

**Employment Practices Liability:
Senior Execs and directors**

by
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Speaking Notes

1. Introduction

These speaking notes have been prepared to act as an "aide-mémoire" for those persons who attended this presentation. Other relevant HWL Ebsworth documents are attached, being:

1. **Employer checklist** regarding discrimination, harassment and bullying.
2. **Discrimination, Harassment and Bullying in the Workplace Handout** - from a HWL Ebsworth workplace training Course in relation to this topic.
3. Information flyer for *My Workplace*—an interactive two hour seminar that explores workplace rights and importantly, educates your employees in respect of their responsibilities for workplace behaviour.

2. Terminating Troublesome Senior Executives

The termination of senior executives will always be governed by the terms of their written contracts of employment. However, these contractual documents leave plenty of room for the exercise of judicial discretion, especially with respect to remedies. The following three cases are useful to look at in this regard:

2.1. *Seven Network v Warburton* [2011] NSWSC 386

In this case, a senior executive resigned before the expiration of his contract of employment in order to commence employment with a rival television station. It was held he could be put on "garden leave", that is leave with pay, for a few months owing to his possession of confidential information. This short time free from the industry would not make him

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unemployable in the future. Even though a twelve month restraint of trade clause in a management equity participation deed was held by the Court to be valid, the Judge exercised discretionary powers by only granting injunctive leave until the end of 2011. In other words, the Judge was of the view that the confidential information in the possession of the employee would be irrelevant information well before the twelve month restraint of trade clause had run its course.

2.2. Walker v Citigroup Global Markets Australia Pty Ltd (2006) 233 ALR 687

A senior employee was head hunted to leave his present employment and to take up employment with another finance corporation. When the employee had signed a letter of offer, the employer changed its mind and invoked a one month termination clause (which was one of the generic clauses in the contract) to terminate the employee with immediate effect.

It was held that the termination was a breach of contract because the generic termination clause had to give way to specific representations in the letter of offer and also to oral representations made in negotiations. These representations promised salary and bonuses for more than one year. By reading the contract in this manner, the Judge was able to award significant damages where an employer had thoughtlessly changed its mind. Prospective employers need to refrain from making written and verbal representations which they are not prepared to honour.

2.3. Byrne v Macquarie Group Services Australia Pty Ltd [2011] NSWCA 68

A high ranking employee was terminated in accordance with the employment contract. However, the employee sought to recover non-vested portions of a profit share retention scheme.

It was held by the Court that the words, "[i]f the employee ceases employment" covered situations where the employee was terminated and where the employee resigned. The judge took into account the nature and purpose of the profit retention scheme.

3. Damages Claims for Sexual and General Harassment by Senior Officers Who Should Know Better

In the recent David Jones sexual harassment matter, settlement was arrived at after the employer agreed to pay a large sum of money. It is essential for corporate and other employers to get their houses in order to prevent this type of harassment. I set forth the following check list for employers. This should be adhered to by all corporations which employ labour.

Check List

1. Ensure that employees, up to the highest levels, have received training on harassment. This should be part of any induction process.

2. Establish a mechanism whereby employees and/or contractors may complain where they have suffered conduct which amounts to harassment, sexual or otherwise.
3. Where complaints have been made, or where information becomes known to management, ensure that machinery exists to investigate any such matters.
4. Where it is shown that harassment has occurred, ensure that it is dealt with promptly by assisting the harassed employee and/or contractor, and by promptly instituting disciplinary proceedings against the recalcitrant employee.

4. The harmonised OHS laws, but Directors Still Face the Same music

On 1 January 2012, new harmonised occupational health and safety laws are expected to come into force. The new *Model Work Health and Safety Act* has already been enacted into law in the States of Queensland and in New South Wales. Section 27 of this model statute places a proactive duty of due diligence on directors and other officers.

Although these new laws have not yet come into force, nationally, in New South Wales, in May and June of this year, the Parliament of New South Wales has enacted this same duty of due diligence upon all New South Wales officers (see *Occupational Health and Safety (Amendment) Act 2011*). From 7 June 2011, all such officers have been required to act with due diligence (see section 26 *Occupational Health and Safety Act 2000*).

Due diligence is defined in the same terms by both statutes (see section 27(5) *Model Work Health and Safety Act*; and section 26(3) *Occupational Health and Safety Act 2000*). In brief, due diligence obliges directors and officers to:

- take reasonable steps to acquire and to keep up to date their OHS knowledge;
- gain an understanding of the hazards and risks of the business;
- ensure that OHS is adequately resourced; and
- ensure that the corporation responds in a timely and appropriate manner to accidents and to other OHS incidents.

In my view, OHS should be part of the induction program for all directors and officers. Furthermore, at all meetings of boards of directors, OHS should be the first item of business after the minutes. Where such boards have HR subcommittees, at their meetings comprehensive OHS reports should be received and discussed.

5. Conclusion

It is my hope that these speaking notes capture the essence of my presentation to this 2011 APIC conference.

Professor Emeritus Ron McCallum AO



My Workplace

Bullying, Harassment, Sexual Harassment and Discrimination in the Workplace – Your Rights and Responsibilities

What is it?

My Workplace is a comprehensive and pro-active seminar delivered on site to your employees.

My Workplace is an interactive two hour seminar that explores workplace rights and importantly, educates your employees in respect of their responsibilities for workplace behaviour. *My Workplace* has been developed by Professor Ron McCallum, Senior Australian of the Year and Consultant to HWL Ebsworth, and Miss Kate Cliff, Solicitor, from HWL Ebsworth's Workplace Relations and Safety practice group.

Why choose *My Workplace*?

It is vital that businesses of all sizes take proactive steps to identify and effectively manage undesirable workplace behaviour. Bullying, harassment, sexual harassment and discrimination in your workplace have the potential to significantly affect productivity by disrupting your workplace and may ultimately accumulate in the commencement of legal action which poses a significant threat for your business. The *My Workplace* package is an invaluable tool to help your business in dealing with these challenges.

Up until now the legislation in this area has been fairly well settled. The introduction of the *Fair Work Act* 2009 on 1 July 2009 has, however, introduced additional protections for employees and additional obligations on employers. Now that employers have had time to become more familiar with the provisions of the *Fair Work Act* 2009 regulators have shifted their focus from being primarily concerned with providing information to employers about the provisions of the act to an approach that is centred on active enforcement. The second half of 2010 saw a substantial increase in enforcement activity by the Fair Work Ombudsman and last year's high profile sexual harassment case brought by Kristy Fraser-Kirk against David Jones has no doubt contributed to the number of sexual harassment claims brought under the *Sex Discrimination Act* 1984 alone almost doubling since 2009.

In this environment of legislative change and increasing activity by the Fair Work Ombudsman and other enforcement bodies it is prudent that employers are proactive and responsive. Take this opportunity to address and educate your employees on bullying, harassment, sexual harassment and discrimination and, importantly, the behaviour that you expect of your employees in your workplace.

How *My Workplace* is different

My Workplace is a package that is focussed on your business' needs and in this respect can be adapted to concentrate on and address specific concerns or behaviour within your business.

Your employees are actively encouraged to participate in the seminar through structured questions based on real life scenarios and through allocated opportunities for open discussion.

What are the components of *My Workplace*?

My Workplace is comprised of the following components:

1. What is discrimination, harassment, sexual harassment and bullying?

In this stage of the *My Workplace* suite we identify the types of behaviour that constitute discrimination, harassment, sexual harassment and bullying and explore these concepts further through various case law examples.

2. Key Concepts – direct discrimination, indirect discrimination and sexual harassment

In this section we outline the key concepts of direct discrimination, indirect discrimination and sexual harassment and explore these concepts by providing specific examples.

3. Discrimination legislation unwrapped

The *My Workplace* suite identifies the key components of the main Commonwealth discrimination statutes: the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and the *Racial Discrimination Act 1975* and explains these to your employees in real terms.

4. The Fair Work Act 2009 provisions

We identify, explain and demystify the relevant provisions of the Fair Work legislation in relation to discrimination and managing workplace behaviour, focussing on practical knowledge of these provisions as they apply to your workplace.

5. Responsibilities and Obligations of Employees and Employers

In this section we focus on the concept of vicarious liability by outlining not only the extent to which employers are liable for workplace conduct but also the responsibilities and obligations of employees for workplace conduct.

To discuss how HWL Ebsworth can assist your business, please contact: Steven Penning, Partner, on (02) 9334 8842 or steven.penning@hwlebsworth.com.au or Michael Connolly, Partner, on (02) 9334 8545 or michael.connolly@hwlebsworth.com.au.

Employer Checklist

- 1.1 Discrimination, harassment and bullying are unlawful. Effective management of harassment and discrimination requires vigilance and a review of workplace practices. Any instances need to be addressed promptly.

The recommended risk management approach is:

- (a) Identify hazards – conduct an internal audit and review incident reports;
- (b) Assess risks – assess what needs to be controlled and what mechanisms are in place;
- (c) Control risks – implement measures to reduce or eliminate risks;
- (d) Respond to Complaints – an investigation to establish whether the behaviour can be substantiated should be undertaken;
- (e) Investigation – an investigation should be conducted by an impartial person applying the principles of natural justice.

Investigation

- 1.2 Any investigation into a reported incident of workplace harassment or discrimination should be conducted promptly and thoroughly. The investigation and its outcome should always be documented. The principles of natural justice should be followed in all formal investigations and will include:

- (a) innocent until all allegations are proven correct;
- (b) allegations need to be put to the alleged offender with that person being given a chance to explain themselves;
- (c) any disciplinary action needs to be commensurate with the seriousness of the complaint; and
- (d) mitigating factors should also be taken into account.

- 1.3 At the end of the investigation, recommendations should be made with respect to the action to be taken. For instance an investigation may find that the report is not substantiated, consequently, no further action is to be taken. If it is substantiated, then the matter needs to proceed to disciplinary action.

The options for proving a complaint can vary from case to case, but may include:

- (a) gaining commitment from the offender to cease the behaviour;
- (b) running an awareness update;
- (c) reviewing the Company's Policies and Procedures;
- (d) provide mediation to the parties (where agreed);

- (e) provide interpersonal skills and communication training to all staff;
- (f) offer support and counselling to the affected person;
- (g) discipline the perpetrator.