

## THE CREEP OF SEXUAL HARASSMENT

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Despite a greater general awareness of inappropriate workplace behaviours, sexual harassment continues to cause significant disruption and costs to Australian businesses. In response, there appears to be a growing trend among courts to find employers vicariously liable for sexual harassment by their employees and to award the victims significant damages in compensation. This trend is reflected in the following recent cases.

### ***Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102**

In this case, an employee who was verbally harassed by a fellow employee successfully claimed against her employer and was awarded \$18,000 in damages. The Federal Court found that the employer had not taken 'all reasonable steps' to prevent the harassment from occurring because its policy was based on global standards that failed to specify Australian standards.

The court said a policy must expressly:

- state Australian sexual harassment standards;
- identify the source of relevant legal standards;
- state that sexual harassment is unlawful and against employer policy; and
- explain that the employer can be held liable for sexual harassment by an employee.

The harassed employee also raised a number of deficiencies with the process the employer followed once she had made her complaint. While the court noted some minor deficiencies in the employer's handling of the complaint, including allowing the alleged harasser to continue to work closely with the employee during an investigation, the employer's defence had failed before the complaint was even made - because of its inadequate sexual harassment policy.

### ***Alexander v Cappello & Anor* [2013] FCCA 860**

A casual barista, who was subjected to daily verbal and physical harassment by her supervisor, was awarded more than \$100,000 in damages by the Federal Circuit Court. Over three quarters of the damages were payable by her employer, the café manager, with the remainder payable by the actual harasser.

This allocation of damages was the result of a finding that the employer was vicariously liable for sexual harassment by the supervisor. The court found that the barista's complaints had fallen on deaf ears because the employer had failed to deal with the situation properly once the complaint was made. The café manager had advised the barista to find work elsewhere, saying he could not afford to lose the supervisor.

The employer was also found to be in breach of the anti-victimisation provisions of the *Sex Discrimination Act* 1984 (Cth) for sacking the barista following her complaints, with the court not accepting the range of other reasons the café manager provided for terminating the barista's employment.



### **What is Sexual Harassment?**

*'... an unwelcome sexual advance or an unwelcome request for sexual favours or engaging in other unwelcome conduct of a sexual nature... in circumstances in which a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated'*

*Sex Discrimination Act 1984 (Cth), s28A*

# WORKPLACE VIEW

## ***Ewin v Vergara (No 3)* [2013] FCA 1311 and *(No 4)* [2013] FCA 1409**

In this case, the Federal Court ordered a contractor accountant, engaged by the employer through a labour hire agency, to pay \$476,000 in damages to an employee accountant who he had sexually harassed. The employee accountant agreed a private settlement of her compensation claims against the employer and labour hire agency arising from the actions of the contractor. The damages order against the contractor was made subject to an examination of the two private settlements to ensure she was not doubly compensated for the same events. The resulting examination saw the damages order against the contractor reduced to \$210,563 plus costs.

The contractor accountant raised a number of defences to the sexual harassment claim, including the fact that he was not a fellow employee and that areas near or around the office such as the lifts were not a 'workplace' for the purposes of the *Sex Discrimination Act* 1984 (Cth).

The court found the two accountants were not fellow employees, but were 'workplace participants' and therefore the harassment was a contravention of s28B(6) of the Act, which provides '*It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of both of those persons.*'

The court did not agree with the contractor accountant's narrow definition of 'workplace', stating the purpose of eliminating sexual harassment at work would be significantly undermined if associated common areas, such as entrances, lifts and corridors were construed as falling beyond the geographical scope intended.

## **What Do Employers Need to Do?**

- Employers must develop and communicate (including by training and refresher training) an effective sexual harassment policy specifically tailored to Australian law, setting out:
  - what sexual harassment is;
  - the type of conduct that constitutes sexual harassment;
  - that sexual harassment is unlawful;
  - the federal, state or territory anti-discrimination laws that apply in the workplace;
  - that legal action can be taken against individuals for sexual harassment and the employer can also be exposed to liability; and
  - that sexual harassment is against company policy.
- Employers must also develop a complaints and investigation procedure that:
  - is understandable and clear;
  - is well documented;
  - ensures action is taken promptly and confidentially; and
  - is fair, considerate, independent (if necessary) and balanced.



## **Did You Know? ...**

In 2014 the High Court will determine once and for all whether or not the duty of mutual trust and confidence is implied into employment contracts in Australia.

In October 2013 we reported that the majority of the Full Federal Court confirmed the existence of the implied term in employment contracts in the case of *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83. In doing so, the court accepted that the implied term had become part of Australian common law and recognised that the principle of mutual trust and confidence was already enshrined in employment contracts in England and Wales.

However, in a strong dissenting judgment, Jessop J found that the implied term had not made its way into Australian law.

Until the High Court provides a definitive answer on the status of the implied duty of mutual trust and confidence, employers should continue to exercise caution in taking any action which could be detrimental to the employment relationship.

# WORKPLACE VIEW

## Legislation Update

Legislative Instrument	Stage of Legislation	Key Proposed Changes
<i>Fair Work (Registered Organisations) Act 2009 (Cth)</i>	Currently before the Senate	<ul style="list-style-type: none"><li>• The establishment of a Registered Organisations Commission, which will monitor and regulate registered organisations and have investigative and information gathering powers.</li><li>• Amendments to the requirements on officers' disclosure of material personal interests and changes to the grounds for disqualification and ineligibility for office.</li><li>• An increase in financial accounting and disclosure obligations for registered organisations and their officers.</li><li>• Increased penalties and the introduction of criminal offences for serious breaches of officers' duties.</li></ul>

## Events Update

On 1 April 2014 Senior Associate Dominique Hartfield will be presenting "How to respond to complaints of workplace bullying, discrimination and sexual harassment – A guide for HR" at the New IR Law for HR Managers Conference. The conference is run by IES Conferences Australia and is being held at the Amora Jamison Hotel, Sydney.

To register, please contact 02 9425 7600 or [admin.manager@iesconferences.com](mailto:admin.manager@iesconferences.com)

## Employer Reminder

### 457 Visa update – Labour market testing in full swing

As of 23 November 2013, The Department of Immigration and Border Protection now requires standard business sponsors of 457 visa holders to undergo labour market testing (**LMT**). This means that sponsors must test the local labour market and demonstrate that there is no suitable Australian citizen or permanent resident to fill a position before they nominate an overseas worker for the role.

#### Requirements

Sponsors must provide evidence of recruitment activity undertaken during the 12 months prior to lodging a nomination. The evidence must include details of the advertising conducted and fees incurred. It can also include information about participation in relevant job and career expositions or research released in respect of recent market trends.

#### Exemptions

The only positive news is that there are some exemptions for LMT, in particular there are exemptions for ANZSCO skill level 1 and 2 occupations other than occupations deemed 'protected occupations'. Protected occupations include engineering and nursing positions in respect of which the LMT requirement continues to apply.

## Client Corner

### **Tonya Miller**

Organisational Development Manager,  
BGC Residential Pty Ltd/J-Corp Pty Ltd



### **What occupation would you have taken up if you had not done your current job?**

*I am very lucky to have fallen into HR as it is really a role that I enjoy, but it wasn't a profession that I had planned on getting into. I have no idea what else I would have done.*

### **What has been your best professional moment?**

*Probably one of my greatest professional moments was to encourage a senior (in years) individual that it was never too late to learn. I managed to convince him to go back and study (something that he hadn't done since he was 14) to get a supervisory certification. This gave him so much confidence and really pushed the boundaries of what he thought he could achieve.*

### **What do you do for fun and at the weekends?**

*I love to cook and spend my weekends doing just that. Weekends are also about our 4 kids who are still very young.*

### **What is the main HR/IR challenge that your business is facing currently? What employee issues are becoming relevant?**

*There are always many and varied HR challenges, but the burning challenge at the moment is that we are currently experiencing an increased demand for our houses, so we need to ensure that we have enough skilled employees to service this increased demand.*

### **What are two rules you try to live by?**

*If you are going to do something, do it properly; and*

*Slow down to speed up: 80% preparation, 20% execution.*

## Contacts



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