MANAGEMENT LIABILITY AND #METOO - A GLOBAL PERSPECTIVE

May 2018

It does not matter where you work or what you do, the recent spotlight on gender equality is having an impact on all businesses, regardless of size, nature or geographical location. The widely publicised actions of Harvey Weinstein have caused global ripples across a broad range of industries which cannot, and should not, be ignored.

In most jurisdictions, actions predicated upon inappropriate and predatory sexual behaviour towards an individual, employee, or group are not novel. However, the acknowledgment that such egregious conduct is much more prevalent than previously recognised, means that insurers are likely to see an increase in tendered claims arising out of sexual misconduct allegations, and the notifications are unlikely to be limited just to Employment Practices Liability (EPL) insurers.

Whilst EPL policies contemplate, and intend to cover, risks including sexual harassment and discrimination, Directors' & Officers' (D&O) insurers may be in for a surprise. D&O policies often provide cover for directors or officers in specific circumstances, where claims are made against them as a result of decisions and actions taken within the scope of their regular duties. Accordingly, actions arising out of alleged misconduct may fall for cover under traditional D&O policies, subject to the wording of the policy and, in particular, the language of any Wrongful Employment Act type exclusion (such as discrimination or harassment).

Kennedys

Further, how organisations have reacted to allegations may give rise to much more significant concerns for insurers and for the reputation of their insureds. It is easy to see how professional indemnity policies, for example, might be engaged if a court finds an organisation has negligently failed to implement proper procedures.

In both the UK and the US, the #TimesUp movement has amassed substantial legal funds with which to support the pursuit of cases of sexual harassment. In the US, the US$21 million fund has received more than 1,600 requests for legal support since 1 January 2018. Meanwhile, the UK's Justice and Equality Fund has set a £2 million target for funding and will make grants to address priority needs, especially those of people in low paid, part-time and freelance employment, and those who face overlapping disadvantages related to their race, age, class, immigration status, disability or sexuality.

UNITED STATES

In the US, lawsuits filed against D&Os alleging sexual misconduct are, unfortunately, not unique. It is clear that these will become even more commonplace following the high profile claims against Harvey Weinstein and The Weinstein Company, alleging sexual misconduct by Mr Weinstein and that the directors and officers had "*actual knowledge of Weinstein's repeated acts of sexual misconduct with women*."

In the wake of these claims against EPL or D&O policies, it seems likely that the US insurance market will experience a wave of shareholder securities and derivative actions, such as those filed against Wynn Resorts in 2018 and against American Apparel in 2014.

Common to these claims is the assertion that the D&Os of the company had "*actual knowledge*" of the systematic wrongful conduct and, by failing to take steps to prevent its recurrence, breached their fiduciary duties to the shareholders. Alternatively, it is often alleged in these actions that the D&Os failed to make disclosures to investors about the extent of wrongful conduct, with implications for the company's financial standing. In a recent D&O case (*City of Monroe Employees' Retirement System v Rupert Murdoch* [Nov. 20, 2017]) it was submitted by plaintiffs' counsel at the time of settlement that:

> "Corporate boards can no longer pretend that such conduct is isolated, nor can corporate boards pretend that such conduct does not and will not pose a grave risk to companies and their shareholders."

Wynn Resorts and its D&Os are defending against securities and derivative lawsuits as a result of alleged executive misconduct and the failure to address and disclose the issues to shareholders. In the derivative complaints, it is alleged that the company and D&Os "t*urned a blind eye to, and covered up, misconduct [of former CEO Steve Wynn] that lasted for decades…and [the plaintiff] seek[s] to hold the board and its directors accountable for failing to meet their fiduciary obligations to shareholders*." The complaints allege that the company's board and top leadership "t*acitly permit[ted] and eventually covered*" Wynn's "decades-long pattern" of "*unchecked*" sexual abuse and harassment.

According to the complaint, the board acted in breach of loyalty and the fiduciary duties owed to shareholders. Ultimately, the media revelation of such alleged repeated misconduct and cover-ups resulted in a market capitalization loss of US$2 billion on the day the news broke. In the securities suit, it is alleged that defendant D&Os made materially false and/or misleading statements and/or failed to disclose that Mr Wynn had engaged in a pattern of sexual misconduct with respect to the company's employees. It is alleged that the defendants were aware that discovery of Wynn's misconduct would subject the company to heightened regulatory scrutiny and jeopardise Wynn's tenure at the company. As a result, the plaintiff claims the company's shares traded at artificially inflated prices.

Similar allegations against company boards can be found in shareholder lawsuits brought against other household names, including 21st Century Fox, which reached a US$90 million settlement in November 2017 during the fallout of #MeToo (which started in October 2017).

The underlying claims against 21st Century Fox included allegations of sexual harassment. Following intimation of those claims, 21st Century Fox

shareholders filed a derivative suit against the company. The derivative complaint asserted several causes of action against the company's D&Os, including breach of fiduciary duty in failing to prevent the alleged misconduct. The public documents filed in support of the agreed settlement indicate that the full US$90 million settlement figure was met by insurers.

Whilst sexual misconduct claims may be on the rise, mandatory arbitration clauses in employment contracts and confidential settlement agreements mask the size of the problem faced by corporations and, ultimately, insurers.

Paramount to the evaluation of this developing trend is the understanding that shareholder claims are different to employment and civil rights related actions. Whist claims brought by the direct victims of alleged sexual misconduct will still be covered by EPL insurers, any shareholder or derivative action will, as always, fall to be considered by the company's D&O insurers. Underwriters would be well-advised to review their wordings whilst wearing a "*#MeToo*" hat.

LATIN AMERICA

While Latin America as a whole has seen an increase in a push for gender equality and safety from workplace harassment, a #MeToo style social movement has yet to take hold.

A far more immediate concern, and perhaps what comes closest to #MeToo, is the #NiUnaMenos (Not One More Woman) movement founded in Peru protesting femicides and violence against women. This movement has spread to neighbouring Chile.

In Brazil, the #DeixaElaTrabalhar (Let Her Do Her Job) movement against sexual harassment in sports broadcasting has emerged as a response to the unwanted sexual advances and other abuse suffered by female broadcast journalists whilst doing their job.

What is interesting about this movement is that it was started by the broadcast journalists themselves and the fact that it has taken hold throughout the country is indicative of change.

While D&O liability has exploded in the past five years in the region, most high profile claims relate to corruption scandals, such as the Petrobras scandal in Brazil or the Odebrecht scandal that has reverberated throughout Latin America. To date, the region has yet to see a significant claim tied to gender equality or workplace harassment that would have D&O implications, as most claims (which are not usually high-profile or for much monetary value) related to these issues fall under the scope of EPL coverage.

> "Nonetheless, with the growth of movements such as #NiUnaMenos and #DeixaElaTrabalhar and the effects of #MeToo spreading throughout the region, it may be only a matter of time until significant D&O claims arising out of these issues become prevalent."

UNITED KINGDOM

In the UK, workplace equality issues are currently topical following the recent introduction of 'gender pay gap reporting' (where companies with 250+ employees must, as of 6 April 2018, publish details of the difference between male and female pay in their organisations) as well as domestic scandals, including the resignation of Defence Secretary Michael Fallon, the suicide of a Welsh Labour MP, Carl Sargeant, and the 'Presidents Club' charity event.

Under the Equality Act 2010, claims for sex discrimination, harassment or victimisation may result in both the perpetrator and the employer being jointly and severally liable to the victim for compensation. Typically, an employer will be "*vicariously liable*" for acts committed by its employees in the course of employment, unless the conduct can be said to amount to the employee entering a "*frolic of his own*." Employers can avoid such liability if they are able to show that they took all reasonable steps to prevent the conduct, although in practice this is often a difficult defence to run. Compensation can be significant and cover both financial losses and non-financial losses, including injury to feelings and personal injury.

> "A 2016 survey by the TUC and Everyday Sexism Project showed that 52% of women surveyed had experienced sexual harassment at work, 63% of whom were aged 18 to 24."

Sexual harassment was more prevalent for women in less stable work, such as zero hours and agency contracts.

More recently, the UK Equalities and Human Rights Commission (EHRC) made a series of recommendations to improve the legal protection of sexual harassment victims in its 2018 report '*Turning the tables: ending sexual harassment at work*':

- Creation of a new legal duty on employers to take reasonable steps to prevent workplace sexual harassment, enforceable by the EHRC itself.
- A new power for the employment tribunal to increase compensation by up to 25% for an employer's failure to comply with a new code of practice on sexual harassment.
- Sexual harassment training for managers.
- Confidential online facilities to enable better reporting of harassment.
- Prohibitions on non-disclosure agreements that seek to prevent disclosure of future acts of harassment.
- Regulation of non-disclosure agreements that prevent disclosure of past acts of harassment.
- Extending the limitation period for harassment claims.

Further, in February this year, the government launched a full enquiry into the extent of sexual harassment against women at work, the findings of which will be used to determine how existing laws can be improved.

The government's enquiry and the recent abolition of fees in the UK employment tribunal system (where most harassment claims are pursued), combined with the heightened publicity that #MeToo is currently receiving, may mean an increase in the number of sexual harassment claims pursued.

FRANCE

In France, the #MeToo social movement has given rise to the French movement #Balancetonporc (denounce your pig), which encourages women to report sexual misconducts arising in workplaces.

Sexual harassment is usually covered in France by EPL insurance policies and may be covered under D&O insurance policies which includes EPL extensions.

Under French law, sexual harassment is defined as:

- The act of repeatedly imposing a person to sexual comments or behaviour that offends his or her dignity because of their degrading or humiliating nature or which create an intimidating, hostile or offensive situation.
- The act, even if not repeated, of serious pressure for the real or apparent purpose of obtaining an act of sexual nature.

Sexual harassment is punishable with up to two years imprisonment and a fine up to €30,000. The fines are excluded under French policies, but damages and civil and criminal defence costs are usually covered.

Sexual harassment may raise the employers' liability, as employers have a duty to take all necessary and reasonable action to prevent, stop and punish acts of sexual harassment. Employers are thus vicariously liable for acts of sexual harassment committed by their employees.

There is, for the time being, very little case law directly addressing the subject of sexual harassment in workplaces. This issue is usually dealt with after termination of employment contracts:

- Of the harasser, to justify an immediate termination without indemnities.
- Of the victim, to allocate compensation for the damage resulting from such acts. The amount of the compensation is usually between €5,000 and €10,000.

The hierarchical position of the harasser is an aggravating circumstance (when he or she is, for instance, a director or an officer). Where the sexual harassment is committed by a person abusing their authority, the act is punishable by up to three years imprisonment and a fine up to €45,000.

Nonetheless, there is not, for the time being, any case law addressing the directors' and officers' liability where they had actual knowledge of one of their employee's sexual misconduct.

A 2014 survey by the French Human Rights Commissioner ("*Défenseur des droits*" in French) revealed that:

- 20% of women are confronted by sexual harassment in the course of their employment.
- Only 30% of cases of sexual harassment are reported to the directors and officers.
- Only 5% of cases of sexual harassment are brought before the courts.

> "The #MeToo movement gave rise to a sharp debate in France on what should be qualified or not as sexual harassment."

Whilst there has been an increase of public denunciations of sexual misconducts under the hashtag #Balancetonporc, some French personalities criticised the censorship that may arise from this movement.

In particular, 100 prominent French women - among them the actress Catherine Deneuve - drafted a highly contentious public letter in the newspaper *Le Monde* to denounce this conception of feminism and the "*confusion*" that was sometimes taking place between an aggression and an "*attempt to seduce someone, even persistently*".

Further, the first man targeted by #Balancetonporc filed a libel suit before the Paris High Court against the French journalist Sandra Muller – who started the #MeToo campaign in France and accused him on twitter- asking for €50,000 in damages and the suppression of the contested tweet. The claimant states that his inappropriate and sex-related remark cannot be qualified as sexual harassment, as it was a single remark which was not stated in the workplace or within a hierarchical relationship, even if he was a business acquaintance. The Paris High Court will therefore -in this highly sensitive context- have to clarify the qualification of sexual harassment under French law.

AUSTRALIA

Over the last 10 years, D&O and Management Liability insurers have been subject to more EPL claims and associated costs. The upwards trend can be seen at both Federal and State/Territory level.

The various jurisdictions in Australia permit EPL claims (1) pursuant to the statutory provisions of the Fair Work Act 2009 and other associated pieces of legislation and (2) at common law.

Most EPL claims are issued in the Federal Fair Work Commission or Federal Magistrates' Court. Such claims are subject to caps and limitations on damages/compensation, as well as some fairly strict procedural requirements. Importantly, a breach by an employer of Federal sexual and gender discrimination legislation will also, generally speaking, constitute a breach of the Fair Work Act.

Accusations by employees of sexual harassment by their employers, or of a failure by the employer to prevent harassment by other employees, entitles an employee to take immediate action against their employer. In the majority of cases, management liability insurance covers the employer's costs.

Over the last eight years, there have been several high profile claims for common law damages relating to alleged sexual harassment. The best known claim was filed by a publicity co-ordinator employed by one of the country's largest department stores, David Jones. Breaches of the Federal Sex Discrimination Act were alleged, together with claims for breach of contract and negligence. The allegations were levelled at the then CEO of David Jones, and also at David Jones itself for the vicarious liability of its senior manager.

The case was settled before any pronouncement could be made on the law and the range of damages that could be expected. However, the case represented a tipping point - bringing compensation claims for sexual harassment is definitely more commonplace now and, when claims are pursued, there is more willingness on the part of State and Federal Courts, both to accept claims and to make significant (and generally increasing) awards.

The case of *Richardson v Oracle Corporation Australia Pty Ltd* [2015] reflects the willingness of courts across the country to apply and enforce what are now regarded as appropriate community expectations concerning the behaviour of employers. *Richardson* was a successful claim for common law damages for sexual harassment in which the court awarded general damages of US$100,000. Before this case, the range of general damages usually fell between US$12,000 and US$20,000. The plaintiff at first instance obtained an award of only US$18,000. The Full Court increased this to US$100,000.

> "On 5 January 2018, Insurance Business Australia reported that premiums for D&O cover have 'skyrocketed' by 300% in the previous six months."

This rise has been driven by the number of class actions launched against Australian companies, many of which are securities claims (usually alleging loss arising from misrepresentation or non-disclosure). On any pragmatic view, the widespread publicity given to the #MeToo movement, combined with the ongoing popularity of class actions, suggests that companies will in the future face similar shareholder actions to the claims mounted in the US against Wynn and 21st Century Fox. This, and a general increase in claims concerning workplace equality claims, is a predictable consequence of the regulatory and judicial climate in this jurisdiction.

HONG KONG

The #MeToo movement has attracted its fair share of press in the local newspapers. Hong Kong's Sex Discrimination Ordinance (which includes anti-harassment provisions) largely mirrors the English Sex Discrimination Act 1975 but the harassment provisions are based on Australian legislation.

Whilst there has been an increase in complaints of sexual harassment (claims under the Sex Discrimination Ordinance account for almost half of all complaints made to the Equal Opportunities Commission (EOC)), there have been no steps taken so far to introduce new legislation to provide better protection against harassment.

Employers are vicariously liable for any sexual harassment committed in the course of employment by any employee. The statutory defence mirrors that in the English legislation. To mount a defence the employer will need to show it had proper policies in place and, depending on the resources of the employer, that it trained employees on the anti-harassment policy.

Despite the comprehensive anti-harassment laws in Hong Kong, sexual harassment remains relatively commonplace, particularly in the service industry. In 2018, the EOC published "*A Study on knowledge of sexual harassment and experience of being sexually harassed in the service industries: Comparing recent female Mainland Chinese immigrants with locally-born women*" which contained some disconcerting findings:

- 14.6% of locally-born women and 9.6% of recent female Mainland Chinese immigrants have been sexually harassed in the service workplace. 'Relentless humour and jokes about sex or gender in general', 'being stared at sexually' and 'verbal harassment' were the three most frequent forms of harassment respondents faced.
- Only 17.9% of the respondents to the Study reported that their employers formulated policies regarding workplace sexual harassment. The most common channel for them to learn about these policies was through referring to employee manuals themselves.
- A lack of knowledge and awareness in smaller to medium enterprises in the service sector as to discrimination law and the potential liabilities that flow from breaches by its employees.

The impact of the #MeToo movement in other parts of Asia has not gone unnoticed. For example, on 6 March 2018, a South Korean Presidential candidate stepped down after allegations of rape were made by his former PA during a TV interview. On 11 April 2018, he was indicted on charges of rape.

INDIA

The #MeToo movement has seen little traction in India, although the local press has reported extensively on events in the US and elsewhere.

There have been some instances after the #MeToo movement broke out of specific allegations having been made against a former leading Bollywood star and some university professors. This has led to criminal complaints being filed and, in some instances, the accused have lost employment, but no general trend can be ascertained as yet.

India did not have a codified legislation for prevention of sexual harassment until recently. The Sexual Harassment (Prevention, Prohibition and Redressal) Act 2013 was enacted in December 2013. The law provides for redressal of sexual harassment claims in the workplace. The law is still at a nascent stage and, although there has been a rise in the number of reported incidents of sexual harassment, no reliable statistics exist.

However, while the data itself is limited and incidents have not been consistently reported, there is an indication of a significant increase of reported cases.

The Bombay Stock Exchange 100 Universe consists of India's top 100 Companies who, under regulations framed by India's market regulator Securities and Exchange Board of India, have in recent times reported on statistics related to sexual harassment cases occurring at the workplace. These statistics show that between the years 2013 – 2017 there has been a 600% increase in reported incidents.

CONSIDERATIONS FOR INSURERS

While the impact of recent events and campaigns varies from region to region, there does seem to be an underlying consistency of evolution in legislation and a lack of acceptance or toleration to this type of conduct which will, inevitably, lead to a shift in both claims behaviour and working practice.

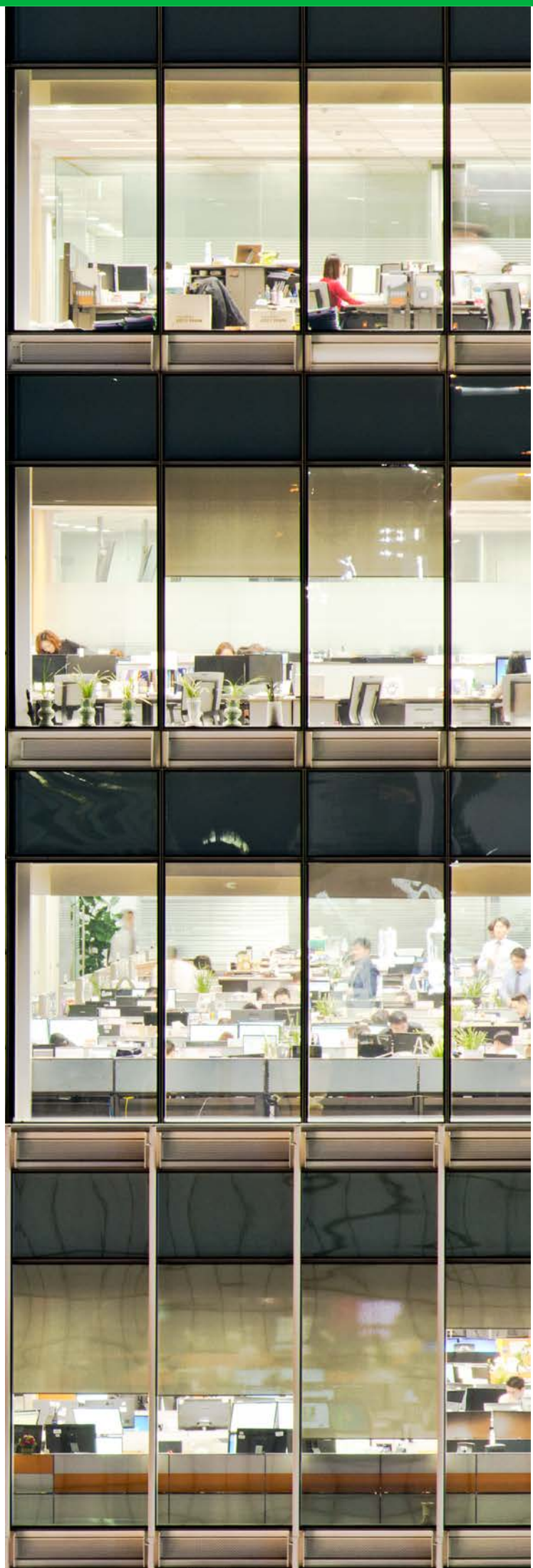
Insurers may wish to tailor their proposal forms to clarify a putative insured's employment practice policies, both in relation to employees and corporate governance.

Responses to questions about pending employment disputes and settlements will give a flavour of the insured's attitude towards claims of this nature, and may indicate the level of risk posed to the company and its shareholders.

D&O insurers should be clear about the risk of claims to their policies and price their product accordingly, or consider altering policy terms. The time may be ripe for a global hardening of D&O rates, following the lead of Australia.

FURTHER INFORMATION

To find out more about our services and expertise, and key contacts, go to: **kennedyslaw.com**



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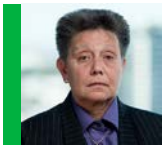

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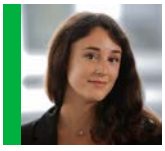

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