

FOCUS

WORKPLACE RELATIONS

Inside:

New legislation

Limits on unfair contract actions

Psychiatric harm in the workplace

Protecting the protectors

Your publication:

If you would prefer to receive our publications in electronic format, please email: publications@aar.com.au

www.aar.com.au

VISIT OUR WEB SITE TO READ ALL FOCUS EDITIONS



New industrial manslaughter offence

A WorkCover NSW report recommends the introduction of a new industrial manslaughter offence and that managers and directors of corporations be subject to a code of practice setting out their occupational health and safety obligations. Senior Associate Tony Saunders reports.

The report

The report, commissioned by WorkCover NSW, recommends a number of changes be introduced to the *Occupational Health and Safety Act 2000* (NSW) (**OH&S Act**). The recommendations include:

- the introduction of a new offence in the OH&S Act relating to workplace fatalities. The elements of the proposed offence would be:
 - a breach of the OH&S Act; and
 - the relevant contravention of the OH&S Act caused the death of an employee;
- imposing higher fines for a breach of the new offence than the current maximum of \$825,000 for a corporation with at least one prior conviction;
- amending the current legislation, which provides that an individual may be imprisoned for up to two years for a second or subsequent offence, to enable individuals to be imprisoned for a first offence;
- against introducing a new offence of industrial manslaughter into the *Crimes Act*. This type of legislation was introduced in the ACT last year, but was criticised by the authors of the report as being 'tokenistic in nature'. The authors suggest that it would be too difficult to obtain a conviction under the ACT laws, principally because they require the prosecution to prove gross negligence or gross recklessness on the part of a defendant; and
- making managers and directors subject to a code of practice that would particularise the steps required by them to discharge their safety obligations and require members of senior management to integrate themselves into safety systems affecting the

operation of the organisation. The emphasis of the code of practice would be to ensure that senior managers were made aware of, and respond in a timely manner to, safety issues.

The introduction of a new code of practice is being driven by the authors' view that it is too easy under the current legislation for managers and directors to rely on 'the complexity of the hierarchy in an organisation or the multiplicity of operations and responsibilities to be able to satisfy' one of the following defences:

- that they were not in a position to influence the conduct of the corporation in relation to its contravention of the legislation; or
- that, at their level of seniority, they used all due diligence to prevent a contravention of the OH&S Act.

Implications

At this stage, the report has no legal force. However, the New South Wales Minister for Industrial Relations, Mr John Della Bosca, has said that he will consider the report and will consult with the unions and employers before taking recommendations to Cabinet later this year.

Given the ALP's support for the introduction of industrial manslaughter laws, it is likely that a new offence in relation to workplace fatalities will be introduced in the near future. The report gives some indication as to the likely scope of the new laws.

New age-discrimination legislation

New federal legislation outlaws discrimination in employment on the ground of age, where age is the dominant reason for the discrimination. Partner David Cross and Lawyer Louise Keats report.

The Act

The *Age Discrimination Act 2004* (Cth) (the **Act**), which became law on 22 June 2004, makes direct or indirect discrimination on the basis of a person's age unlawful. The areas covered by the Act include

employment and related matters, education, access to premises, provision of goods, services and facilities, and provision of accommodation.

The Act prohibits an employer from discriminating against a person on the basis of age when:

- offering employment;
- setting employment terms and conditions;
- promoting, training or offering other benefits; or
- dismissing an employee.

The usual exception in discrimination law, discrimination based on the inherent requirements of the job, is included as a defence.

The Act also contains a number of general exemptions in the areas of charities, superannuation, tax, pensions and health.

Rationale

The Act is a response to a number of recent studies and reports calling for legislation to address the negative consequences of age discrimination on the economy and on the financial and psychological wellbeing of individuals. That age discrimination is widespread is evidenced by the fact that age discrimination complaints (under state legislation) already make up a significant proportion of all complaints received.

Impact

The Act brings federal legislation into line with existing state positions, subject to an important exception. Unlike state legislation, the Act uses a 'dominant reason' test, which requires age as the *main* reason for the discrimination. Under most state legislation, it is enough if age is just one reason for the discrimination. As a result, many complainants may still prefer to use state laws.

The value of another forum will be different in each state. For example, the major impact in New South Wales will be to give employees an extra six months to lodge a complaint, since the current time limit for complaints to the NSW Anti-Discrimination Board is six months, compared with 12 months for the Commonwealth Human Rights and Equal Opportunity Commission.

Although a spate of complaints under the new Act is unlikely, given existing age discrimination laws, employers should revisit their practices to ensure that they conform with both state and federal requirements.



Guidance about \$200K cap still some time off

The eagerly anticipated Full Bench decision in *Aveling* is still a number of months away, as Senior Associate Andrew Cardell-Ree and Law Graduate Peter Beacroft report.

Limits introduced in June 2002

As regular readers of *Focus: Workplace Relations* will recall, with effect from 24 June 2002, the NSW Parliament introduced two limits on who can bring an unfair contract action. One of those limits, found in section 108A of the *Industrial Relations Act* (the **Act**), bars executives who earn more than \$200,000 in the year before termination. The second limit, found in s108B, is a 12-month time limit from the date of termination.

Do they extinguish an existing right?

These limits do not say expressly that they apply before 24 June 2002, and there has been much debate about whether they extinguish an employee's pre-existing right to bring an unfair contract claim. A number of decisions in the Industrial Commission have considered the 12-month time limit in s108B and found that, although it bars new claims, it does not prevent employees exercising existing rights to bring an unfair contract claim. In late May 2004, a single member of the Industrial Commission in *Larsen* found otherwise, saying that amending legislation can extinguish the mere right to bring a claim, even if it does not say so expressly, giving s108B retrospective effect.¹ That decision is now the subject of an appeal to the Full Bench of the Commission.

Aveling and the \$200K cap

Before the *Larsen* decision was handed down, a Full Bench had considered the retrospective effect of the \$200,000 cap in s108A, in the context of a claim by an (ex-) employee named *Aveling*. The Full Bench

had retired to consider the arguments and make its decision when the *Larsen* decision came down. Since *Larsen* may have a direct bearing on the *Aveling* case, the Full Bench will hear further argument about the *Aveling* claim on 30 July 2004, and its decision will follow some time after that.

Implications

Applications similar to that in *Aveling* have been parked, pending the outcome of the *Aveling* decision. Employers anticipating claims relating to the period before 24 June 2002 will have to wait some time yet for the Full Bench's guidance on this important issue.

Workplace harassment standard

A new workplace health and safety advisory standard has been issued in Queensland, officially acknowledging workplace harassment as a health and safety issue. Lawyer John Naughton reports.

Definition

The new advisory standard defines workplace harassment to include repeated behaviour, other than sexual harassment, which is:

- unwelcome and unsolicited; and
- offensive, intimidating, humiliating or threatening.

When assessing whether behaviour is offensive, intimidating or threatening, the test is objective and excludes reasonable management action taken in a reasonable way.

The effect of the advisory standard is to address behaviour known to cause injury and illness, but which is not prohibited by existing discrimination or industrial legislation.

Employer's compliance obligations

To comply with workplace health and safety obligations, employers must either:

- do what the standard says; or

¹ *Larsen v Ondeo Nalco Australia Pty Limited* [2004] NSWIRComm 123.

- adopt and follow another method that gives the same level of protection against the risk of workplace harassment.

If an advisory standard is not followed, it is very difficult for an employer to demonstrate that they have followed such an alternate method, remembering that the level of protection needs to be the same. As a consequence, the new advisory standard is likely to operate in practice as a mandatory code. Failure to comply may lead to a breach of the *Workplace Health and Safety Act 1995* (Qld) and consequent financial penalties.

Queensland Government's approach

The Queensland Government's approach emphasises the need for employers to deal with workplace harassment as an important workplace health and safety issue. Previous advisory standards have related to what might seem more traditional workplace health and safety risks (eg asbestos, manual handling, scaffolding and noise). The introduction of an advisory standard for harassment recognises that the effects can be equally as damaging.

The advisory standard commenced on 1 June 2004 and remains in place for five years.

Psychiatric harm in the workplace

The rise in WorkCover claims for stress-related illness has highlighted the duty owed by an employer to take reasonable care to prevent psychiatric harm. Partner Julian Riekert and Articled Clerk Tess Hardy review a recent decision.

Background

In *O'Leary v Oolong Aboriginal Corporation*², the appellant, Mr O'Leary, was a long-term employee of the Oolong Aboriginal Corporation (OAC), a residential drug and rehabilitation centre. After a period of leave

in October 1998, Mr O'Leary noticed a number of changes in the workplace:

- all books of accounts had been removed from his office;
- his workspace had been moved to the verandah area;
- his computer was taken away; and
- he was no longer authorised to sign cheques.

OAC offered Mr O'Leary no explanation for these changes, but other employees were aware that he was suspected of misappropriating funds. By January 1999, Mr O'Leary was no longer able to cope with the situation and resigned. Soon afterwards he was diagnosed with reactive depression. OAC was aware that, in September 1998, Mr O'Leary had been diagnosed with an adult adjustment disorder. Following resignation, Mr O'Leary brought a claim for damages against OAC, arguing that it failed to meet its duty of care.

Decision

The trial judge found that the injury sustained by Mr O'Leary was 'far too remote', as OAC could not have reasonably foreseen that a possible consequence of its conduct was that the plaintiff would suffer a recognised psychiatric illness.

Appeal

On appeal, Chief Justice Spigelman confirmed the trial court's findings on the basis that the test of *reasonable foreseeability* has largely been replaced by that of *conceivable foreseeability*.³ He emphasised that, despite OAC's knowledge of Mr O'Leary's pre-existing mental vulnerability, Mr O'Leary's reaction was 'sufficiently idiosyncratic that it could not be said to be reasonably foreseeable that psychiatric injury... could result from the OAC's conduct.'

Justice Sheller also found in favour of OAC, but described the behaviour of OAC as 'wrong if not disgraceful'. Ultimately, Justice Sheller based his decision on expert medical evidence that suggested that it was unlikely that anyone could have foreseen that Mr O'Leary would develop reactive depression.

In dissent, Justice McColl held that Mr O'Leary's mental injury was reasonably foreseeable and the employer was in breach of their duty of care to him.



² [2004] NSWCA 7 (Unreported, Spigelman CJ, Sheller and McColl JJA, 14 May 2004).

³ But see *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 (McHugh J) 96-108; 331.

Conclusion

There is no doubt that employers owe a duty of care to their employees and that, in proper circumstances, a failure to take reasonable care can result in liability even for a purely psychiatric illness. It is true that, like in *O'Leary*, courts are reluctant to hold employers liable for illness suffered following a degree of pressure in the workplace.

However, in a recent English case with similar facts, the court held that employers had an obligation to monitor and 'make sympathetic inquiries' about the psychiatric health of their employees, particularly where an employee is known to be suffering from a pre-existing illness or noticeable work-related stress.⁴

While Australian courts are reluctant to impose a similarly high standard of care, there is an increasing acknowledgment that workplace pressures can induce serious psychiatric illness. If the employer is aware that an employee is at risk, prudence suggests that action be taken to address the risk and minimise the chance of it evolving into a claim.

Protecting the protectors

In recent years, Australian governments have introduced legislation to protect emergency workers and defence reservists in the employment context. Partner Julian Riekert and Articled Clerk Tess Hardy give an overview of employers' obligations.

Emergency service

Amendments to the *Workplace Relations Act 1996* (Cth) make it unlawful to dismiss any employee who is temporarily absent from work because of voluntary emergency management activities.⁵ A 'voluntary emergency management activity' arises if the employee:

- carries out an activity dealing with an emergency or natural disaster on a voluntary basis;

- is a member of, or has membership association with, a recognised management body; or
- was requested by or on behalf of the body to carry out the activity, or would have been requested if the circumstances had permitted.

The employee's absence must be reasonable having regard to all the circumstances, including the duration of the absence and the size of the employer's business.

These entitlements echo state legislation designed to prevent victimisation of emergency service workers.⁶ As an example, the *New South Wales Emergency and Rescue Management Act 1989* (NSW) makes it unlawful for an employer to dismiss or otherwise treat an employee detrimentally because of their absence from work on any emergency services in the event of a natural disaster or specific emergency.

In addition, many awards and agreements provide entitlements to emergency services leave. While there is no explicit legislative entitlement to leave, there is often an expectation that employees will be granted leave in certain circumstances, whether or not a legal entitlement to leave exists. However, if no entitlement exists, an employer may refuse requests by employees to attend emergencies, and an employee leaving work without permission to attend an emergency can be liable for dismissal.

The employee's contract of service is deemed to continue throughout the duration of emergency services leave, and service-bound entitlements continue to accrue. In practice, most employers pay employees for periods of emergency services leave at their normal rate of pay.

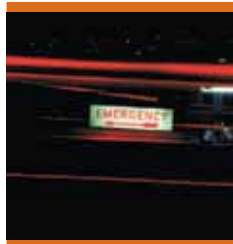
Defence service and discrimination

The *Defence Reserve Service (Protection) Act 2001* (Cth) makes it unlawful to dismiss, discriminate against, or otherwise treat an employee detrimentally if that person has volunteered for defence service. In addition, an employer is prohibited from refusing to employ someone because the person is, has, or might in the future join the Defence Reserve. Breach of these

⁶ See *State Emergency and Rescue Management Act 1989* (NSW); *Emergency Services Act 1976* (Tas) s42; *State Counter-Disaster Organisation Act 1975* (Qld) s35; *Public Safety Preservation Act 1986* (Qld) s9; *Emergency Management Act 1999* (ACT) s76; *Disaster Act 1982* (NT) s47; *Fire and Emergency Act 1996* (NT) s15; and *State Disaster Act 1980* (SA) s18.

⁴ *Barber v Somerset County Council* [2004] UKHL 13 (Unreported, 1 April 2004).

⁵ See *Workplace Relations Amendment (Protection for Emergency Management Volunteers) Act 2003* (Cth).



provisions is a criminal offence and the employer may be fined up to \$3,300, as well as being liable to pay compensation.

While an employer is not obliged to pay the employee for any defence service leave, it has the option of making up the difference between the amount the Commonwealth pays the employee and their ordinary pay. The federally-funded Employer Support Payment Scheme provides financial assistance to eligible employers to help offset the costs of releasing employees for reserve military service.

During reserve service, the employment contract is suspended. Employers are not obliged to continue paying workers' compensation premiums, superannuation guarantee levy amounts or other entitlements while employees are absent on reserve service. In other words, employees are treated as being on leave without pay.

The employer is entitled to terminate the employment of an employee during, or at the conclusion of, defence service leave. However, the onus is on the employer to prove that the termination was justified and not related to this service. Finally, the employer is entitled to replace the employee for the duration of the period of leave, but must acknowledge the employee's right to return to their position.

Conclusion

The legislation is designed to ensure that volunteers are able to continue with their activities, whether in an emergency situation or as a military reservist, without jeopardising their employment. If employees are not covered by an agreement or award that grants emergency services or defence service leave, it is a good idea to develop a policy that clarifies leave entitlements and notice requirements.



For further information, please contact:

Jamie Wells

Partner, Brisbane
Ph: +61 7 3334 3268
Jamie.Wells@aar.com.au

Tim Frost

Partner, Sydney
Ph: +61 2 9230 4995
Tim.Frost@aar.com.au

Peter Arthur

Partner, Sydney
Ph: +61 2 9230 4728
Peter.Arthur@aar.com.au

Gavin MacLaren

Partner, Singapore
Ph: +65 6535 6622
Gavin.MacLaren@aar.com.au

David Cross

Partner, Sydney
Ph: +61 2 9230 4394
David.Cross@aar.com.au

Julian Riekert

Partner, Melbourne
Ph: +61 3 9613 8672
Julian.Riekert@aar.com.au

Steven Cole

Partner, Perth
Ph: +61 8 9488 3743
Steven.Cole@aar.com.au

Have your details changed?

If your details have changed or you would like to subscribe or unsubscribe to this publication or others, please go to www.aar.com.au/general/subscribe.htm or contact Barbara Leis on +61 7 3334 3371 or email Barbara.Leis@aar.com.au

www.aar.com.au