

NAVIGATING THE CHRISTMAS SEASON IN THE #METOO ERA: 5 TIPS FOR PLANNING A FUN (AND LIABILITY-FREE) WORK EVENT

15 November 2018 | Australia

Legal Briefings - By **Anthony Wood and Starr Brenton**

The spotlight on sexual harassment in the workplace has never been brighter. The #MeToo movement has empowered people to draw a sharp line in the sand about inappropriate sexual behaviour in the workplace. The number of high profile men – politicians, entertainers and business leaders, plus the many, many others whose conduct escapes the public scrutiny, continues to escalate.

Whilst there is a long way to go, the #MeToo movement is encouraging more people to come forward. The Australian Human Rights Commission's [fourth national survey on sexual harassment in Australian Workplaces](#) found that one in five Australians reported that they were sexually harassed in the workplace in the last 12 months. There is also an increase in the number of state and federal discrimination complaints this year, as well as general protections claim made under the *Fair Work Act*.

It's time for employers to (again) take note as we enter the Christmas season (or, in this context, more aptly described as the "silly season"). To point out the obvious, the festive season brings with it alcohol fuelled events, which are fertile ground for sexual harassment issues.

The question is: what should employers do to ensure their Christmas events meet the expectations of the #MeToo movement, and thereby reduce the risk of reputational or legal liability? Here are five tips:

1. KNOW WHAT THE EXPECTATIONS ARE

Employers are required to take reasonable steps to ensure appropriate standards are maintained. What will be reasonable at a work event will depend on the circumstances but at a minimum alcohol should be served responsibly and service should be limited to a particular location and time frame.

Under workplace health and safety legislation in each state, employers are also required to proactively assess risks and identify appropriate control measures to address any hazards (including those that may affect someone's mental health).

2. MAKE SURE LEADERS UNDERSTAND THEIR PERSONAL RESPONSIBILITIES

Leaders who use their position to encourage negative behaviours like excessive drinking, or getting a taxi with another more vulnerable staff member, run the risk of being seen to be abusing their power.

Managers and senior leaders must understand their obligations to role model appropriate behaviour. This should include, at least, training on their personal obligations to protect themselves or others from exploitation. Training should also cover:

- a clear understanding of the organisation's policies and procedures; and
- how to intervene when they spot undesirable or at risk behaviours in others at work events.

3. IMPLEMENT PRACTICAL STEPS THAT REDUCE THE RISKS OF SEXUAL HARASSMENT OR OTHER ABUSES OF POWER

Whilst it is almost impossible to eliminate the risk of poor behaviour, liability can be reduced or eliminated where employers have implemented all reasonably practical steps to protect their employees. Many organisations include the cost of employee taxi expenses in the Christmas party budget to ensure staff have a safe and inexpensive way to get home.

Employers may be held vicariously liable for the unlawful actions of their employees outside of work hours where the unlawful conduct is connected to their employment. There should be clear messaging as to whether or not some events, such as "after parties" are sanctioned by your organisation. If they are sanctioned, you will have an obligation to monitor and prevent risks.

4. GET YOUR HOUSEKEEPING IN ORDER

Take the opportunity before the event to remind all staff of the standards of behaviour that are expected of them when attending work-related functions. Consider how the #MeToo movement may have widened those expectations. For example, it is quite appropriate to direct staff to report any misbehaviour at the Christmas party to HR, but also consider additional avenues for reporting.

The Christmas period also presents an opportunity to review your workplace policies in relation to bullying; sexual harassment; alcohol and drug consumption; grievances; and social media.

In our experience, the most effective policies are those that are grounded in practical common sense. Ensure that all employees are familiar with the content of your policies and are made aware of the consequences of any misbehaviour at the event.

5. PROMPTLY INVESTIGATE ANY INCIDENTS AFTER THE EVENT AND RESPOND APPROPRIATELY

Reflect on your investigative processes. If any incidents do occur, they should be addressed absolutely as soon as is practicable after the event. Consider whether an internal investigation is adequate, or if an external or legally privileged investigation report is warranted.

Below are three interesting 2018 cases that might help harden your resolve in approaching this issue:

- in [Vai v ALDI Stores \(A Limited Partnership\) \[2018\] FWC 4118](#), the Fair Work Commission upheld an employer's decision to dismiss an employee after the employee allegedly threw a beer glass in the direction of a group of colleagues during the Christmas party. The dismissal was deemed fair largely because the employer was able to demonstrate that it had taken steps to prevent misbehaviour occurring at the Christmas party, such as limiting alcohol and hiring security guards for the function;
- in [George Talevski v Chalmers Industries Pty Ltd \[2018\] FWC 1807](#) at [28] the Fair Work Commission rejected the argument that a long-standing maintenance worker had not engaged in sexual harassment by hugging a junior female because "*it [was] understandable that she would not feel able to tell a much older man, the applicant, to stop*";
- the Victorian Civil and Administrative Tribunal recently ordered an employer to pay \$10,000 in damages to an employee for discouraging her from making a sexual harassment complaint about her male colleague's inappropriate comments. See [XVC v Joanne Baronessa \[2018\] VCAT 1492](#) at [33].

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MILES BASTICK
REGIONAL HEAD OF
PRACTICE -
EMPLOYMENT,
PENSIONS AND
INCENTIVES,
AUSTRALIA, SYDNEY
+61 2 9225 5722
Miles.Bastick@hsf.com



ANTHONY WOOD
PARTNER,
MELBOURNE
+61 3 9288 1544
Anthony.Wood@hsf.com



KIRSTY FAICHEN
PARTNER, BRISBANE
+61 7 3258 6492
Kirsty.Faichen@hsf.com



**ANTHONY
LONGLAND**
PARTNER, PERTH
+61 8 9211 7273
Anthony.Longland@hsf.com

LEGAL NOTICE

The contents of this publication, current at the date of publication set out above, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2019

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND
MORE**

Close