CORPORATE GOVERNANCE & SEXUAL HARASSMENT – RESPONSE
RECOMMENDATIONS FOR EMPLOYERS

HARMERS WORKPLACE LAWYERS
SWISSOTEL SYDNEY
THURSDAY 28 AUG 2014
Sexual harassment in executive culture

One of Australia’s leading sexual harassment lawyers says a 'boozy, boysie' culture still prevails in the modern workplace, with senior executives taking clients to strip clubs and brothels, and co-workers spiking the drinks of female employees at corporate functions.

Michael Harmer - who has run sexual harassment cases against leading firms including Oracle, PricewaterhouseCoopers and David Jones - says that these practices are prompting a rise in the number of complaints coming through his door.
AGENDA

- Introduction
- A brief overview of Workplace Relations
  - Key developments
  - Future directions
- Foundations of the law – Sexual Harassment
- Radio National Part 2
- Lessons from recent sexual harassment cases
- 730 Report - *Vergara v Ewin*
- Legal Risk Management Model
- Questions and discussion
INTRODUCTION & KEY DEVELOPMENTS IN WORKPLACE RELATIONS IN AUSTRALIA

MICHAEL HARMER
CHAIRMAN & SENIOR TEAM LEADER
JANUARY 2014

01/01  -  commencement of the Fair Work Commission (FWC) Anti-Bullying regime

-  beginning of the 2014 FWC Review of Modern Awards (four year review)
<table>
<thead>
<tr>
<th>Date</th>
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<tr>
<td>10/02</td>
<td>Royal Commission announced – Trade Union Governance and Corruption</td>
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<td>10/02</td>
<td>Toyota (Ford 06/13); Holden 12/13)</td>
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<td>SPC Ardmona</td>
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<td>19/02</td>
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## CHRONOLOGY

### MARCH 2014

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<tr>
<th>Date</th>
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<tr>
<td>06/03</td>
<td>FAIR WORK AMENDMENT BILL 2014</td>
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<td>- second Reading Debate</td>
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<td>07/03</td>
<td>Productivity Commission Review of the Workplace Relations Framework</td>
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<td>- draft Terms of Reference</td>
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<td>27/03</td>
<td>Senate Committee Reports due for:</td>
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<td></td>
<td>(a) Bill to reinstate ABCC</td>
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<td>(b) Fair Work (Registered Organisations) Bill 2013</td>
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<tr>
<td>March</td>
<td>Debate continues concerning the proposed new Paid Parental Leave Scheme (due for implementation 01/07/2015)</td>
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**APRIL 2014**

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<tr>
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<tr>
<td>01/14</td>
<td>Revised Reporting requirements for the <em>Workplace Gender Equality Act 2012</em></td>
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<td>15/04</td>
<td>Controversy over statistical composition of the Fair Work Commission Full Benches</td>
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<tr>
<td>17/04</td>
<td>Advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code 2014 to apply to post 24/4 EBAs despite delay to foundational legislation</td>
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<tr>
<td>28/04</td>
<td>Fair Work Commission ruling on Financial Services Council challenge to the default superannuation expert panel.</td>
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CHRONOLOGY

MAY 2014

Heydon Royal Commission continues

12/05  -  Fair Work Commission interprets “bullying” and the reasonable management action qualification to the Anti-Bullying Jurisdiction – *Ms SB [2014] FWC 2104*

13/05  -  Federal Budget – paid parental leave from 01/07/2015

-  income cap of $100,000.

15/05  -  Fair Work Commission Full Bench reduces certain casual Sunday penalty rates from 75% to 50% in the Restaurant and Catering Industry
JUNE 2014

Heydon Royal Commission continues

04/06 - Fair Work Commission decision to lift National Minimum Wage by 3%

19/06 - NSW Parliamentary Inquiry calls for State anti-bullying legislation to mirror Fair Work Act provisions

19/06 - Fair Work Commission project to identify EBA clauses that enhance productivity and innovation
**JULY 2014**

Heydon Royal Commission continues

01/07  -  New Minimum Wage Rates apply
         -  Transition to modern award rates of pay concludes

15/07  -  *Richardson v Oracle Corporation [2014] FCAFC 82* raises standards for non-economic loss arising from sexual harassment

CHRONOLOGY

AUGUST 2014

Heydon Royal Commission Continues

12/08 - Vergara v Ewin Federal Court Appeal Decision
$500k damages for sexual harassment

13/08 - FWC Full Bench Guidance on the Four Yearly Review of Modern Awards

25/08 - Building and Construction Industry (Improving Productivity) Bill 2013 to come before the Senate
AUGUST 2014

25/08  - Federal Court rejects appeal against FWC decision to reduce Sunday penalty rates for Restaurant employees

27/08  - Fair Work Amendment Bill 2014
Passed by the House of Representatives 27/08/2014
Uncertain passage through Senate

27/08  - Federal Cabinet yet to approve Productivity Commission Review of the Workplace Relations System
WORKPLACE RELATIONS REFORM LONGER TERM TIMELINE

Federal Election (Half Senate Election)

W.A. Half Senate Elections

Amendment Bill likely to be passed

Next Federal Election

New Anti-Bullying Regime

Change in Senate Composition

PC Report

Further change in the Senate Composition
FAIR WORK AMENDMENT BILL 2014

- Greenfields agreements
- Right of entry
- Individual flexibility agreements
- Transfer of business
- Other - dismissal of unfair dismissal applications
  - unpaid parental leave
  - annual leave loading
PRODUCTIVITY COMMISSION REVIEW

- Assess the performance of the system
- Advise on the most appropriate long term framework
- Test capacity for adaptation to the global economy
- Wide range of issues specified
  - Balancing interests of employers, employees, contractors, and the economy
WORKPLACE RELATIONS REFORM
LONGER TERM TIMELINE

- Federal Election (Half Senate Election)
- W.A. Half Senate Elections
- Amendment Bill likely to be passed
- Next Federal Election
- New Anti-Bullying Regime
- Change in Senate Composition
- PC Report
- Further change in the Senate Composition
Overview

- What obligations are there for employers and senior management?
- What’s new? Recent developments in respect of these obligations.
SOURCES OF OBLIGATIONS FOR EMPLOYERS AND SENIOR MANAGEMENT

- **Sex Discrimination Act 1984 (Cth) and Anti-Discrimination Act 1977 (NSW)**
- **Fair Work Act 2009 (Cth)**
- **Work Health and Safety Act 2011** – for both Federal and NSW Jurisdictions
- **Corporations Act 2001 (Cth)**
Prohibition on sexual harassment (sections 28A and 28B)

What is sexual harassment?

A person sexually harasses another person (the person harassed) if:

a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which:

- a reasonable person
- having regard to all the circumstances
- would have anticipated the possibility that
- the person harassed would be offended, humiliated or intimidated.
The circumstances to be taken into account include:

a) any prescribed attribute of the person – that is, the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;

c) any disability of the person harassed;

d) any other relevant circumstance.

‘Conduct of a sexual nature’
This includes:

- making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.
The prohibition on sexual harassment
Broadly, it is unlawful for a person to sexually harass another person in the context of employment. This prohibition applies to:

- an employer; a fellow employee; or a partner in a partnership; and

- a ‘workplace participant’ where the sexual harassment occurs at a place that is a workplace of either the ‘harasser’ or the person harassed.

‘Workplace’ defined very broadly – includes ship, aircraft vehicle. Applies to any place where the ‘workplace participant’ carries out functions in connection with being a ‘workplace participant’.
Sexual harassment may also constitute discrimination on the ground of sex

- *Aldridge v Booth* (1988) 80 ALR 1
- Confirmed in *Hall v Sheiban* (1989) 20 FCR 217
- Cited in numerous sexual harassment cases including *Elliott v Nanda* (2001) 111 FCR 240
Sex Discrimination Act 1984 (Cth) Continued

- Victimisation provisions also apply (section 94)

Prohibition on victimisation
A person must not commit an act of victimisation against another person.

It is an offence under the Sex Discrimination Act to contravene this prohibition.

The maximum penalties are as follows:
- $2,500 and/or 3 months imprisonment – for an individual;
- $10,000 – for a body corporate.
What is victimisation?
Person 1 engages in victimisation if the person subjects, or threatens to subject, Person 2 to any detriment on the ground that Person 2 has or proposes to:

- make a complaint to the AHRC; commence proceedings; participate in AHRC proceedings; assets their own rights or the rights of another under the AHRC Act; or
- has made an allegation that a persons has done an act that is unlawful by reason of a provision of Part II of the Act [this includes sexual harassment];

or Person 1 believes that Person 2 has done, or proposes to do, any of the above.

The only defence to victimisation is as follows: if it is proved that the allegation was false and was not made in good faith.
Vicarious liability of employers (section 106)

Section 106 of the Sex Discrimination Act provides that:

- Where an employee or agent of a person, in connection with the employment or agent’s duties, engages in unlawful sexual harassment; then
- the Sex Discrimination Act applies to the person (ie the employer or principal) as if they had engaged in that unlawful sexual harassment personally.

The only defence available to the person (ie the employer or principal) is:

- if the person took all reasonable steps to prevent the employee or agent from doing the “acts of the kind referred to”, ie engaging in sexual harassment.
Prohibition on sexual harassment (sections 22A and 22B)

What is sexual harassment?

- More concise version of the drafting in the Sex Discrimination Act
- Defined as:
  A person sexually harasses another person (the person harassed) if:
  (e) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
  (f) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which:
- a reasonable person
- having regard to all the circumstances
- would have anticipated the possibility that
- the person harassed would be offended, humiliated or intimidated.
Prohibition on sexual harassment
- drafted in substantially the same terms as the Sex Discrimination Act
- **Ancillary liability** (section 52)
  “It is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act.”
- **Vicarious liability** (section 53)

Recent developments:
- *Ewin v Vergara* line of cases
- *Richardson v Oracle*
  Both of these cases will be discussed in detail later in this seminar.
Other recent developments:

- **Alexander v Capello & Anor** [2013] FCCA 860:
- **Shammas v Canberra Institute of Technology** [2014] FCA 108
- **James v Wild Food Highlands** [2012] NSWADT 111
General Protections provisions – prohibition on ‘discrimination’ (section 351)

Ancillary liability – involvement in a contravention of the *Fair Work Act* (section 550)

Recent developments:
*Kassis v Republic of Lebanon* [2014] FCCA 155
*Daglish v MDRN Pty Ltd (t/as McCarthy Durie Lawyers)* [2014] FCCA 1138
Work Health and Safety Legislation

- Model Work Health and Safety Act and Regulations


- Primary duty of care imposed on a Person Conducting a Business or Undertaking (‘PCBU’) – Section 19

- Duty of ‘due diligence’ imposed on officers of the PCBU – Section 27

Recent developments:
- *Workers Compensation Nominal Insurer v Brasnovic* [2013] NSWDC
DIRECTOR’S DUTIES UNDER THE CORPORATIONS ACT 2001 (CTH)

- ‘Care and diligence’ (section 180(1))
- Business Judgment rule (section 180(2))
- ‘Good faith’ obligation (s 181)
- No misuse of position or information (ss 182 and 183)

Recent developments:

No recent developments which are particularly relevant to the WHS context.
Sexual harassment in the workplace: part 2

A rampant 'boozey boysie' culture in the corporate world is prompting a rise in the number of sexual harassment complaints in Australia, and triggering an increase in the level of pay-outs to settle such complaints.

Leading workplace lawyer Michael Harmer says he has negotiated pay-outs of up to $10 million to settle sexual harassment cases.

Mr Harmer represented former media adviser James Ashby in his sexual harassment suit against former Federal Speaker Peter Slipper.
LESSONS FROM RECENT SEXUAL HARASSMENT CASES

MARGARET DIAMOND
GENERAL COUNSEL & TEAM LEADER
Background Facts
“Quite frankly, Randol’s sexual harassment was easier to deal with than HR’s treatment of my complaint has been. As I also said to you last week, I regret ever having involved HR in this situation.”
LEGAL ISSUES

- Did Randol Tucker’s conduct constitute sexual harassment?
- Was Oracle vicariously liable for Randol Tucker’s conduct?
- Once liability was established, what damages flowed from that?
General damages are awarded to compensate for the emotional and psychological impact of the wrong doing.

Damages for economic loss are awarded where the wrong doing has caused losses of a monetary kind such as lost wages.
DAMAGES AWARDED AT FIRST INSTANCE

- $18,000 for general damages
- No economic loss damages
Full court increased general damages award to $100,000 and also recognised that Mr Tucker’s conduct was a material cause of Rebecca Richardson’s decision to leave Oracle and so awarded damages for economic loss of $30,000.
LESSONS FROM RICHARDSON

- Audit internal procedures against AHRC Code of Practice.
- Ensure complaints handling process does not exacerbate harm:
  - Ensure arrangements which are put in place whilst the complaint is being investigated are sensitive and take into account the practicalities of the employees working arrangements;
  - Take the time to think through how employees work, interact and communicate with each other to perform their roles and what risks arise from this;
  - Think through the implications for the complainant of any changes in working arrangements; and
  - Take the complainant seriously do not assume that the complainant is exaggerating or causing an unnecessary fuss.
BACKGROUND FACTS:

- James Ashby was hired as a media advisor to the former Speaker, Peter Slipper.
- James Ashby brought proceedings against Mr Slipper and the Commonwealth alleging, amongst other things, that:
  - Slipper had a practice of hiring young homosexual men for a particular purpose;
  - Once James Ashby commenced employment with Mr Slipper, Mr Slipper subjected him to sexual harassment and it became apparent that Mr Slipper was intending to follow a similar pattern with Mr Ashby;
BACKGROUND FACTS:

- There was a clear evidentiary basis for this in the text messages which had been sent between Mr Slipper and James Ashby, the content of which had been made known to the Commonwealth reasonably early on;

- The Commonwealth and Mr Slipper sought to strike out the proceedings on the basis that the proceedings had been brought to discredit Mr Slipper for political purposes and were not a genuine claim;

- The Commonwealth settled with James Ashby before the strike out application was heard;
BACKGROUND FACTS:

- The strike out application was initially successful but was overturned by the Full Federal Court on appeal, on the basis that there was no evidence to support a political conspiracy of any kind, but instead, Mr Slipper’s communications towards James Ashby were capable of amounting to sexual harassment;

- By then, things had moved on considerably for both Peter Slipper and James Ashby and the matter was not taken any further.
LESSONS FROM THE SLIPPER CASE

- PATTERN FEATURES:
  - Distrust of complainant regardless of known facts
  - Expedient support for perpetrator
FINAL LESSON

Awareness and critical thought
CORPORATE GOVERNANCE RESPONSE MECHANISMS FOR EMPLOYERS

MICHAEL HARMER
CHAIRMAN & SENIOR TEAM LEADER
ABC 7:30 PROGRAM
Sexual harassment victim demands inquiry into police investigation
- Vergara v Ewin [2014] FCAFC 100
LEGAL RISK MANAGEMENT

MICHAEL HARMER
CHAIRMAN & SENIOR TEAM LEADER
HARMERS WORKPLACE LAWYERS ("HWL")
LEGAL RISK MANAGEMENT MODEL ("THE MODEL")

PREVENTION

1. Corporate Commitment and Leadership
2. People Commitment and Business Culture
3. Allocation of Responsibility
4. Understanding Legal Obligations and Opportunities
5. Risk Identification, Analysis, Assessment and Prioritisation
6. Introduction of Risk Controls
7. Supervision, Training and Enforcement
8. Monitor and Review
REACTION

1. Specific Emergency Response Plans
2. Internal Reports
3. External Reports
4. Internal Investigation
5. External Investigation
6. Steps to Prevent Recurrence
7. Risk Transfer
8. Monitor and Review
QUESTIONS AND DISCUSSION
CORPORATE GOVERNANCE & SEXUAL HARASSMENT – RESPONSE
RECOMMENDATIONS FOR EMPLOYERS

HARMERS WORKPLACE LAWYERS
RACV
TUESDAY 2 SEPTEMBER 2014
FOUNDATIONS OF LAW - SEXUAL HARASSMENT (VICTORIA)

SOPHIE REDMOND
SENIOR ASSOCIATE & TEAM LEADER
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- *Fair Work Act 2009 (Cth)*

- *Occupational Health and Safety Act 2004 (VIC)*

- *Corporations Act 2001 (Cth)*
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The only defence available to the person (ie the employer or principal) is:

- if the person took all reasonable steps to prevent the employee or agent from doing the “acts of the kind referred to”, ie engaging in sexual harassment.
What is sexual harassment?

- Substantially the same definition
- Slightly broader than the drafting in the Sex Discrimination Act:
  - Specifically, ‘conduct of a sexual nature’ additionally includes:
    - subjecting a person to any act of physical intimacy
    - Making any gesture, action or comment of a sexual nature in a person’s presence.
Prohibition on sexual harassment

- The Victorian Act imposes the prohibition across a range of areas, being harassment:
  - By employers and employees;
  - In common workplaces;
  - By partners in firms;
  - In industrial organisations;
  - By members of qualifying bodies;

Note: mentioning only those areas potentially relevant to employment.

Note: Protection of volunteers in employment: ‘employment relationship’ definition extended to volunteers for purposes of this prohibition.
Ancillary liability (sections 105 and 106)

- Referred to in the Victorian Act as ‘authorising and assisting’ discrimination and sexual harassment
- A person must not request, instruct, induce, encourage, authorise or assist another person to contravene a provision of Part 6 (s 105)
- If there has been an actual contravention of Part 6, then a person can bring a complaint to the Commission or to VCAT (s 106)
Equal Opportunity Act 2010 (VIC)

Vicarious liability (section 109)

- Substantially the same terms as the Sex Discrimination Act.
- Defence against vicarious liability – taking “reasonable precautions” vs “all reasonable steps” (s 110)

Positive duty to eliminate sexual harassment (s 15)

- Where a person has a duty not to discriminate (for example, an employer), then the Act imposes a positive duty upon that person to avoided engaging in discrimination, sexual harassment and victimisation AND
- To take reasonable and proportionate steps to eliminate discrimination, sexual harassment and victimisation.
- Some guidance on what constitutes reasonable and proportionate measures (section 15(6))
Recent developments in respect of sexual harassment:

- *Ewin v Vergara* line of cases
- *Richardson v Oracle*
  Both of these cases will be discussed in detail later in this seminar.

Other recent developments:

- *Alexander v Capello & Anor* [2013] FCCA 860:
- *Shammas v Canberra Institute of Technology* [2014] FCA 108

Also:

FAIR WORK ACT 2009 (CTH)

- **General Protections provisions** – prohibition on ‘discrimination’ (section 351)

- **Ancillary liability** – involvement in a contravention of the *Fair Work Act* (section 550)

- Recent developments:
  - *Kassis v Republic of Lebanon* [2014] FCCA 155
  - *Daglish v MDRN Pty Ltd (t/as McCarthy Durie Lawyers)* [2014] FCCA 1138
As an employer, you have an overarching duty, as far as reasonably practicable, to provide a safe and healthy workplace for your workers and contractors.

Recent developments:
- *Brown v Maurice Blackburn Cashman* [2013] VSCA 122
- *Victorian WorkCover Authority v Asahi Beverages Australia Pty Ltd (Ruling)* [2014] VCC 1260
- *Willett v State of Victoria* [2013] VSCA 76
‘Care and diligence’ (section 180(1))
Business Judgment rule (section 180(2))
‘Good faith’ obligation (s 181)
No misuse of position or information (ss 182 and 183)

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HARMERS WORKPLACE LAWYERS RACV

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