Code states that there is no set standard of what amounts to "all reasonable steps". The court will consider the size of the organisation, available resources, any history of a poor workplace culture or complaints and the nature of the particular workplace. However, there are two minimum expectations:

- Employers must have a suitable sexual harassment policy that is implemented, monitored and communicated to all employees. The courts have consistently held that the mere presence of a policy is not sufficient to avoid liability—it is the implementation, monitoring and training that is paramount.
- Employers must have a clear procedure for dealing with any sexual harassment. This should include an internal grievance handling process, information on how victims can access the process, and support for managers and employees dealing with complaints.

Key messages for employers

These simple actions will help you manage the risk of sexual harassment in your workplace and may save you from winding up in the courtroom (and the headlines):

- operate a policy that addresses sexual harassment and the management of complaints
- implement the policy and train all employees on an ongoing basis i.e. annually
- set the standard for appropriate behaviour, and
- immediately follow up on any complaints as per your policy.

We would like to acknowledge the contribution of Josephine Lennon to this article.

The rise of the general protections claim

By Felicity Edwards

The general protections provisions were introduced to the industrial relations landscape in 2009 with the introduction of the *Fair Work Act 2009* (the Act). The number of claims wasn't as high as first expected, however, they have been increasing over the past few years as employees become more familiar with these types of claims and the benefits they offer over traditional unfair dismissal claims.

What is a general protections claim?

There are many types of general protections claims but the most common is an adverse action claim. Adverse action can include an employer dismissing an employee, injuring an employee in their employment or altering the employee's position to their prejudice. An employer cannot take adverse action for a prohibited reason. Prohibited reasons include because an employee or prospective employee:

- exercises a workplace right, which includes:
  - having an entitlement, role or responsibility under a workplace law (such as the Act) or a workplace instrument (such as a modern award or enterprise agreement)
  - being able to initiate or participate in a process or proceeding under a workplace law or instrument, such as commencing court action, or
  - making a complaint or inquiry in relation to their employment
- has a particular attribute e.g. their gender or race, a disability, or
- is a member of the union.

Increase in general protections claims in the Fair Work Commission (FWC)

In the FWC's 2016/2017 Annual Report, it reported 4,666 general protections matters (involving and not involving dismissal), which was an increase from 4,210 in the previous period. It also reported the number of unfair dismissal claims fell from 14,694 in 2015/2016 to 14,135.

Although unfair dismissals are still the largest category of applications received by the FWC each year, a look at these numbers suggests general protections are slowly increasing.

Unfair dismissal versus general protections

There are several reasons general protections claims may be more attractive to employees than unfair dismissal claims:

- To be eligible to make an unfair dismissal claim, an employee needs to have served the minimum employment period of six months. There is no such requirement for a general protections claim—a prospective employee can even make a claim against their prospective employer, despite no work having ever been performed.
- Employees bringing a general protections claim are not limited by the high income threshold, which is currently $145,400.
- Damages for a successful general protections claim are uncapped, unlike unfair dismissal claims, where an employee is limited to maximum damages of 26 weeks' pay. Also, employees can access a wider range of remedies in general protections claims, including damages not only for economic loss, but hurt, distress and humiliation. For this reason alone, adverse action is clearly an attractive option.
- Once an employee establishes the existence of a workplace right and that adverse action was taken, the employer bears the onus of proving the adverse action was not taken because of the existence or exercise of the workplace right (s 361 of the Act). This takes a considerable evidentiary workload out of the hands of the employee.

Despite the many benefits, there are some undesirable aspects to a general protections claim, including that such claims are not usually determined by the FWC. While the FWC does have the power to decide a general protections claim if both parties consent, most opt to pursue the matter in the Federal Circuit Court or the Federal Court. Matters in these Courts are dealt

"The FWC's 2016/2017 Annual Report reported 4,666 general protections matters."

with more formally and take a lot longer to complete than claims in the FWC. Therefore, applicants cannot expect their claims to be resolved in the relatively quick manner that the FWC deals with unfair dismissals.

What is a workplace right?

Perhaps another reason for the increase in general protections claims is the courts' broad interpretation of a "workplace right". In defining what constitutes a workplace law, workplace instrument and a complaint or inquiry, the courts have found:

- the *Occupational Health and Safety Act 2004* (Vic) is a workplace law (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525), as is the Sex Discrimination Act because it seeks to eliminate discrimination and harassment in the workplace (*Celand v Skycity Adelaide Pty Ltd* [2016] FCCA 399)
- a concern raised with the employee's supervisor about the manner of testing being carried out by his employer was a complaint or inquiry (*Evans v Trilab Pty Ltd* [2014] FCCA 2464), and
- a complaint made by an employee about the behaviour of a manager was a complaint even though it did not arise directly in relation to her own employment (*Walsh v Greater Metropolitan Cemeteries Trust* (No 2) [2014] FCA 456).

The courts have also taken steps to restrict the meaning in some limited circumstances. For example, a workplace right does not include the right to refuse to perform an aspect of one's job (*Regulski v State of Victoria* [2015] FCA 206), nor the right to work overtime when it's available under an enterprise agreement (*Celand v Skycity Adelaide Pty Ltd* [2017] FCAFC 222).

What does the increase in general protections claims mean for employers?

The general protections provisions are broad and can apply in a range of circumstances.

To appropriately defend an adverse action claim (or prevent a claim being made), employers, particularly those who make decisions that can adversely affect others in the workplace, should:

- get familiar with the meaning of adverse action and the prohibited reasons, and
- be very clear about why any action is being taken against an employee or prospective employee, and ensure it is not for a prohibited reason.

We would like to acknowledge the contribution of Georgia Wells to this article.

As vicarious liability prosecutions rise, are you the third wheel?

By Julie Kneebone

Did you know that managers, human resources (HR) professionals and professional advisers can be personally fined by the Fair Work Ombudsman (FWO) for an employer's breach of a workplace law? According to the FWO 2016/2017 annual report, it recovered more than $1.1 million from individuals who were accessories to contraventions of workplace laws. Prosecutions by the FWO under vicarious liability provisions are on the rise. We look at two cases that make clear the responsibility of individuals to ensure employees are correctly paid.

How are individuals responsible?

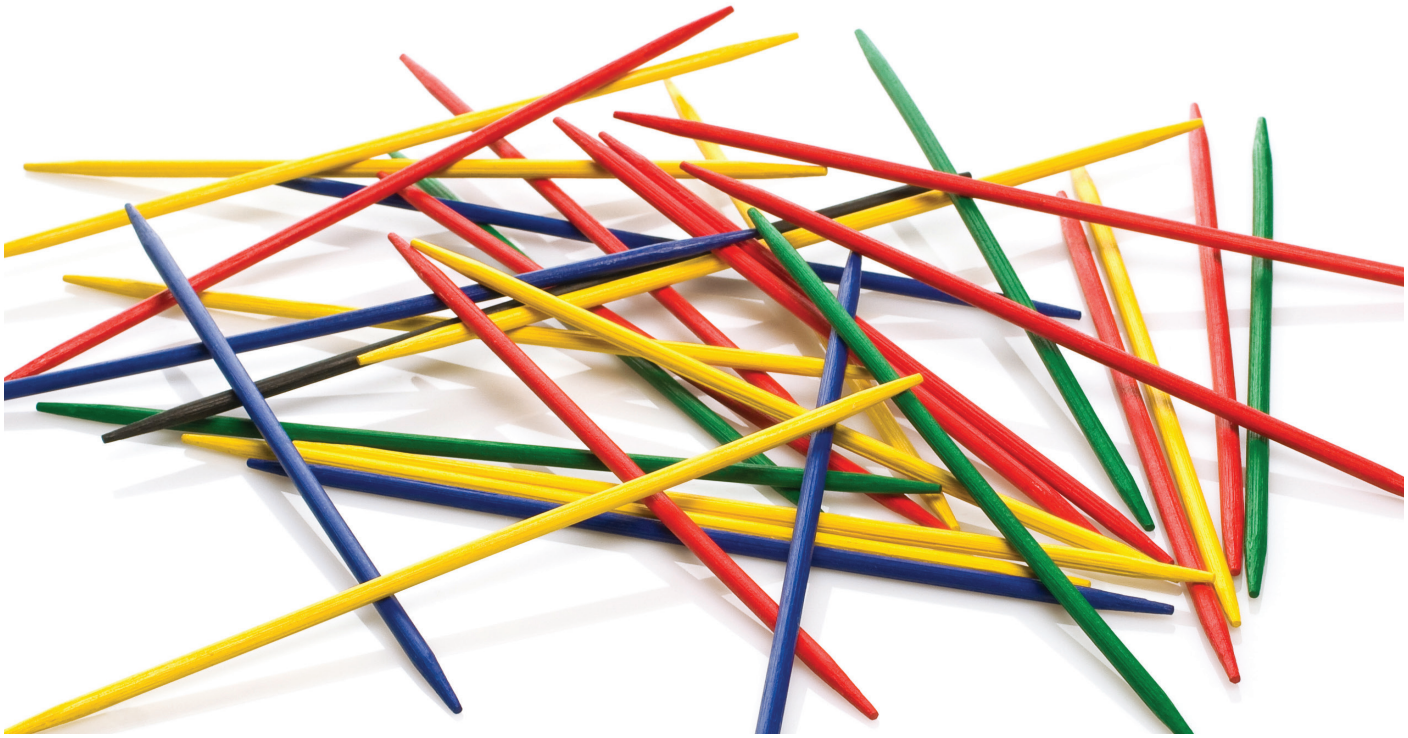
The *Fair Work Act 2009* (FW Act) provides for "accessorial liability", making individuals responsible for contraventions of the FW Act where they are "involved" in that contravention and treating them the same as employers when there is a contravention.

Who can be accessorially liable?

Directors, in particular, are being pursued under the FWO: In 2016/17, 84% of the FWO's prosecutions named a director. Directors are often pursued to ensure that moneys can be recovered even if the employer company becomes insolvent.

Employees and advisers are also at risk of incurring penalties for accessorial liability. In fact, anyone who is involved in arranging or implementing the terms of an employee's contract could be liable. The FW Act provides that a person is involved in a contravention of a civil remedy provision if, and only if, the person:

- aided, abetted, counselled or procured the contravention
- induced the contravention, whether by threats, or promises or otherwise
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to a contravention, or
- conspired with others to effect the contravention.



Sharing the blame

More than one individual can be accessorily liable for the company's actions. In *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301, the company's director, HR manager and store manager were each held accessorily liable.

Ms Zhu, the HR manager, had various responsibilities, including payroll. She knew an Award applied to New Shanghai's employees and had informed sole director Mr Chen that its employees were not being paid in accordance with the Award. Ms Zhu continued to pay the employees less than the applicable Award rate and created false employee records after receiving an employee complaint regarding wages.

Ms Xu was the restaurant manager, responsible for the day-to-day operation of the restaurant, including employee supervision. Ms Xu gave employees weekly cash payments for their hours worked the previous week. Ms Xu knew full-time employees were not being paid annual leave and that no employees were receiving payslips. She assisted in the creation of falsified employment records.

Although Ms Zhu and Ms Xu were acting at the behest of their employer, their awareness of and failure to act on the employer's breaches made them guilty of being involved in contravening a civil remedy provision. Ms Zhu was personally fined $22,000 and Ms Xu was personally fined $18,000. The director, Mr Chen, was personally fined $55,000 and the employer was fined $300,000 after it was found liable for underpayments of almost $600,000 during a 16-month period.

But I'm not even an employee!

Professional advisers may also be liable.

In *Fair Work Ombudsman v Blue Impression Pty Ltd & Ors* [2017] FCCA 810, Ezy Accounting was held accessorily liable for its client's underpayments and ordered to pay a $53,000 fine. Ezy Accounting denied liability, claiming it had no "actual knowledge" of the employees' rates of pay. However, the Federal Circuit Court found Ezy Accounting:

- had previously conducted an audit at the request of the FWO, during which, Ezy Accounting was provided with the correct rates its client was required to pay the employees
- had continued to pay incorrect rates until an FWO investigation determined there was a breach of the FW Act, and
- as such, processed the employees' wages knowing the rates were below minimum entitlements.

Justice O'Sullivan held that Ezy Accounting "had at their fingertips all the necessary information that confirmed the failure to meet the Award obligations and nonetheless persisted with the maintenance of its payroll system with the inevitable result that the Award breaches occurred".

What should you do?

If something seems amiss, speak up.

If you are in any way responsible for employee entitlements—payroll, record keeping or employee supervision—you must have an understanding of any applicable Award, Agreement or Standard that applies to the employees. You should also stay up-to-date with changes to Awards, such as the introduction of new leave provisions or annual wage increases.

You should ensure accurate records are being kept. For example, under the Restaurant Industry Award 2010, if you employ someone on an annualised salary, you are required to keep a record of every hour that person works and have them sign this record each week to validate its accuracy. This is so that both parties can reconcile the annualisation at the end of each year to ensure it complies with other aspects of the Award.

If you do all that is reasonably practicable to ensure you and the employer are complying with the FW Act and keeping accurate employment records, then you are more likely to avoid the long arm of the FWO coming after you.

We would like to acknowledge the contribution of Layla Langridge to this article.

LPP–not just a label

By Ian Bennett

Legal Professional Privilege (LPP) is a rule of law that enables the protection and non-disclosure of communications between clients, their legal representatives and certain third parties in specific circumstances. It is considered a fundamental concept in the administration of justice as it operates to allow and encourage frank communications and detailed discussions between a client and their lawyer regarding appropriate legal options.

In the workplace context, a claim that a communication is subject to LPP may arise in a variety of circumstances where there is a significant event or risk of litigation (for example, a safety incident or allegations of systemic bullying and harassment). It is undeniable that exploring these potential issues in a controlled manner and with protection against disclosure is appealing, however, LPP is an inherently complex legal concept that is frequently misunderstood or misapplied.

A number of recent cases illustrate the common problems that may be encountered in the practical application and reliance on LPP.

What is it?

LPP protects the disclosure of communications (including notes, memoranda, letters, reports or documents) when created for the "dominant purpose" of seeking (or providing) legal advice and for use in existing or anticipated legal proceedings. While it may be possible to have multiple purposes for a communication, the "ruling, prevailing or most influential" purpose will determine whether a claim of LPP is founded.

The party asserting LPP needs to prove the "dominant purpose" for which the communication was created. The purpose of the communication cannot be retrospectively created, nor can a claim of LPP be applied in hindsight.

LPP derives from common law and is enshrined in the uniform Evidence Acts in each Australian jurisdiction (referred to as "client legal privilege"). Common law principles apply in situations where proceedings are not on foot, while the uniform Evidence Acts apply in circumstances where litigation has already begun. Despite these differing sources of authority for LPP, the key principles are essentially the same.

Certain legislation expressly preserves the right to claim LPP over materials. For instance, s 269 of the model Work Health and Safety Act acknowledges that the powers of the regulators to compel the provision of information do not displace the potential application of LPP. However, such provisions do not preclude a potential contest or challenge to the legitimacy of a claim of LPP.

Challenges to LLP

A claim of LPP may be contested where the "dominant purpose" is unclear or appears illegitimate. Even if LPP is accepted as having been established over a communication, it can be waived if the substance has been disclosed or the item was otherwise treated inconsistently with the continued application of LPP.

Most commonly, LPP may be challenged where:

- there is a range of potential alternate or differing purposes (for example, if LPP is claimed over an investigation report but there is industry specific legislation or an internal policy that requires the investigation and creation of such a document, it may be difficult to establish that the "dominant purpose" was for obtaining legal advice or in connection with potential litigation)
- the communication is commissioned or instigated by in-house legal counsel because their role inherently involves a range of different business considerations and is isolated or limited to providing strict legal advice, and
- the communication is distributed or the substance is disclosed to a broad audience.

In *Perry & Anor v Powercor Australia Limited* [2011] VSC 308, a challenge arose where the plaintiffs in a class action sought the

production of documents associated with an investigation commissioned by Powercor's in-house lawyers in response to the 2009 Victorian bushfires.

The Court ultimately accepted that the documents were used in the provision of legal advice. However, they were also used for a range of other purposes and functions, such as assisting with managing insurance claims, verifying maintenance issues and to carry out mandatory reporting obligations under specific legislation. As such, the Court was not satisfied that the "dominant purpose" was for the provision of legal advice or use in legal proceedings. Consequently, the claim of LPP was not substantiated and the documents needed to be produced.

In *Kirkman v DP World Melbourne Limited* [2016] FWC 605, an issue arose regarding the legitimacy of a LPP claim over an investigation report used to address allegations of bullying by a number of employees. In effect, the employer maintained—and it was upheld by the Fair Work Commission—that the report was validly subject to LPP as it:

- was commissioned by their external legal advisers (as opposed to directly by the employer) and in response to the employer's request for the provision of legal advice
- came into existence after proceedings had been brought by employees and there was evidently a risk for the employer that required legal advice and assistance, and
- was provided to the employer's legal advisers for consideration and the provision of advice (rather than being provided directly to the employer).

In *Bartolo v Doutta Galla Aged Services Ltd* [2014] FCCA 1517, the Court accepted that a confidential report prepared by an employer's legal advisers containing factual findings and advice was covered by LPP. However, this was held to have been waived as it would be unfair to allow the employer to not disclose the report given it had been tabled at a board meeting and ultimately prompted the CEO to fire the employee.

Lessons for employers

LPP is not just a label that can be attached to workplace communications, nor should it be used in an attempt to cloak or avoid the discovery of items. When legitimately founded and maintained, LPP has extensive value in enabling businesses to thoroughly explore and discuss potential legal risks and mitigation strategies.

In general terms, a legitimate claim of LPP may arise when:

- a request is made for legal advice and assistance following a particular event or incident that has potential legal risk
- engaging external legal representation may assist in creating an "arm's length" relationship and neutralise other potential purposes that could undermine the LPP claim
- the legal representative requests and commissions certain processes (such as an investigation) and the creation of relevant communications (such as a written report) so they can provide advice
- communications are limited in their dissemination and are received and reviewed by the legal representatives
- advice and recommendations are provided by the legal representatives based on the communications
- advice and recommendations are considered and/or implemented by the client, and
- the communications and their substance are not widely disclosed, distributed or circulated.

When facing the prospect of litigation or potential legal risk, an independent legal adviser may help to manage the initial response and obtain preliminary advice. It may also assist in ensuring that appropriate controls and protections (such as LPP) are validly maintained over relevant communications.

We would like to acknowledge the contribution of Joe McCombe and Katherine Sakoulas to this article.

Recent developments

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

Workplace aggression

We examine our employment Commissions' views on when aggressive workplace behaviour justifies dismissal.Recent case law suggests being involved in a workplace physical or verbal altercation doesn't automatically validate termination. Employers are put to a high standard when investigating and managing aggression in the workplace. *Click here to read more...*

A new dawn, a new day

SafeWork Australia has undertaken a review of the model work health and safety (WHS) laws. The subsequent report is due to be published in early-2019 and aims to propose actions for ministers to review and refine the legislation as deemed necessary. The review is expected to significantly influence the future of WHS regulation and policy in Australia, and potentially move WA and Victoria closer to harmonisation. *Click here to read more...*

Electrical safety

We examine a decision that provides a timely reminder of the consequences that can arise as a result of workplace incidents as well as useful context when considering what courts consider to be "reckless conduct". Employers and individuals with health and safety duties must ensure the health and safety of workers by taking steps to eliminate or minimise risks in the workplace, where reasonably practicable. *Click here to read more...*

SafeWork prosecution guidelines

SafeWork NSW published its updated Prosecution Guidelines, which it uses to "determine what enforcement action should be taken in response to risks which arise and incidents which occur" in workplaces. The Guidelines aim to streamline and clarify SafeWork NSW's approach to its enforcement obligations. *Click here to read more...*

From everyone at Sparke Helmore Lawyers, thank you for making us the Law Firm of the Year

We couldn't have done it without you.

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