Employment Law Update

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The *Fair Work Act* Anti-Bullying Regime

1. Introduction

Bullying is not confined to the playground. Unfortunately, it also occurs at work. Bullying is not just a serious health issue. It has been estimated to cost the Australian economy between $6 and $36 billion every year. It also generally costs employers about $20,000 per claim.

2. Before 1 January 2014

Prior to 1 January this year, there was no legislation that specifically prohibited workplace bullying. A bullied worker had to rely on a variety of avenues depending on the type of bullying or whether an injury was suffered, including internal workplace policies, employer codes of conduct, grievance procedures in an employment contract, work health and safety laws, workers' compensation legislation and anti-discrimination legislation (state or federal depending on the type of discrimination). In rarer circumstances, and often the most serious cases, a bullied worker made a civil or criminal claim.

3. New anti-bullying regime

On 1 January 2014, a new, Federal anti-bullying regime came into effect. Contained in Part 6-4B of the *Fair Work Act 2009* (the **Act**), the new provisions make workplace bullying unlawful, and allow workers to apply to the Fair Work Commission (**FWC**) for redress. It is important to note, however, that the new anti-bullying laws do not replace any of the pre-existing avenues. This means employees can make multiple claims, exposing employers to even greater liability.

4. Preliminary issues

Before turning to what constitutes bullying under the new regime, we will address some fundamental preliminary issues.

4.1 Timing

Firstly, the new law is retrospective. It applies to bullying that occurred before 1 January 2014, and any bullying after that date.

4.2 Who is covered?

Secondly, the law protects 'workers'. 'Worker' is broadly defined, and includes employees, contractors, subcontractors, employees of contractors or subcontractors, employees of labour hire companies, apprentices, volunteers, trainees, students on work experience, and outworkers (outworker – an employee or contractor who works for another's business from their private residence).

4.3 At work

The worker must be 'at work'. 'At work' is not defined in the Act. However, based on case law on the meaning of 'at work' in work health and safety legislation, we are confident that a worker is 'at work' when they are performing work activities and that the definition is not necessarily limited to the confines of the physical workplace.

It is not currently clear whether the new anti-bullying laws extend to work functions, social media interactions or non-traditional workplace arrangements. Employers are still generally liable for their employees' actions at work functions. As such, the prudent employer should operate as if the new laws extend to all work events. Given the mainstream popularity of social media it is inevitable that allegations of workplace bullying connected with social media will develop a body of case law in the near future.

4.4 Constitutionally-covered business

Finally, the worker must be at work 'in a constitutionally-covered business'. The definition of 'constitutionally-covered business' is convoluted; however, it effectively captures most workers in Australia, including most Commonwealth employees.

The definition does not include state government employees or employees of unincorporated bodies, such partnerships, sole traders and not-for-profit associations.

5. What is bullying?

Bullying is defined in section 789FD of the *Fair Work Act* as follows:

> (1) A worker is bullied **at work** if:
>
> (a) while the worker is at work in a constitutionally-covered business:
>
> (i) an individual; or
>
> (ii) a group of individuals;
>
> **repeatedly** behaves **unreasonably** towards the worker, or a group of workers of which the worker is a member; **and**
>
> (b) that behaviour creates **a risk to health and safety**.

For a claim to be successful, three things must be proved.

5.1 Behaves unreasonably

Firstly, the behaviour must be 'unreasonable'. Unreasonableness is not defined, but is assessed objectively with regard to all the facts of the case. According to the FWC, bullying behaviour may include, but is not limited to:

- Aggressive or intimidating conduct.
- Belittling or humiliating comments.
- Spreading malicious rumours.
- Teasing and practical jokes.
- Initiation ceremonies and hazing.
- Victimisation.
- Exclusion from work-related events.
- Unreasonable work expectations.
- Displaying offensive material.
- Pressure to behave in an inappropriate manner.

5.2 Repeatedly

Secondly, the behaviour must occur more than once. It follows that two incidents or twenty incidents can equally amount to bullying. Also, the same type of bullying does not have to be repeated; a range of different conduct is sufficient.

5.3 Creates a risk to health and safety.

The final element is that the behaviour must create a risk to health and safety. Some important things to note are as follows:

- The test for whether there is a risk to health and safety is objective.
- Whether the alleged victim believed their health or safety was at risk is relevant but is in no way conclusive.
- The behaviour must *cause* (or substantially cause) the risk to health and safety.
- While actual danger is not required, the possibility of risk must be real and not merely conceptual.
- Proof of actual harm or injury is not required; just the risk to health and safety need be established.

6. Case studies

To see what this all means in practice, let's look at some cases.

6.1 Applicant v General Manager and Company C [2014] FWC 3940

In this case, the worker alleged that that her manager had bullied her by (amongst other behaviour): excluding her from meetings; behaving in an aggressive manner; and twice yelling at her. The FWC held that bullying was not made out because:

- The behaviour was deemed to be reasonable in the circumstances. The manager had made direct contact with other team members not to exclude her, but to get a variety of views on improving the department's performance. In regard to the aggressive behaviour, the Commissioner noted that 'it is to be expected that people, including managers, will from time to time get upset and

angry and will express that upset and anger'. Importantly, the behaviour was not repeated.

- There was a lack of evidence that the manager had raised his voice. Even if he had, it was not unreasonable on this particular occasion.

Note: This case is in no way a precedent to the effect that managers, or any workers, are permitted to yell or be aggressive towards other workers. However, it does highlight the fact that, when applying the new anti-bullying laws, the Fair Work Commission appreciates the reality of the modern Australian workplace, and this includes that heated conversations between co-workers will occur from time to time.

6.2 Application by Ms SB [2014] FWC 2104

In this case Ms SB alleged that two of her co-workers had made vexatious allegations against her, and had spread inaccurate rumours. The FWC held that such behaviour, if repeated, could constitute bullying. However, on the facts, the Commissioner held:

- There was insufficient evidence that the behaviour had occurred.
- If it had occurred, it was not unreasonable, because there was no evidence that the co-workers had intentionally made false accusations.
- To the extent that the behaviour might have been unreasonable, it did not create a risk to health and safety.

7. The Defence of 'Reasonable Management Action'

These anti-bullying laws provide one 'defence' or qualification to the definition of bullying; that is, bullying does not include 'reasonable management action carried out in a reasonable manner': s 789FD(2). In other words, reasonable management action is unlikely to constitute unreasonable behaviour (and hence not be bullying for the purposes of the Act).

7.1 Reasonable management action

'Reasonable management action' is not defined in the Act. However, the Commissioner has asserted that the aim of the qualification is to exclude everyday actions that direct and control the way work is carried out. This includes:

- Disciplinary action for misconduct.
- Performance appraisals and performance management.
- Requesting a worker to perform reasonable tasks or duties.
- Maintaining reasonable workplace standards.

7.2 Reasonable manner

In addition, any reasonable management action must be conducted in a reasonable manner. If not, the management action may constitute bullying. Reasonableness is assessed objectively, and will depend on the facts; for example, whether procedural fairness has been applied and company policies followed.

The onus is on the employer to prove that:

a) the management action was reasonable; **and**
b) the manner in which the management action was taken was also reasonable.

8. Remedies

If the victim worker successfully proves that bullying has occurred, what remedy is available? The most important point to note is that the FWC cannot compensate the worker or make any pecuniary award.

According to the Act (s 789FF), if the FWC is satisfied that a worker has been bullied ***and*** there is a risk that the bullying will continue, it may 'make any order it considers appropriate' to prevent the worker from being bullied. For example, the orders could be that the bully be forbidden from having contact with the victim alone, or from commenting at all on the worker's clothes or appearance (as in *Applicant v Respondent FWC Order, PR548852*).

If an individual or the employer does not comply with a stop-bullying order, the Federal Court may impose a civil penalty (the maximum penalty being $51,000 for companies and $10,200 for individuals).

9. Costs and Losses

Bullying complaints are often very costly to any business. External costs include fines and penalties; human resource advisors; independent workplace investigators; counselling services; and legal fees in obtaining advice and defending and/or settling claims.

Although the internal costs and losses are equally substantial, they are frequently underappreciated. Common internal costs and losses include:

- Loss of productive work time dealing with the complaint (victim; bully; witnesses; supervisor and management discussing and responding to the complaint; preparing witness statements; participating in investigations; taking legal advice; attending the FWC etc.).
- Loss of productivity due to demotivated and distracted staff performing work poorly or not all.
- Poor work performance by bullying victims can lead to poor delivery of services to customers or defective products.
- Bullied workers taking personal/sick leave, unauthorised breaks, extended lunch and other breaks, and starting late and/or finishing early.
- Unchecked bullying incidents can create a culture of acceptance, increasing the volume of bullying incidents, bullies and victims.
- Damage to the business' reputation from customers witnessing or experiencing a bullying incident; public knowledge via FWC hearings and decisions; or from the media.
- Increased staff turnover and recruitment costs.

Given the significant external and internal costs and losses, all business operators should ensure that bullying does not occur; and, if it does, management must ensure that any such bullying complaints are addressed quickly and managed in a reasonable, sensitive and confidential manner in accordance with any applicable policy.

10. Conclusion

In summary:

- The new anti-bullying regime does not replace existing legal avenues for workers who are victims of unsafe practices, discrimination, harassment or bullying in the workplace.
- The aim of the anti-bullying regime is to prevent bullying, not to compensate victims of bullying.
- Whether bullying has occurred will always depend on the facts and context of the case.

Whilst there were some concerns that the new anti-bullying regime would open the floodgates to claims, this has not been the case. At the time, these concerns had some merit given the significant media coverage and literature published by the Federal Government, unions and other interested parties, in addition to the relative inexpensiveness in pursuing a bullying claim (alleged bullying victims pay a FWC filing fee of $67.20 and can represent themselves). The FWC had initially expected 900 claims per quarter; but to the end of March 2014, there were only 151. There is little doubt that the primary reason for this is that the FWC is unable to make compensation or pecuniary orders. Opportunists and fraudsters need not apply!

Nevertheless, all employers should familiarise themselves with the relatively new anti-bullying laws, particularly as they may be required, at significant cost, to defend their management actions at the FWC.

Prevention is better than cure. We therefore recommend you consider implementing or developing anti-bullying policies, a code of conduct, effective procedures, and appropriately drafted employment contracts, in addition to educating staff and encouraging open communication. We have experience in these areas, and would be happy to assist you or your clients to meet your applicable needs and to avoid bullying in the workplace.

Restraints of Trade in Employment Contracts

1. Introduction

A restraint of trade clause is a contractual clause that seeks to limit a person's freedom to engage in employment or trade. A restraint of trade is most commonly found in employment contracts, franchise agreements and contracts for the sale of businesses. The focus of this paper will be on employment contracts, but the principles are of general application.

In employment contracts, restraints may try to:

- Regulate an employee's activities *during* employment, and/or
- Prevent an employee from engaging in certain activities *after* the employment relationship has ended.

Employees rarely take issue with restraints during employment. However, disputes frequently arise with post-employment restraints.

A post-employment restraint will attempt to regulate three things:

1. The employee's **activities**.
2. The geographic **area** within which such activities are restricted.
3. The **duration** of the restrictions.

2. Enforceability

2.1 Generally

The starting point is that restraints are generally void or unenforceable on the basis that they are contrary to the public interest. This is because:

1. A person should not be unreasonably prevented from earning a lawful living, and
2. The public should not be deprived of the services of a person prepared to engage in employment.

2.2 Exception

However, a restraint may be enforceable if it is ‘reasonably necessary’ to protect the employer’s ‘legitimate business interests’.

Legitimate business interests include (amongst other things):

- Income.
- Reputation.
- Confidential information.
- Trade secrets.
- Staff connections.
- Client connections.

A restraint attempting to protect these interests must be reasonable, having regard to the activities being regulated, as well as the geography and duration of the restraint. An unreasonable restraint is void and unenforceable, but this does not affect the validity and enforceability of the remainder of the contract. The question of reasonableness is therefore the main issue that employers and courts must consider.

Courts will not substitute what they think to be a reasonable restraint if one is not provided in the contract; in other words, the courts will not re-write clauses. Although in New South Wales the *Restraints of Trade Act* 1976 provides courts with the power to read down otherwise void restraints.

At the start of an employee’s employment it is almost impossible for the employer or the employee to say definitively what a reasonable restraint of trade will be when the employee ultimately leaves the employ of that employer. This is because neither party knows how many years of service the employee will perform or what position the employee will hold when the employment concludes. These are important factors because the same restraint that is unenforceable against one employee can be enforceable against a long-term senior employee.

These difficulties have increased the popularity of ‘cascading’ clauses. Cascading clauses often provide a number of options or a series of potential restraints regarding geographical distances and durations of the restraint. For example, a geographical restraint might be expressed as being for 10, 20, and 50 kilometres from the employer’s place of business. If a court deems that a 10 km distance and no further is, in conjunction with a reasonable duration and activities restraint, reasonable in order to protect the legitimate interests of the business, the longer restraints will be severed from the contract (ignored) and only the 10 km restraint will be enforced.

2.3 Factors

Whether a restraint is reasonable depends on a number of factors, as well as the particular circumstances of the case. A general rule of thumb is that the broader the restraint, the less likely it will be considered reasonable. Restraints should therefore always be specifically tailored to each employee.

When assessing whether a restraint of trade is reasonable the courts consider a number of general factors, including:

- The employee’s role (such as the degree of seniority; the employee’s duties and access to information; and the level of contact with clients).
- The nature and location of the employer’s business or industry.
- The location of clients.
- The bargaining positions of the parties.
- Whether the employee is compensated for agreeing to the restraint, and the amount of compensation.
- Whether the employer explained the reasons for the restraint.

3. What are employees restrained from doing?

3.1 Activities

The activities that different employees are restrained from vary greatly. It often depends on what the particular employer perceives as its risks, and also the extent of access the particular employee has to clients, customer and suppliers. However,

there are four main types of activities that employers seek to refrain employees from engaging in.

3.1.1 Non-compete

A non-compete restraint prevents an employee from working for a competing business or carrying on a business themselves in the same industry. Some relevant factors to note are as follows:

- The degree of detail in which the activities are stated in the restraint. If they are described too vaguely or broadly, or do not specifically relate to the duties and responsibilities undertaken by the employee, then the clause may be unenforceable. For example, a restraint that seeks to prevent an employee from taking employment in *any* capacity with a direct or indirect competitor is likely to be unenforceable, whereas a restraint on a sales executive to work as a sales executive for a competitor may be acceptable.
- The employee's seniority in the business. The more senior the employee (and hence the more important the employee is to the business' success and client relationships) the more likely a non-compete clause will be reasonable.
- The employee's knowledge, experience and access to confidential information.
- Whether the employee is compensated for the non-compete restraint.
- Whether the clause was negotiated with the employee.

3.1.2 Non-poaching

A non-poaching restraint prevents a former employee from encouraging current employees from leaving the business and joining the former employee at their new business or employer. The primary objective of this type of restraint is to prevent key employees (or groups of employees) from leaving an employer, only to set up a new business in direct competition with the previous employer.

3.1.3 Non-solicitation

A non-solicitation restraint prevents an employee from soliciting clients away from his or her previous employer. It may be enforceable if the employee had significant

contact with particular clients. Restraints that prohibit an employee from approaching all clients of the previous employer are often unreasonable.

3.1.4 Non-dealing

A non-dealing restraint is the flipside of non-solicitation. It prevents an employee from having business dealings with former clients where the *clients* approach the employee (rather than vice versa). These types of restraints are often unenforceable because they are in effect a restraint on the clients. This can be deemed as anti-competitive conduct and not in the public's best interest. However, if an employee is specifically compensated for providing a non-dealing restraint, it is more likely that the restraint will be enforceable.

3.2 Geography

The next question is *where* the employee is prohibited from performing the above activities. This may be expressed in terms of distance (for example, 10 kilometres from the employer's place of business), or location (for example, 'in Parramatta').

For most employees, a restraint area or distance that effectively means they must be unemployed or relocate to a more rural area for the duration of the restraint will be unenforceable.

3.3 Duration

The final element of a restraint clause is the duration. Restraints cannot be for an indefinite period and are generally measured in months or sometimes years. As above, the seniority of the employee, or the degree of knowledge he or she has of the business, is relevant. For example, in one case, a two-year restraint was held to be enforceable. However, in that case the restrained employee was remunerated for the restraint and was the managing director, co-founder and "the face" of his former employer, and sought to set up a business in direct competition with the business he co-founded.

4. Enforcement and other avenues for employers

An employer may enforce a restraint clause through an injunction (particularly where confidential information is at risk); and can claim for damages or an account of profits.

Even if a restraint is unenforceable, an employer may still be able to 'restrain' its former employee pursuant to its equitable and/or contractual rights preventing an employee from using confidential information the employee obtained in the course of his or her employment.

5. Conclusion

To summarise:

- Restraints of trade are generally void.
- They are enforceable if 'reasonably necessary' to protect the employer's 'legitimate business interests'.
- Restraints should be carefully considered and drafted
- The most effective restraint is one that was tailored for an individual employee.
- Potential invalidity of restraints can be avoided by using 'cascading' provisions.
- Where a restraint is void, employers may still be able to bring actions such as breach of confidence, breach of contract, breach of duty or breach of the employer's intellectual property rights; and injunctive relief may be appropriate.

Recent Developments and Hot Topics

Single safety breach a ground for dismissal

An employer can dismiss an employee on several grounds. For example, misconduct, dangerous behaviour and poor performance. However, an employer cannot dismiss an employee where doing so is 'harsh, unjust or unreasonable' (the definition of 'unfair dismissal').

Recent cases have shown that a single safety breach may be a valid ground for dismissal.

For example, in *Conlon v Asciano Services Pty Ltd*, a freight train driver was dismissed for failing to see a cautionary signal and for not responding quickly to a subsequent warning signal. Although he did respond, he was only two minutes away from colliding with another train.

As the dismissal was based on just one incident in the employee's 30 years of employment, the employee lodged a claim for unfair dismissal. The employee was ultimately unsuccessful with his claim and found to be validly dismissed because:

- Observing and responding to signals was one of a train driver's most fundamental duties.
- His actions posed a significant and imminent risk of injury or death to himself, his co-driver, passengers and others.

The FWC reached this decision despite the driver's 30 years' experience, good safety and performance record, and the serious consequences the dismissal would have on the employee's personal circumstances (he was 63 years old).

Thus, where safety is paramount to an employee's duties (such as in the construction, mining and transport industries) a single safety breach may be a sufficient ground for dismissal.

Liability of employers for incidents outside the conventional workplace

One issue that often arises in workers' compensation cases is whether an injury was suffered *in the course of employment* when suffered away from the ordinary workplace. For example, last year, in a high-profile case (*Comcare*),[1] the High Court held that injuries suffered as a result of a sexual encounter on a work trip were not covered by workers' compensation legislation. However, in a recent case,[2] an employer was liable to pay compensation to a worker who was sexually assaulted in accommodation provided by the employer.

The employee worked for the Oaks Hotel and Resort chain on the Sunshine Coast. She was offered a position within the same company in Brisbane, which she accepted. As part of the relocation, the company provided her with an apartment, rent-free, located at the hotel, which she would share with another employee. The other employee sexually assaulted her in the apartment. Soon thereafter, the injured employee applied for workers' compensation for the psychological injuries she suffered as a result of the assault.

Under Queensland's workers' compensation legislation, a worker claiming compensation for a psychological injury must prove that:

- the injury arose out of, or in the course of, employment; and
- the employment was a major contributing factor to the injury.

Because the worker was not engaged in work activity at the time, the issue was whether the employer had induced or encouraged her to be at the apartment.
The Court held that the employer had done so because the company:

- owned the apartment;
- had allowed the employee to live at the apartment rent-free; and
- had assured her of the flat mate's good character.

[1] *Comcare v PVYW* [2013] HCA 41
[2] *Oaks Hotels and Resorts (Qld) Pty Ltd v Blackwood* [2014] ICQ 023

The company was therefore liable to pay compensation.

In both this case and the *Comcare* case, the employer had induced or encouraged the worker to be in a particular place. However, in the Queensland case, the employee's mere presence in the apartment caused the injury. In *Comcare*, the employee engaged in additional activity that her employer had not encouraged or induced.

'Mutual Trust and Confidence' in Employment Contracts

For some time there has been uncertainty in Australian law as to whether or not there was an implied term of 'mutual trust and confidence' in all employment contracts. This essentially requires employers to not behave in a manner that undermines or destroys the relationship of trust and confidence between employer and employee (without reasonable cause). For example, this implied term requires an employer to not conduct its business in an unlawful or dishonest manner, and to follow its own internal policies, including but not limited to, disciplinary and performance management processes.

In August 2013, the Full Federal Court of Australia held that the implied duty of mutual trust and confidence was implied by law into Australian employment contracts. However, on Wednesday last week, 10 September 2014, in the case of *Commonwealth Bank of Australia v Barker* [2014] HCA 32, the High Court of Australia unanimously reversed the Full Federal Court's decision, holding that there is no implied term of mutual trust and confidence.

CBA v Barker – The Facts

Mr Barker was an executive manager at the CBA. As part of a restructure, Barker's position was made redundant. The CBA's redeployment policy required the bank to take steps to redeploy redundant employees within the company. If no suitable position was found, the employment could be terminated with one month's notice.

Attempts were made by CBA to contact Mr Barker about potential opportunities, but because he had been ordered not to return to work, Mr Barker did not receive the telephone calls or e-mails. Mr Barker's employment was subsequently terminated.

Barker sued the CBA, arguing that the bank had breached an implied term of mutual trust and confidence by failing to make proper efforts to redeploy him. The Federal Court of Australia agreed with Mr Barker, awarding him $317,500 in damages.

***CBA v Barker* – The Decision**

CBA appealed to the High Court, which ultimately found that there was no implied term of mutual trust and confidence in employment contracts. The Court held that:

- It was not 'necessary' to imply the term into all employment contracts because its potential scope went beyond what was necessary to maintain the employment relationship. Put simply, it is too uncertain.
- The implied duty of 'mutual trust and confidence' arose as a result of circumstances and legislation particular to the UK, which are not necessarily relevant in the Australian context.
- The issue is ultimately a question of policy, which goes beyond the law-making functions of the Court. In other words, it is up to the Australian Federal Parliament to decide whether to incorporate the term.

While there is now no implied term of mutual trust and confidence, the High Court left open the question of whether there is an obligation to act in good faith in the performance of contracts generally. However, issues of fairness remain relevant to terminating employment contracts; and, ultimately, treating employees fairly and ensuring policies and procedures are followed is always good practice.

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