# BURKE & MANGAN

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## SEXUAL HARASSMENT

## UPDATE ON COMPENSATION AND REASONABLE ACTION

**Recent decisions of the Federal Court of Australia are a reminder to employers to address their workplace policies, training and actions with respect to sexual harassment. Employers need to ensure that they are not only addressing and promoting appropriate conduct in the workplace between co-workers, but also between workplace participants. The latter can include contract workers and independent contractors in your workplace.**

The Full Court of the Federal Court of Australia in the matter of *Richardson v Oracle Corporation Australia Pty Limited (2014) FCAFC 82* awarded an employee general damages of $100,000 who was forced to resign after 11 incidents of sexual harassment in or about 2008. The psychological impact on the employee was significant and she suffered a chronic adjustment disorder with mixed features of anxiety and depression.

What makes this judgement significant is that the Full Court of the Federal Court of Australia commented that the current approach of awarding up to a maximum of $20,000[i] for general damages (this is for pain and suffering, loss of amenities and expectation of life and disfigurement) in sexual harassment cases is inadequate and out of touch with the expectations of society. The Court recommends an approach consistent with that in personal injury cases where significant general damages can be awarded[ii]. In the case of sexual harassment it is not clear what will be considered the maximum compensation of general damages, but it would only be payable in a most extreme case. A most extreme case can be considered to include non-consensual sexual intercourse resulting in significant physical and psychological injuries.

Another recent significant decision of the Full Court of the Federal Court of Australia is *Vergara v Ewin (2014) FCAFC 100*. The Full Court upheld the decision of the trial judge[iii], who found that as a result of a number of incidents within the office and outside the office a contract worker had sexually harassed an employee of the host employer as defined in the *Sex Discrimination Act (Cth) 1984* (**Act**) entitling the employee to compensation.

While there was a number of incidents of sexual advances, inappropriate touching and requests for kisses and sexual favours the incident that caused the employee the most significant harm was that occurring on 13 May 2009 at, and following, a work condoned function. The employee testified that she suffered memory loss (possibly due to drink spiking) and it was during this period she believes she had non-consensual sex with the contract worker at the office of her employer. Given her earlier protests and rejection of advances and requests by the contract worker for sexual favours

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the Court had no hesitation in finding that the contract worker knew that he was engaging in unwelcomed and non-consensual sexual activity.

The Court awarded the employee in excess of $476,163 (including $110,000 for general damages). She suffered physical injuries and significant psychological injury in the nature of PTSD, including depression. The assessment of damages was reduced to $210,563 as the employee had recovered, by way of settlement, monies from her employer and the contract worker's employer. Under the double compensation principle the employee could not retain both amounts.

***ELEMENTS OF SEXUAL HARASSMENT***

These cases are a timely reminder of the obligations employers and host employers have to their staff and contract workers. In making its finding in *Vergara's case* the Court reviewed the elements of what constitutes sexual harassment under the Act. This is:-

(i) there must be a sexual advance, request for sexual favour or conduct of sexual nature;
(ii) it must be unwelcomed (such that it is disagreeable to the person; not solicited or invited; undesirable or offensive to the person – this is a subjective test); and
(iii) In circumstances in which a reasonable person having regard to all the circumstances would have anticipated that the person harassed would be offended, humiliated or intimidated. In essence the reasonable person has the same attributes as the person harassed – this is an objective test.

In the case of employees the provisions of the Act do not differentiate between conduct occurring at the place of work or outside the place of work in order to constitute sexual harassment. However, with workplace participants (as in *Vergara's case*) the sexual harassment must occur at a place where both or either work or at a place where either or both carry out functions "in connection with" being workplace participants. The phrase "*in connection with"* is considered to be a phrase of the widest import and requires a mere relationship to work. Accordingly, a conservative view should be adopted in determining whether the provisions of the Act apply to conduct of a workplace participant outside the place of work.

**CONSIDERATIONS**

In light of these decisions and the significant increase in potential damages that can be awarded to employees subject to sexual harassment, employers should be reviewing their workplace policies on sexual harassment and code of conduct and also undertaking appropriate training. To this extent, it should also be noted that online training might not satisfy the obligations under the legislation[iv].

We also recommend that employers ensure they have a robust and confidential complaints handling process and take remedial action immediately on notification of a complaint.

Employers who follow these steps can potentially avert a significant liability or vicarious liability, as was the case in recent decisions involving a manufacturing enterprise and a hotel business. In these cases it was found there were strong policies and training in the case of the manufacturer and that the hotel employer took swift action when a complaint was received. What is necessary to successfully defend a claim is to show that the employer took reasonable steps. What is considered reasonable steps will vary from case to case and employer to employer according to AHRC.

Should you wish to discuss your policies, training or a concern please do not hesitate to contact us.

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[i] We have seen substantially greater award for general damages in rare cases such as Lee v Smith (2007) FMCA 59

[ii] As an example under Section 16 *Civil Liability Act (NSW) 2002 up to $551,500 can be awarded for general damages/non-economic loss.*

[iii] His Honour Justice White found one incident did not occur in the workplace of both workplace participants and therefore could not be considered sexual harassment under the *Sex Discrimination Act* 1984.

[iv] It was found that face to face training was more in line with taking reasonable steps that online training in the case of *Richardson v Oracle Corporation Australia Pty Limited (2013) FCA 102*