

WIN WISE UPDATE

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HARMONISED WORK HEALTH AND SAFETY LAWS PUSHING BOUNDARIES INTO WHITE COLLAR WORK

Australia has an impressive track record in legislating and enforcing work health and safety laws as underscored by the recent harmonisation of work health and safety laws in most jurisdictions across Australia¹.

Safe Work Australia's draft Code of Practice on Preventing and Responding to Workplace Bullying ("**Bullying Code**") is a game-changer that marks the first meaningful development in work health and safety law for employers in "safe" industries and office workers for many years.

The Bullying Code, once finalised, will set a national benchmark for managing workplace bullying that is likely to have a strong impact on employment law.

As a by-product of harmonised workplace health and safety laws in Australia, the Bullying Code can be expected to resonate much more strongly than single State work health and safety initiatives have done in the past to combat harassment or bullying².

In practical terms the draft Bullying Code is also revolutionary because it expands the frontiers of work health and safety law into mental well-being.

BACKGROUND

Safe Work Australia is an independent statutory agency responsible for improving occupational health and safety arrangements across Australia.

It has presided over an occupational health and safety harmonisation process that was agreed by all jurisdictions in principle in 2008 and which has led to the Commonwealth and six of eight States and Territories (other than Victoria and Western Australia) legislating close to "mirror" Work Health Safety Acts from 1 January 2012 onwards.

While work health and safety laws apply to all industries, in practice the regulatory burden and risk of criminal prosecution is concentrated in dangerous industries such as construction, manufacturing and mining.

This is reflected in the Codes of Practice that complement work health and safety legislation being focused on high risk work such as work at heights, near cranes and around gas cylinders. Where Codes of Practice stray into office worker territory it is mainly to lay down guidelines on matters such as amenities, lighting, ventilation and first aid matters, that are so well established as to have become standard.

The Bullying Code, while relevant to all Australians, pushes the boundaries of work health and safety law into white collar work. Employers in "safe" industries that might not otherwise be heavily impacted by work health and safety law will need to pay attention to the Bullying Code if only from an employment law and human resources management perspective.

¹ Western Australia and Victoria have yet to sign up to the harmonised laws.

² Prevention of Workplace Harassment Code of Practice 2004 (Queensland); Code of Practice - Violence, Aggression and Bullying at Work 2010 (WA).

CONTENT OF THE BULLYING CODE

The Bullying Code was issued a second time for public comment ending 15 July 2013. It attracted 105 submissions and remains in draft form until finalised.

The Bullying Code defines workplace bullying as "repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety". It provides examples of behaviours that could potentially be considered workplace bullying including not only overt behaviours, but behaviours that are more subtle, and likely to be more difficult to prove, such as unjustified criticism or complaints, withholding information vital for effective work performance, setting unreasonable deadlines or constantly changing deadlines, setting tasks that are unreasonably below or beyond a person's skill level and excessive scrutiny at work.

DEVELOPING A WORKPLACE BULLYING POLICY

The Bullying Code provides that employers should develop a workplace bullying policy. It recommends face to face training on the policy with facilitated role plays, group work and opportunities to ask questions.

INVESTIGATING BULLYING COMPLAINTS

Where an allegation of workplace bullying indicates a serious risk to health and safety, the Bullying Code states that an investigation may be the most appropriate way to manage the situation. It recommends that an external investigator is engaged if there is no one at the business who is suitably impartial or qualified to lead the investigation.

If the investigation substantiates the bullying allegation, appropriate actions are said to include gaining a commitment that the behaviour will not be repeated and monitoring this over time, transferring a worker or workers to another area, apologies, demotion or dismissal. It also suggests that the business look to itself for any behaviours that might have arisen from underlying factors such as workloads, staffing levels and training.

If the investigation does not substantiate the bullying allegation, the Bullying Code nevertheless suggests providing assistance to resolve any outstanding issues such as mediation, counselling, or changing working arrangements.

Top Tips for In-House Counsel

Once the Draft Code is finalised and released you will need to look at your processes for dealing with workplace bullying and see how they compare with the Code. It is highly likely that you will have to:

- Conduct a risk assessment of your organisation and identify the factors specific to your workplace which may give rise to bullying;
- Put in place a risk management process;
- Draft a tailored policy for your organisation on workplace bullying that includes a response, resolution and investigation process; and
- Train and educate staff about bullying and the organisation's policy on bullying.

TAKING PREVENTATIVE STEPS TO STOP BULLYING

The Bullying Code places equal emphasis on not only responding to bullying but taking preventative steps. It suggests talking to workers to find out if bullying is occurring, monitoring patterns of absenteeism and workers compensation claims and holding exit interviews to flush out bullying.

Even if a workplace has experienced no bullying complaints the Bullying Code recommends scheduling periodic reviews to check if anti-bullying controls are working, including through gathering evidence on whether supervisor and manager training has been effective and whether workers feel empowered to raise complaints.

LEGAL AND OTHER EFFECTS THE OF BULLYING CODE

Once the Bullying Code is finalised it will be up to the relevant Commonwealth, State and Territory work health and safety Ministers to approve the Bullying Code and give it legal effect in their jurisdiction.

While not a law as such, section 275 of the harmonised work health and safety legislation makes a Code of Practice admissible in prosecution proceedings under the legislation. The court or tribunal hearing the proceedings may use the Bullying Code to determine what could have been done, in a practical sense, to protect workers from bullying. That said, there is nothing to prevent an employer from adopting another method outside a Code of Practice that is equivalent to or of a higher standard than the standard required in a Code.

The Bullying Code should be seized upon by in-house lawyers as it carries the imprimatur of work health and safety law and will create a national standard for best practice management in relation to workplace bullying in Australia. The Bullying Code will also complement recent changes to the *Fair Work Act 2009* (Cth) which, from 1 January 2014, will open up a new venue for employees to raise workplace bullying claims before the Fair Work Commission.

MODIFYING BEHAVIOURS TO PREVENT BULLYING COMPLAINTS

We consider the Bullying Code and the new bullying provisions in the Fair Work Act will be a catalyst for modifying behaviours in the workplace.

For example, to avoid bullying claims:

- by employees who say they have been subject to unjustified criticism or complaints, managers should think carefully before criticising or complaining about an employee and consider doing so in a structured meeting with the employee rather than making ill thought out remarks in front of the employee and others.
- based on employees' being set tasks unreasonably below or beyond their skill level, employees should be provided with job descriptions when employed, and written performance reviews on an annual basis, that confirm the expected skill level and typical tasks (including mundane tasks like photocopying, or, at the other end of the spectrum, difficult tasks) required of the role.

based on over-scrutiny, managers who are scrutinising employees in relation to legitimate concerns about issues such as late arrival at work or lack of attention to detail should consider elevating these issues to formal performance management with an agreed monitoring process so that the employee is aware of the process.

These are some of the examples of how the Bullying Code is pushing the boundaries of work health and safety law into white collar work. In our view, these trends are likely to lead to a shift in the thinking of many organisations about the importance of actively managing employees.

FURTHER INFORMATION

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