SQUIRE SANDERS

WORKPLACE VIEW

December 2013

2013 - THE YEAR IN REVIEW

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As 2013 draws to a close, we reflect on what has been an eventful year for Australian workplace law. As well as changes to the *Fair Work Act 2009* (Cth) (FW Act), some of which will kick off on 1 January 2014, there have also been some significant case law developments including the High Court finally putting the controversial workers' compensation sex injury claim to bed.

We have highlighted below some of these changes as well as areas to be aware of as we move into 2014.

New Anti-Bullying Provisions

Earlier this year, amendments to the FW Act were implemented through the *Fair Work Amendment Act* 2013 (Cth). These included new anti-bullying provisions which take effect from 1 January 2014 and allow a "worker" who has been bullied at work to bypass their employer and apply to the Fair Work Commission (FWC) for an order to stop the bullying. A statutory definition of bullying will be introduced for the first time, namely "repeated unreasonable behaviour that creates a risk to health and safety". Thankfully for employers, reasonable management action (such as a performance management process) is specifically excluded.

In the event an application is made, the FWC must deal with it expeditiously within 14 days of receipt and, if it considers that bullying has occurred, it may issue an order to "stop the bullying" or make a number of other invasive orders such as conducting a review of the employer's policies or requiring additional training. However, the FWC will not have the power to make an order for compensation or reinstatement.

A 'stop bullying order' is undesirable because it may result in reputational damage. Furthermore, in the event of any prosecution under work health and safety legislation, it may provide evidence that bullying occurred and not all 'reasonable steps' were taken to prevent bullying. If a 'stop bullying' order is contravened, the FWC can impose fines of up to AU$51,000 for companies and AU $10,200 for individuals.

While the new coalition government has indicated that it supports the new anti-bullying provisions, it does propose to tinker round the edges by requiring workers to first seek help or impartial advice from an independent regulatory agency. There is also a proposal to expand bullying behaviour to include conduct of union officials towards workers and employers.

It will be interesting to see whether these changes lead to a wave of bullying claims early next year, as predicted by critics, but the FWC is certainly preparing the ground for it and has established an anti-bullying panel. We recommend that employers also prepare for this change by:

- updating and promoting workplace bullying and grievance policies;
- training managers on bullying and performance management policies and procedures;
- promoting internal remedies first; and
- conducting defensible investigations into complaints of bullying.

Expansion and Clarity for Flexible Working Requests

The expansion of the relatively new right to request flexible working arrangements took effect on 1 July 2013, also as part of the FW Act amendments. Prior to this date, employees were only eligible to make such a request if they had completed 12 months' service and had a child under school age or under 18 if they had a disability. Although the service requirement is unchanged, employees can now make a request if they:

- are a parent or guardian of a child who is school age or younger;
- are a carer;
- have a disability;
- are 55 or older;
- are experiencing family or domestic violence; or
- are caring for or supporting an immediate family or household member who requires care or support because of family or domestic violence.

The types of changes to working arrangements are unaffected and an employer can still refuse a request on "reasonable business grounds", which was previously subject to interpretation as this term was undefined.

However, the FW Act now provides guidance on what "reasonable business grounds" may include, such as:

- potential costs to the employer;
- capacity to change existing employees working arrangements to accommodate changes;
- practicalities of changing other employees working arrangements or recruiting new employees;
- likelihood of significant loss of efficiency or productivity; or
- negative impact on customer service.

If employers have not done so already, we recommend updating any parental leave policies to include the expanded eligibility grounds.

Further Family Friendly Rights

Some further amendments to the FW Act took effect on 1 July 2013 as part of the previous government's objective to ensure that family provisions accommodate the "modern family". These changes comprise of:

- **Concurrent leave** – previously parents of an employee couple (i.e. both parents are employed) were only entitled to three weeks unpaid concurrent parental leave taken in a single unbroken period. This has now been increased to eight weeks and also can be taken in broken periods of two weeks or less (if agreed) at any time in the 12 months after the birth or placement.
- **Special maternity leave** – in the event special maternity leave is required to be taken, that is, leave required due to pregnancy-related illness, any such leave taken does not reduce the employee's period of unpaid parental leave. Previously, any period of special maternity leave was deducted from the period of unpaid parental leave.
- **Transfer to a safe job** – if a pregnant employee is fit for work but it is inadvisable for her to continue in her present position during a stated period, she is entitled to be transferred to a safe job. In the event there is no safe job available then an employee who has more than 12 months of continuous service is entitled to be on 'paid no safe job leave'. If an employee does not meet the service requirement, they are still entitled to safe job leave albeit unpaid.

Further, there has been an increase in paid parental leave entitlements to two weeks of government funded pay at the national minimum wage for eligible dads and partners taking parental leave. Again, if employers have not done so already, we recommend reviewing parental leave policies to take account of these recent amendments.

In addition, some further changes to Modern Awards will take effect on 1 January 2014, which will require employers to consider the impact of family or caring responsibilities on employees when consulting in relation to changing employees' regular rosters or ordinary hours of work. In such circumstances, it is important to invite employees to give their views about the impact of any proposed changes to rosters or hours of work.

Gender Reporting Requirements

As discussed in our New Year Legal Round Up, the *Workplace Gender Equality Act* 2012 (Cth) (WGE Act) commenced on 6 December 2012 and reports for the first full reporting period for 2013–14 must be submitted between 1 April and 31 May 2014.

As a result of these changes, employers with more than 100 employees will be required to report against standardised gender equality indicators which should be set prior to the beginning of the reporting period in which they apply. As soon as reasonably practical after lodging the report, employers must inform employees and any members or shareholders that the report is being lodged and how it may be accessed.

Important case law developments

Some key decisions in 2013 included:

- **Recognition of implied duty of mutual trust and confidence** – the existence of this particular implied term in Australian employment contracts was recently confirmed by a majority decision of the Full Federal Court in *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83. It may go to the High Court on appeal and be overturned, however until such time, it is important to be aware that dealings with employees are subject to the implied term of mutual trust and confidence unless expressly excluded in employment contracts. Please click here for a full case summary and implications for employers.
- **Vicarious liability in sexual harassment claims** – in *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102, the Federal Court of Australia found Oracle vicariously liable for the sexual harassment of its employee by failing to take 'reasonable steps' in preventing the conduct from occurring. Although Oracle had in place a global policy and online training program, these were held to be inadequate in the context of Australian anti-discrimination legislation. Where overseas companies operate in Australia, it is important that policies and procedures are tailored to the Australian legislative context. Please click for a full case summary.
- **Clarity regarding workplace injuries** – the High Court of Australia has now clarified that employers will only be liable for injuries suffered by employees in the course of their employment (*Comcare* v *PVYW* [2013] HCA 41). Such injuries do not include injuries sustained during a sexual encounter while on a work trip, as was controversially the previous court's position. Please click here for further commentary on this case.

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Legislation Update

Legislative Instrument	Status	Key Proposed Changes
Minerals Resource Rent Tax Repeal and Other Measures Bill 2013 (Cth)	Introduced into Parliament on 13 November 2013 and read a first time; currently before the House of Representatives for a second reading debate; will need to overcome a hostile Senate to be passed.	• Delays the increase in the superannuation guarantee until 30 June 2016. The guarantee will remain at 9.25% until 30 June 2016 and then rise to 9.5% on 1 July 2016. It will then increase in half percent increments until it reaches 12% in 2021. • Repeals the Minerals Resource Rent Tax (Mining Tax). • Abolishes the previous government's low-income superannuation contribution and income support bonus (both of which were to be funded by the Mining Tax).

Employer Reminder

The silly season is upon us and employers should take care when arranging Christmas parties to avoid the risk of litigation. Regardless of where your Christmas party is held and whether it is inside or outside office hours, employers have an ongoing duty of care to employees who attend these events.

These are our tips for limiting your exposure during the silly season:

- Monitor alcohol consumption at Christmas events and lead by example –senior members of staff and those in human resources should not become intoxicated. Adequate food should be served.
- Have clear finishing times for functions and recommend safe travel arrangements for staff members who will be drinking.
- Inappropriate behaviour at Christmas parties can result in discrimination or harassment claims. Ensure your policies which cover harassment/discrimination/inappropriate conduct are up to date, that staff are reminded of them prior to Christmas events and that management lead by example.

Client Quiz

The first correct entry emailed to paula.rogers@squiresanders.com will win a copy of the West Australian Good Food Guide 2013 (delivery within Australia only)

Which of the following statements about the statutory anti-bullying regime (which will come into force on 1 January 2014) is incorrect?

a) Reasonable performance management is excluded from the definition of bullying;

b) Employees of non-incorporated employers and state public servants are covered by the regime;

c) The Fair Work Commission may issue orders to stop the bullying or prevent further bullying; or

d) The anti-bullying regime covers labour hire workers and contractors.

Did You Know? …

In November 2013, ASIC released a consultation paper relating to employee incentive schemes.

Employee incentive schemes (such as share schemes, options schemes) are aimed at aligning the economic interests of employers and employees by offering employees ownership interests in the company or financial returns linked to the company's success.

The consultation paper contains proposals aimed to reduce business costs and enhance economic efficiency while also ensuring participants are confident and informed about what they are being offered.

The new policy proposals include:

- expanding the categories of people who can participate in share schemes;
- providing greater flexibility in the way employee incentive schemes can be structured to better reflect market practices;
- reducing the administrative burden associated with reporting to ASIC; and
- expanding the situations in which unlisted bodies may offer employee incentive schemes.

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Back row L-R Bruno Di Girolami, Suzanna Dunsmore, Felicity Clarke, Dominique Hartfield, Andrew Burnett, Emily Tan
Front row L-R Jillian Howard, Janine De Sousa, Kylie Groves, Naomi McCrae
Absent - Luci Browne, Caitlin Cook, Anna Elliott and Elizabeth Maclean

Have a safe and happy festive season from Squire Sanders!