Legal

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Public

House Standing Committee on Education and Employment
Committee activities (inquiries and reports)
Inquiry into the Fair Work Amendment Bill 2013

Via Email: ee.reps@aph.gov.au

This Submission has been prepared by:

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INTRODUCTION

Beasley Legal initial submissions made to this review commenced:

"Despite the positive developments that have been introduced by the Fair Work Act, the legal landscape which ultimately confronts the targets of workplace bullying is fragmented, uncertain and in some instances, totally inadequate. Indeed, gaps in the existing framework are so substantial, that many victims of workplace bullying may find themselves with no attainable avenues of recourse at all.

As the ILO has reported, there seems to be widespread acceptance that psychological violence or bullying at work is a 'major though still under recognised issue' which poses an 'extremely costly burden to the worker, the enterprise and the community'."

Accordingly Beasley Legal welcomes the reforms proposed, however we encourage an amendment to Part 6-4 B, section 789 F D (2) "Reasonable Management Action" by including a subsection or definition that would read, words to the following effect:

The Employer has the burden of proof to discharge that the reasonable management action:

1. was commenced based on prima facie evidence;
2. was undertaken in a reasonable manner; and
3. was genuine and not used as an abuse of process against the employee or group of employees.

Our submissions follow and we thank you for the opportunity to make them.

Yours Faithfully

Bradley Beasley

Beasley Legal Background

The Principal of Beasley Legal has an employment history of working for two employee organisations, two universities, and two personal injury law firms one working for plaintiffs and one working for defendants.

The following submissions in no way represent the values, vision, aspirations or opinions of the above employee organisations, Universities or law firms.

Beasley Legal Goals and Objectives are to:

- Provide accessible legal services in the pursuit or defense of legal rights for individuals and organisations (Client's).

- Ensure Client's subject to the legal system are treated with respect and dignity so they know they are not alone. This will be achieved by providing relevant referrals to other organisations, health providers and agencies.

- Assist the Client decision making process by providing accurate and informed information, so Client's understand their legal rights to make informed decisions for the resolution of their legal matters.

- Provide legal education to develop an understanding of the law and the legal systems through seminars, presentations, printed materials, on-line links and collaboration with other relevant organisations, providers and agencies.

- Engage in community participation of law reform, activities and projects, approaching legal problems from: wider social needs, client's point of view and that of practitioner's experiences.

- To advocate for, and participate in the process of legal and social changes that redress injustices and inequities in the law and society.

- Through participation in professional and other bodies seek positive changes to: legal structures and the law that is not intended to prejudice or marginalise legal rights unfairly for profit and/or political gain.

- Participating and maintaining active links with community organisations and legal service providers.

Education and Standing

The Principal is:

1. A Legal Practitioner of the Supreme Courts ACT, NSW and the High Court of Australia and holds an unrestricted practicing certificate and his awards and standing include:

    a. Admitted as a Legal Practitioner of the Supreme Court ACT

    b. Admitted as a Legal Practitioner of the High Court of Australia

    c. Admitted as a Legal Practitioner of the Supreme Court NSW

    d. Masters of Laws, UTS

    e. Bachelor of Laws Degree, UTS

    f. Graduate Certificate of Legal Practice, UTS

    g. Advanced Industrial Law, UTS

    h. Industrial Law, UTS

    i. Advanced Certificate in Safety Management, TAFE

    j. Advanced Certificate in Industrial Relations, TAFE

2. Recognized and established in the fields of: Industrial, Employment, Workplace Relations, Human Rights, Human Resources and Criminal Law,

3. Holds affiliation with a number of distinguished professional bodies and has held leadership positions with a number of them.

4. Has represented clients and organisations domestically and internationally.

Beasley Legal Response to the proposed Fair Work Amendment Act 2013

Introduction: This submission deals with the proposed Part 6-4 B of the Act, in-particular, section 789 F D (2) which excludes an application as a result of 'reasonable management action' being pursued.

Beasley Legal Submission:

It is our Submission that the proposed Part 6-4 B of the Act is long-overdue in responding to the prevalence and severity of bullying in Australian workplaces.

Although the steps taken by the Government are positive they do not go as far as section 83 (5) of the *Industrial Relations Act 1996* (NSW), as submitted by Beasley Legal in the Fair Work Act Review.[1]

In the Federal Jurisdiction, the granting of power to the Fair Work Commission (the Honourable Commission) to make orders to stop bullying, fills a void providing an employee or a group of employees (employees) with an opportunity to seek redress. Employees will now have the opportunity to seek formal external redress, a preventative measure that has the potential to prevent exacerbation from occurring, which could strike at the root of the contract of employment causing irreparable harm to the employment relationship and causing serious long term psychological injury to employees.

This is a proactive measure that moves away from the traditional forms of redress waiting for employees being injured, that is, compensation for damage already done. Providing an opportunity for redress in this proactive way will attempt to preserve both the health of the employee and the employment relationship from being damaged.

It is foreseeable that the introduction of this part will also have a positive impact likely to reduce the number of claims made seeking redress following the cessation of the employment relationship.

However, there is one subsection included in the proposed section 789FD that in our view is fundamentally contradictory to the aims and proposed benefits of the inclusion of Part 6-4 B. That is "*Reasonable Management Action".*

On review of case law Reasonable Management Action appears to be interchangeable with the term Reasonable Administrative Action which could result in similar unjust outcomes preventing a matter being Heard and dealt with.[2]

This was outlined in our submission to the *Safety, Rehabilitation and Compensation Act* (the SRC) review, the inclusion of Reasonable Administrative Action as a category of risk for which Employers cannot be held liable: *"presents a profound and unprecedented reversal of the long held legal principle that risks at work are not voluntarily assumed, even within the context of an on-going employment relationship".*[3]

Volenti

The activities outlined in Subsection 5A (2) the SRC Act are not exhaustive, they are common activities conducted by employers in the course of an employee's employment. It is not our submission that a reasonable appraisal or reasonable disciplinary action carried out in a reasonable manner in relation to an employee's employment is unreasonable but that those acts can (just as any other activity in the workplace) result in an employee sustaining an injury as a consequence. Compounding the risk for employees is that these acts can be targeted and/or a process of constructive dismissal. In these cases, many employees who

[1] Beasley Legal Submission, Fair Work Act Review, February 2012 at p4 see Meaning of Dismissal 2 (b)
[2] *Q-COMP v Craig John Hohn* [2008] QIC 56 (26 March 2008)
[3] Beasley Legal Submission into the Safety, Rehabilitation and Care Act Review

have been targeted with long term psychological abuse are not in a sound position to take remedial action for some time after their employment has ceased.

Not only do these activities pose risks of injury - most commonly mental injury, those risks are multiplied in the case of bullying, where not only the action itself can pose injury, but the action(s) or processes and/ or procedures relating to such actions can in fact be used as a tool for bullying.

Reasonable Manner

In our submissions to the SRC review we stated that the *Reeve* decision was applied as intended by the legislator. The legalisation read in conjunction with the explanatory memorandum created preliminary hurdles. That is the legislation is restricted to: "legitimate management action", or "reasonable administrative action" taken in a "reasonable manner".[4]

If the action taken by the employer was legitimate, reasonable and balanced then there must be a connection to the second element that is not limited however, it is related to something to do with the employee in the employment.

If the above is satisfied then the employee is denied his or her workers compensation claim, that is conduct undertaken by the employer that has caused an injury to the employee.

This denies the employee income, rehabilitation, medical and psychological treatment and medicines. It shifts the burden from the employer onto society and in some cases the social security system. It may also result in the employee never returning to the workplace. In extreme cases it may result in the death of an employee. [5]

This is *contra* to the modern law related to activities in society. Individuals deserve to have their interests protected from being violated or exposed to unreasonable risk. This is conduct where a person suffers an injury sustained as a result of others. The law in a modern responsible society is to adjust these losses and afford compensation.[6] More importantly for this review remedial action by the Honourable Commission.

Any negative law that denies rights should be read down and dealt with narrowly. Therefore if a check and balance is not put in place with respect to the meaning of "reasonable management action", will the jurisdictional legal battles commence as to the meaning of "reasonable management action" before a matter is heard and/or go on appeal, reflective of the federal and state systems use of the same clause? Foreseeable, likely and probable and yes.

Reasonable Management Action

We submit that the use of "reasonable management action" resurrects a legal principle that the worker voluntarily assumes the risk, a defence rejected in this country for many decades with respect to the employment relationship, however in the federal jurisdiction used by the Howard Government in association with Work Choices.

The introduction of "reasonable management action" seeks to distinguish between types of management risk or in this case a process and procedure being instigated. Employers have a duty to provide a safe workplace, and any attempt to differentiate some workplace risks from others, not only breaks with long standing legal principle, but could be viewed as a sinister attempt to protect employers from not exposing their abuse in the workplace let-alone the culture of some organisations. For this submission "reasonable

[4] *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21 (8 March 2012)

[5] Individual Impact Statements made on 17 August 2012, to the House of Representatives, Standing Committee on Education and Employment. Inquiry: Into Workplace Bullying, the Main Committee Room Parliament House in Canberra

[6] Sappideen and Vines; "Flemming's The Law of Torts, The Lawbook Company, 10th Ed

management action" could be used as a jurisdictional defence preventing a bullying matter being heard by the Honourable Commission if an appropriate 'check and balance' was not put in place.

Not voluntarily assuming the risk does not prevent employees from the requirement to have regard for their own safety or in our submission, conduct. The law surrounding "contributory negligence" provides an opportunity for a presiding member to take this into account. The legal principle is to discount the full weight of action or compensation if awarded where employees are found to have contributed to their condition or circumstances. In such cases the long-standing legal principle has been that any award of damages is reduced by an appropriate amount in recognition of the employee's negligence. This remedy is sufficient to protect employers from any undue burden and is consistent with community expectations both of personal responsibility, and the right to be safe at work.

The legislative requirement for such action to be taken is 'reasonable' though this does not provide adequate safeguards for employees from such abuse or injury. The law on the issue to date whilst not conclusive sets the test for reasonableness only at action that was satisfactory in the circumstances:

- However, reasonableness does not need to "equate with perfection."[7]

- The action cannot be "irrational, absurd or ridiculous[8]" yet does not have to be "best practice"[9] or even "whether it could have been done more reasonably"[10].

- The action does however; have to be taken in a manner that is "tolerable and fair"[11].

Though the test of "tolerable and fair" provides a 'higher' benchmark for which to assess employer's behaviour, it does not provide an adequate safeguard for employees who can still sustain injuries as a result.

An example we can offer is pressure being placed on one of our client's where the employer wanted our client to attend an interview and provide a statement. Our client had been absent from work for a number weeks due to a medical condition that our client alleges was caused by bullying and harassment in the workplace by senior management. Our client provided medical evidence of his worsening medical condition.

Our Client was not contacted by his employer nor was he offered any assistance to return to the workplace. However, after our client started to agitate his rights some weeks later his employer made a number of serious allegations against him.

Our client with our assistance cooperated with the employer in answering the serious written allegations. This was despite the fact that our request for further and better particulars related to evidence used to make the allegations against our client was denied.

Even though our client was absent from work evidenced by a medical certificate, the employer then wanted our client to attend an interview with them for our client to make a statement. We were willing to assist and in light of our client's medical condition we requested the questions be put to us in writing 48 hours in advance prior to the interview, but the employer refused.

With repeated demands by the employer on our client to attend an interview and make a statement this exacerbated our client's medical condition and we provided the employer with a statement to this effect

[7] *Bowers v WorkCover Queensland* [2002] QIC 18; (2002) 170 QGIG 1 at p. 668, paragraph 6
[8] *Wei and Comcare* [2010] AATA 894
[9] *KRDV and National Australia Bank Limited* [2011] AATA 210
[10] *Bropho v HREOC* (2004) 135 FCR 105
[11] *Beasley and Comcare* [2012] AATA 411

from our client's treating Psychiatrist. We again offered to assist, and requested the questions in writing however on 9 April 2013 the employers replied:

"In respect of your other points raised:

1. *XXXX needs to communicate that the interview will be taped …;*

2. *It is not practical to provide a list of questions 48 hours before the interview as requested because Mr XXXX answers may necessitate further questions. Mr XXXX is aware of the allegations and questions will be based on those…*

The employer went on to say in effect as a: *"matter of law"* our client had no rights to without prejudice communications and as there was a criminal investigation being conducted by police. The employer then implied that if our client did not attend the interview and answer the questions he would and I quote: *"be compelled to disclose information"*.

Reasonable management action and the special case of bullying

It is our submission that "reasonable management action", separated as a distinct sub-category of risk that the employer cannot be held liable for is especially problematic in the case of bullying because "reasonable management action" can be used by employers as a method to consciously and/or deliberately cause harm. As the law currently stands, there is no obligation for employers to act on prima facie evidence, or to avoid abuse of process. There is, in short, no obligation for "reasonable management action" to be reasonable.

Case Study

By way of illustration, we provide a recent example of a case from our practice

Our Client

The following is an actual case study authorised for release for this submission by our Client.

Our Client is an employee of the Government Authority. At the time our client came and saw us he was visibly emotionally and psychologically distraught. Our client was on sick leave, and sought assistance from our practice in relation to ongoing conduct by his employer, especially in relation to alleged abuse and bullying that amongst other things has prevented him undertaking: his PhD, continued research by mischief of his supervisor concerning scientific discovery that affords my client recognition and intellectual property.

When the employer was made aware of the conduct our client was subjected to, his employer had no interest in addressing our client's concerns.

Following our practice contacting the employer on our client's behalf, the employer issued our client with allegations alleging amongst other things, serious criminal behaviour – namely, utilising work facilitates for the purposes of the production of illicit substances, possession and use of illicit drugs while at work and misuse of the employer property and equipment.

In our view the allegations were spurious. When we sought better and further particulars as to the evidence supporting the allegations, our client was denied access to any further material, including evidence that was being relied upon – asserted as 'facts' in the original allegations.

Upon further inquiry, we were informed by representatives of the NSW Police Force that much of what constituted the employer's allegations, were accusations made by an ex-partner of our client. Our practice

is still awaiting the outcome of the forensic investigative and report, meanwhile, our client continues to suffer psychological trauma not only from the original injuries that he alleges were sustained through workplace bullying, but further from the investigative process which has to date taken months to complete.

This case succinctly but sadly demonstrates the effect of the current definition of reasonable management action to be conducted in a reasonable manner. According to the current definition, the investigation into alleged criminal behaviour is considered reasonable, yet there is no obligation on the employer, or any employer to have a reasonable basis for that action. This is a profound flaw in the current law which unless rectified leaves employees such as our client vulnerable to further injury and financial hardship.

"Reasonable management action" to be reasonable in the circumstances

It is our submission that a transparent criteria must be applied in order for the proposed Part 6-4 B to have in practice, what it seeks to effect in principle. The inclusion of an objective criteria to the definition of reasonable management action would seek to, at a bare minimum ensure that the action itself was reasonable in the circumstances not merely the conduct of employers in relation to the action. This would guard against employees being subjected to unfair and/or unreasonable actions which have no evidentiary basis. In creating such a test, we look to the common law, which has long accepted that an allegation must be scrutinised as to whether it can be considered reasonable before the Court.[12]

We submit that not only should the Honourable Commission be able to assess the reasonableness of the reasonable management action but that the burden should be on employers to prove that the reasonable management action undertaken had a foundation in the circumstances.

Case Studies Supporting our Submission

With respect to our submission we rely upon the following correspondence in part between our practice and the employer dated 5 March 2013:

"It is now apparent that the source who made the allegations against my Client is his ex-partner Mr XXXX. This was confirmed with the Police on 1 March 2013. Mr XXXX ended their relationship on 10 January 2012 Mr XXXX communicated with my Client by email and made threats against him. Please find attached herewith.

My Client is of the view that Mr XXXX knowingly made false accusations against him to subject him to an investigation related to a baseless offence or offences. Further Mr XXXX made these defamatory allegations without lawful excuse in an email to you. Mr XXXX made these allegations knowing they are not true and with the intent to cause harm to my Client. The facts of this matter clearly indicate that a public mischief has occurred by Mr XXXX.

As stated in our correspondence dated 25 January 2013 Mr XXXX is acting in a vindictive, malicious manner and has maligned my Client's reputation with the intent to damage his standing with the employer, his employer.

It would have been reasonable for the employer to make an inquiry with my Client in the first instance rather than subject him to this unnecessary unreasonable disproportional and harmful process that has caused damage to my Client's health and reputation."

Based on the above case study and those we earlier submitted to this inquiry (Beasley and Hill) we urge that the following subsection be included following the proposed section 789FD (2) that would read, words to the following effect:

"The Employer has the burden of proof to discharge that the reasonable administrative action:

1. was commenced based on prima facie evidence;

[12] *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336

2. *was undertaken in a reasonable manner; and*

3. *was genuine and not used as an abuse of process against the employee or group of employees."*

Concluding Summary, why the above amendment should be made

By not including the above amendment and on experience with the application of reasonable administrative action under the SRC Act this would:

1. Introduce a justification to act contrary to the legal principals of contract law, the law of tort and employment law.

2. Provide a shield for the employer to hide behind without questioning their conduct related to the justification for undertaking such steps re: reasonable management action.

3. Protect the employer from conduct that would amount to bullying and harassment, committing a tort.

4. Not put in place a test justifying the action being taken by employer.

5. Not put in place a transparent test how the employer should conduct themselves.

6. Not examine in which the manner the process was undertaken.

7. Not examine the substance of any allegations made against the employee concerning their performance or conduct.

8. Not examine the culture of the organisation, looking at similar fact and evidence.

9. Not take into account the impact on the employee.

10. Reinvigorates *volenti non fit injuria* a concept repugnant to, and contrary to modern day law.

11. Offers no accountability for breach of mutual trust and confidence in the employment relationship.

12. Undermines a wide range of duties implied upon employers that has emerged through English legal authority.

The above is supported by:

- *Loty and Holloway v AWU* [1971] ARN (NSW) 95 decision: fair go all round
- *Byrne v Australian Airlines Ltd* [1995] HCA 24; at paragraph 128
- *M v M* [1988] HCA 68 referring to *Briginshaw v. Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, at p 362
- *Beahan -v- Bush Boake Allen Australia Ltd* [1999] NSWIRComm 582 (17 December 1999)
- Sappideen, O'Grady, Riley and Warburton, Macken's Law of Employment, 7th ed, Lawbook Co from page 156
- *NSWLR BLF v Minister Industrial Relations* 372 Supreme Court [(1986) 7, see Street CJ at 387
- *Beasley v Comcare* [2012] AATA 411 (3 July 2012) at paragraph 118