Motor Trades Organisations

Senate Standing Committees on Legal and Constitutional Affairs - Inquiry

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Bill)

MOTOR TRADES ORGANISATIONS – RESPONSE TO QUESTION TAKEN ON NOTICE

1. Motor Trades Organisations (MTO) thanks the Committee for the opportunity to expand upon the concern expressed at paragraph 6 of MTO's written submission in relation to vicarious liability case law, that in *"practice the 'all reasonable steps' test has often proved insurmountably and arguably, unreasonably high for small business in particular."*

2. In this regard MTO notes that the Explanatory Memorandum (EM) to the Bill acknowledges that whilst the term 'reasonable and proportionate measures' is not defined in the Sex Discrimination Act, the *"... related concept of 'all reasonable steps' has been extensively explored in the case law in relation to vicarious liability under the SD Act..."* [1], with the courts also considering the *"size and circumstances of an individual employer in applying this test, which involves considerations of 'proportionality'."* [2] The EM also acknowledges the relevance of the existing vicarious liability case law in *"determining whether an employer or PCBU has taken 'reasonable and proportionate measures' to eliminate certain conduct 'as far as possible' under the new duty."* [3]

3. MTO is concerned that the case law demonstrates that measures that might otherwise be considered as reasonable and proportionate have been found to be insufficient to discharge the employer's obligation to demonstrate they have taken 'all reasonable steps' to satisfy the vicarious liability test. Put another way, the case law demonstrates that the 'all reasonable steps' test is sufficiently **broad and subjective** to enable a Tribunal or Magistrate to find an employer vicariously liable should they wish to – regardless of the steps taken by the employer and regardless as to whether the taking of additional steps would, in actuality, prevented the harassment or discrimination from occurring.

4. A recent practical example of this concern is found in ***Oliver v Bassari (Human Rights) [2022] VAC 329***. This matter involved a small male grooming business "Man Oh Man" and the

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[1] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 Explanatory Memorandum*, [83]
[2] Ibid.
[3] Ibid.,[89]

conduct of one of its then employees, Federico Catalfamo, towards then co-worker Devorah Oliver, including an incident of sexual assault ('motor boating'). The incident was caught on the business' CCTV camera and subsequently led to police charges, to which Mr Catalfamo was ultimately fined without conviction.

5. In finding the Respondent vicariously liable – and ordering the owner of the (by then, defunct due to COVID-19) business to pay $150,000, the Tribunal member noted that whilst the employer provided each employee with an electronic Handbook containing the Company's Anti-Discrimination and Equal Opportunity Policy (which included what appears to have been a detailed complaints handling procedure[4])and discussed the Handbook in at least one staff meeting prior to the First Complaint occurring, the Tribunal member *"was not satisfied …. that the Second Respondent took reasonable precautions to prevent the sexual harassment complained of by the Applicant."* [5]

6. Importantly, at paragraph 64 of the Decision, the Tribunal member outlined what the small business operator would have needed to have done to satisfy the test:

> *"Instead, what would have amounted to reasonable precautions to prevent sexual harassment in the Second Respondent's workplace would have been for the Second Respondent to ensure Mr Catalfamo and other employees received, read and had a sound understanding of the sexual harassment and related policies in the Handbook, for example, by having employees undertake a short questionnaire, to conduct regular but not necessarily frequent refresher training meetings on the Handbook and, given the Second Respondent has available to it CCTV footage of the workplace, to monitor the workplace to ensure employee compliance with its Anti-Discrimination and Equal Opportunity Policy in the Handbook."* [emphasis added]

7. These measures stand in stark contrast to the illustrative example provided in the EM for a small business operator:

> *Joe is the owner of a small delivery business. Joe has seven full-time workers, including six male delivery drivers and one female administrative officer … Joe writes a short policy on harassment and discrimination, including how a complaint would be handled and responding to inappropriate conduct by customers. Joe discusses the policy during a staff meeting and provides a printed copy to all staff. Joe also regularly checks in with his staff to discuss rostering, leave and other matters, including any behavioural issues. As a result of these measures, Joe is likely to be compliant with the positive duty under section 47C in the circumstances.*[6]

8. Unfortunately for Joe, based on the example of ***Oliver v Bassari***, Joe would almost certainly be found **not** to have complied with his positive duty under the proposed 47C should one of his employees actually be harassed. For example, deficiencies could be found in Joe's 'short policy' for not being detailed enough; and Joe's discussion of the policies could be found deficient as Joe is unlikely to be qualified to conduct effective training, particularly as Joe did not test employees to ensure that each staff member fully understood the policy (including any CALD-related considerations). In addition, Joe's regular check ins with his staff could be

[4] *Oliver v Bassari (Human Rights) [2022]*, VAC 329, [50].
[5] Ibid., [61].
[6] Op. cit., [118].

found deficient as not constituting either refresher training or specific surveillance with regard to harassment and discrimination.

9. MTO's concerns are reinforced by the findings of the Full Court in ***Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) [2020] FCAFC 13***. As referenced in the EM[7], the case involved the overturning of an original finding by the primary judge that the Company was not vicariously liable for the sexual harassment of its then employee Lilo Hana Von Schoeler by her then colleague John Urquhart, due to the lack of evidence supporting steps *actually* taken to convey the seriousness and consequences of sexual harassment to employees[8]. As noted by the primary judge[9], this appears to have been significantly influenced by the Company's delays in conducting an investigation into the Applicant's complaint.

10. Relevantly, the Full Court decision provides useful guidance on the 'all reasonable steps' test, noting that whilst it is not enough for an employer to take "some of the reasonable steps"[10], it is not necessary for an employer to take "all steps necessary"[11]. Importantly in the context of reasonable steps taken to prevent the employee or agent from doing the relevant act, the Full Bench found that:

> "*… the focus must be on what steps would or might prevent an employee from doing the relevant unlawful act. A criticism that may be levelled at some of the cases decided by anti-discrimination bodies in this area is that they tend to focus upon perceived deficiencies in policies and training without adequate consideration of whether those deficiencies could have made any difference to the doing of the relevant act."* [12]

One might respectfully suggest that this observation had relevance in the case itself, given a different outcome may have been arrived at had Ms Von Schoeler's supervisor Timothy Hey acted immediately on the complaint in accordance with the Company's 'Zero Tolerance' policy.

11. Another practical example is found in ***Caton v Richmond Club Limited [2003] NSWADT 202.*** In that case, a licensed club was found vicariously liable for the sexual harassment of a female worker by her then co-worker Robert Crowley. In that matter the Tribunal acknowledged the Club had written polices and procedure in place, conducted training, and acted quickly and appropriately to investigate the matter as soon as they became aware of the harassment (no prior knowledge of conduct through formal or informal reporting channels), leading to the perpetrator being summarily dismissed.

12. Whilst the Tribunal accepted that the Club took 'all reasonable steps' *after* the complaint was made – it found that it had not taken 'all reasonable steps' *before* the complaint was made. The reasoning of the Tribunal was the inadequate training of management in particular[13], whilst at the same time acknowledging that one of the Club's Duty Managers, Mr Hunt, took appropriate action by taking a record of the informal report made by the

[7] Ibid., [88].
[8] *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2) [2020],* FCAFC 13, [81].
[9] Ibid., [47].
[10] Ibid., [60].
[11] Ibid., [61].
[12] Ibid., [63].
[13] *Caton v Richmond Club Limited [2003],* NSWADT 202, [153].

Applicant *before* the complaint was made and advising the Club's senior management there might be an issue (despite the Applicant not wanting the matter attended to), in case other incidences were occurring[14].

13. The Company's failure to meet the 'all reasonable steps' test was ultimately due to a deemed failure in training, arising from the Tribunal's conclusion that:

> "… *None of the Managers seemed to recognise the potential and continuing possibility of unlawfulness and the ramifications of Mr Crowley's behavior for other staff and in the wider workplace. The Managers should have been trained sufficiently to recognise Mr Crowley's propensity to sexually harass its female workers and they should have taken action in relation to that conduct…"* [15]

14. Again, such measures stand in stark contrast to the illustrative example provided in the EM for a larger business operator:

> *Aida and Daniel are the co-owners of a large hotel in a ski resort. The hotel employs more than 60 staff in a range of roles, including managers, chefs and cleaners … Aida and Daniel task their human resources officer with developing a policy on harassment and discrimination and ensuring this is part of the onboarding process for new staff. Aida and Daniel also require managers to complete externally-provided training on harassment and discrimination on an annual basis. The managers are then responsible for ensuring their staff are aware of the policy and reiterating behavioural standards. As a result of these measures, Aida and Daniel are likely to be compliant with the positive duty under section 47C in the circumstances.*[16]

15. Unfortunately for Aida and Daniel, based on the examples of ***Oliver v Bassari*** and ***Caton v Richmond Club Limited***, Aida and Daniel would almost certainly be found **not** to have complied with his positive duty under the proposed 47C should one of their employees actually be harassed. For example, deficiencies could be found in regard to the policy developed by their human resources officer and the training provided to non-managerial employees, including the lack of refresher training and the lack of evidence that the policy is understood by each staff member (including any CALD-related considerations). Deficiencies are also likely to be able to be found with the externally-provided management training, particularly if it lacks the sufficient length and sophistication to give manager expertise in being able to effectively profile employees to recognise and act upon an individual's 'propensity and potential possibility' of unlawfulness. Additionally, there is no mention of dedicating resources to monitor compliance through the hotel's CCTV footage.

16. To be clear, MTO notes that the examples provided in the EM (and referred to above) are reasonable and agree that such measures *should* be sufficient for the hypothetical employers in each example to be deemed compliant – given they appear to be 'reasonable and proportionate' in the circumstances of the business. However, as the practical examples provided above from vicarious liability case law demonstrate, in practice the 'all reasonable steps' test has often proved insurmountably and in MTO's view, unreasonably high for small businesses in particular.

[14] Ibid., [153].
[15] Ibid., [175].
[16] Op. cit., [119].

17. Accordingly, MTO reiterates its view that the examples currently provided in the EM as 'likely' to make the employer compliant with the positive duty under the proposed section 47C should firstly, be more definitive than 'likely' to give employers greater certainty as to the measures that will meet their positive duty; and secondly, be added to the Bill as a statutory note. Referencing these examples only in the EM allows Tribunals, Courts and Commission's to ignore them should they wish. If those examples truly reflect the intention of the Bill, they should be included within the Bill. In the alternative (and noting that a judicial officer ultimately has discretion to make the decision on breach of the positive duty), MTO recommends that small businesses be exempted in recognition of the disproportionate impost of time, resources and expertise that will otherwise be required, in practice, for a small business to meet the proposed positive duty.

18. The final practical example MTO wishes to provide is ***Johanson v Michael Blackledge Meats [2001] FMCA 6***. The matter involved a small butcher shop business and the accidental sale of a particular bone to a customer. The issue related to the fact that the bone in question had been crafted into the shape of a phallus by an employee for the purpose of a prank to be played on a friend outside of work. The bone in question inadvertently ended up amongst the other bones and was placed in an opaque bag for sale (for dogs). The customer who ultimately bought that bag happened to be female and was offended. In finding the Company vicariously liable for sexual harassment and discrimination, the magistrate had particular regard to the then Code of Practice on Sexual Harassment prepared by HREOC, noting that the employer had not met the requirements of the Code (in relation to very small businesses), including that *"… No brochures were made available…"* [17] Given the unique circumstances of the case, MTO is at a loss to understand the specific content such a 'brochure' could have reasonably contained to have prevented the action from occurring.

19. MTO notes that the EM also references the current iteration of AHRC guidance for employers on vicariously liability[18]. MTO notes that this guidance was last updated in 2014 and is not differentiated based on the industry or size of business. As noted in its written submission, MTO believes that the AHRC should be focused on developing (through collaboration with industry) up-to-date and fit-for-purpose guidance materials to ensure that it is of practical utility for business (and small businesses in particular).

[17] *Johanson v Michael Blackledge Meats [2001],* FMCA 6*,* [105].
[18] Op. cit., [88].