SQUIRE PATTON BOGGS

WORKPLACE VIEW

December 2014

2014 – The Year in Review

By Anna Elliott

On balance, 2014 has been a favourable year for employers. While employers started the year bracing themselves for an influx of bullying complaints following one of the most significant legislative amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) taking effect on 1 January, the numbers were much lower than expected and the Fair Work Commission (**FWC**) provided helpful guidance in respect of reasonable management action limitations. Another highlight was the highly anticipated High Court decision in *Commonwealth Bank of Australia v Barker*, which provided some much needed clarity and became one of the most significant employment law decisions of the last few years.

The impact of these highlights, and others, are summarised below.

Anti-Bullying Update

The most significant legislative amendment to kick off the year was the new anti-bullying laws, which amended the FW Act to allow a "worker" who reasonably believes they have been bullied at work to bypass their employer and apply to the FWC for an order to stop the bullying.

In deciding whether to make a stop bullying order, the FWC needs to be satisfied that the behaviour in question has been "repeated, is unreasonable, and creates a risk to health and safety".

The types of orders available to the FWC include:

- ordering an individual or group to stop the specified behaviour;
- requiring regular monitoring of the workplace and report backs;
- recommending changes to a bullying policy or requiring compliance with the bullying policy; and
- recommending training and information for the workplace.

The orders allow the FWC to intrude into the workplace and regulate day-to-day operations, including in one decision, dictating an employee's start and finish times, and limiting the number of emails sent.

Despite what many predicted, the FWC reported that, after reviewing more than 530 applications in the first nine months of 2014, **only one order** had been issued to prevent further risks. This is to be contrasted with a peak in adverse action claims this year and a drop in unfair dismissal claims.

Only current employees are eligible to lodge a complaint with the FWC, yet alleged bullying conduct that occurred prior to 1 January 2014 may be considered as the basis for a stop bullying order.

Although the new provisions do not allow the FWC to make orders on reinstatement or compensation, a breach of an order will attract a civil penalty and constitute an offence.

Thankfully for employers, it has been made clear that the new provisions should not inhibit a business from taking appropriate management decisions (such as performance management). Section 789FD of the FW Act provides that management decisions are not considered bullying if they are carried out in a reasonable manner, take into account the circumstances of the case, and don't leave the individual feeling victimised or targeted.

It is important to be aware that these laws are broad and apply not only to direct employees but also to labour-hire workers and contractors. There is now greater pressure on employers to be proactive in updating and promoting workplace bullying and grievance policies and promptly dealing with complaints before they escalate.

Changes to Privacy Laws

This year was meant to mark a big change in privacy law in Australia, with significant amendments to the *Privacy Act 1988* (Cth) (**Privacy Act**) coming into effect in March 2014, including new Australian Privacy Principles, new enforcement powers for the Privacy Commissioner, and mandatory privacy policies for entities caught by the Privacy Act.

However, despite all the fanfare, there has been very little by way of any real action by the Privacy Commissioner and the general feeling seems to be one of wondering what all the fuss was about. Indeed, the major activity has been more in the nature of criticism of the Privacy Act's labyrinthine drafting and how to make privacy policies both compliant and comprehensible. One or the other is easy, but achieving both is proving difficult.

For employers in Australia, the main issues remain, firstly, how broad is the "employee record" exemption in reality and, secondly, given that most organisations have both employees and contractors, is it just easier to get the necessary privacy consents from everyone, rather than rely on the exemption? Then there is the ongoing debate about what disclosure is necessary regarding the overseas transfer and storage of personal information, particularly within corporate groups when a "consolidated" privacy policy is considered desirable. Mix that all together with the differing privacy standards in Australia, the US and the EU, and it has been frustrating times for in-house privacy counsel.

Hopefully 2015 will provide more guidance – we all look forward to that although not to being the first ones chosen by the Privacy Commissioner for regulatory action!

Gender Reporting Update

This year marked the first time employers of more than 100 employees were required under the new *Workplace Gender Equality Act 2012* (Cth) to report on a range of workplace gender equality issues (the first reporting period was from April 2013 to March 2014).

Despite a few setbacks, including a delay in the implementation of minimum standards in connection with reporting and a watering down of those standards, the results from the first reporting period emphasised the need for improvement regarding gender equality in the employment sector.

Results from the reporting period, amongst other things, revealed that the average base remuneration for women in medium and large companies was 19.9% lower than men, while total remuneration was 24.7% lower.

Significant Case Law Developments

- ***Commonwealth Bank of Australia v Barker* [2014] HCA 32** – In this much awaited decision, all five members of the High Court found that a term of "mutual trust and confidence" should **not** be implied into Australian employment contracts at common law. The High Court unanimously found that, in order for a term to be implied, it must be "necessary", meaning that, without the term, the enjoyment of the rights conferred by the employment contract would be "rendered nugatory, worthless, or… seriously undermined". In doing so, the High Court decided that the implied term of mutual trust and confidence imposes mutual obligations wider than those which are necessary and, therefore, it is not within the power of the judiciary to imply the terms into contracts of employment.

The decision means that any employee or ex-employee who finds themselves in a situation, such as that which confronted Mr Barker, would not be in a position to maintain an action in damages based on the employer's breach of an implied duty of trust and confidence. However, the High Court also referred to the duty to co-operate and therefore employers should ensure they are seen to act co-operatively and in good faith in their performance of employment contracts to minimise employee claims. You can read a full case summary and the implications for employers in our Australian Employment Law Update (PDF).

- ***Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102** – The Full Court raised the bar this year by awarding AU$130,000 in damages to former Oracle employee and victim of workplace sexual harassment, Ms Richardson. The Full Court held that the previous award of AU$18,000 in general damages by the Federal Court in 2013 was "out of step" with prevailing community standards and disproportionately low having regard to the loss and damage which was suffered.

For employers, the exposure and cost of failing to comply with anti-discrimination and general protections laws is likely to increase significantly now that the award for damages will no longer confirm to a pre-existing range.

The Full Court's decision may trigger an increase in complaints lodged by employees and the amount of compensation sought. Accordingly, employers should ensure that there are clear, up to date policies regarding appropriate conduct in the workplace. Employers should become more proactive in providing staff with regular training and regularly assess the workplace culture to eliminate unnecessary risks. You can read more information on the full case in our January edition of Workplace View (PDF).

- ***Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 32** – In what appeared to be yet another win for employers, the High Court overturned a decision of the Full Court in finding that an employer may discipline an employee for misconduct even if it occurs while participating in lawful industrial action. The High Court, by a 3:2 majority, decided that while the reason for the employee's termination were connected to his participation in industrial action, that was not the reason for the termination.

Understandably, the High Court found that the employee's sign, which he held at the gates of BHP's premises and read "No principles, SCABS, no guts", was inappropriate and in violation of BHP's conduct policy. Whilst the decision appears to broaden the scope for which an employer can take legitimate adverse action against employees, an employer must be able to demonstrate that the reasons for taking the adverse action are separate from the exercising of workplace rights or the taking of industrial action. You can find more details on the case and its implications for employers in our November edition of Workplace View (PDF).

WORKPLACE VIEW

Did You Know?

Progress has been made towards WA occupational health and safety legislative reform with the State Government releasing the long-awaited draft *Work Health and Safety* Bill (**WHS Bill**) on 23 October 2014 for public consultation. Despite the State Government's long-standing resistance on high fines, the WHS 'green' Bill includes the same maximum penalties as the national model, being up to:

- AU$3 million for a body corporate convicted of reckless conduct;
- AU$600,000 and five years' imprisonment for an individual PCBU or officer convicted of a category 1 offence; and
- AU$300,000 and five years' imprisonment for other workers and non PCBUs or offices for reckless conduct.

Currently, under the *Occupational Health and Safety* Act *1985* (WA), WA is considered to have a relatively lenient penalty regime (maximum fines of AU$500,000) compared to other states that have adopted the national model.

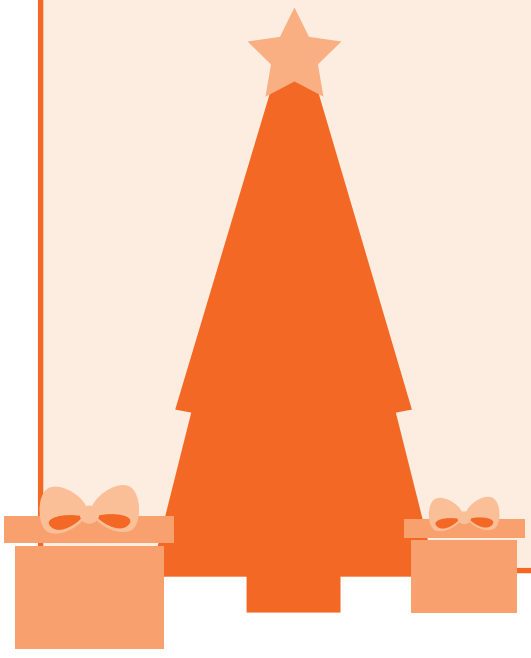
While the WHS Bill includes the main provisions of the national model, the State Government has not yet committed to adopting the provisions on union right of entry and the ability of health and safety representatives to direct the cessation of unsafe work.

The WHS Bill is open for a three month public comment period until 30 January 2015. All stakeholders have been encouraged to participate in the consultation process and submit any comments to better facilitate the future of health and safety in WA workplaces.

Employer Reminder

With the silly season upon us, employers should take care when organising work celebrations to avoid the risk of litigation. Regardless of when or where your Christmas party is held, employers have an ongoing duty of care to employees who attend these events. Employers should recommend safe travel arrangements for staff members who will be drinking and have clear policies in place regarding inappropriate behaviour at these events.

Although Christmas functions are usually a time for us all to blow off some steam, employers should be mindful of how they speak to employees. As one employer found out recently in a decision by the Fair Work Commission, telling an employee to "F*** off" could constitute constructive dismissal. You can read our article which covers this case on our Employment Law Blog.



Client Quiz

Santa is thinking of asking some of his Elves to work on Christmas morning. Which of the following factors does not make his request to work on a public holiday a reasonable (and therefore lawful) request?

(a) More than 130 million children were born in 2014 and Santa needs all hands on deck to get the presents ready for delivery;

(b) Two weeks' advance notice will be provided to the Elves requested to work;

(c) Only Elves without family will be requested to work; or

(d) In return for working on Christmas morning, the Elves will be allowed to leave half an hour earlier on their next shift.

The first correct answer emailed to isla.rollason@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Legislation Update

Legislative Instrument	Stage of Legislation	Proposed Changes
Work Health and Safety Bill (**WHS Bill**) 2014	Draft WHS Bill has been released for public consultation	A draft WHS Bill was released on 23 October 2014 as a 'Green Bill' for public consultation until 30 January 2015. It does not necessarily represent the State Government's settled position and further debate on the proposed WHS Bill will continue into 2015 before a final WHS Bill is settled on. This will then need to go through the WA Parliament before becoming legislation. Key issues: • Contains the core provisions of the national WHS model developed by Safe Work Australia for implementation by Australian states and territories. Key provisions include: - expanding the concept of 'primary duty holder' from Employer or Principal to a 'Person Conducting a Business or Undertaking' (**PCBU**); - requiring Officers to exercise due diligence and take active steps to ensure their PCBU complies with relevant obligations; and - significantly increasing current OSH penalties.
Sex Discrimination Amendment (Boosting Superannuation for Women) Bill 2014	House of Representatives – second reading speech delivered on 1 December 2014	• Amends the *Sex Discrimination Act* 1984 (**SD Act**) to allow employers to make higher superannuation contributions for women employees without breaching discrimination laws or having to apply for an exemption. • Currently, the SD Act prohibits employers from discriminating against an employee on the grounds of the employee's sex unless an exemption is sought. • The amendment seeks to address issues relating to financial gender imbalance flowing from statistics that the average superannuation account balance for men is AU$82,615 compared to AU$44,866 for women.

Contacts

Kylie Groves
Partner
T +61 8 9429 7475
E kylie.groves@squirepb.com

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

Felicity Clarke (Editor)
Senior Associate
T +61 8 9429 7684
E felicity.clarke@squirepb.com

Dominique Hartfield (Editor)
Senior Associate
T +61 8 9429 7500
E dominique.hartfield@squirepb.com

Anna M. Elliott
Senior Associate
T +61 2 8248 7804
E anna.elliott@squirepb.com