

# Overwork – Medical and legal risks: real or perceived

Presented by Sian Gilbert, Partner – Workplace Relations & Safety

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# Legal risks

- Work, health and safety law analysis
- Employment law analysis
- Contract law analysis
- Common law analysis

# Risk analysis

- Overwork and work stress are related to psychological illness;
- Stress-related workers' compensation claims have doubled in recent years, costing over \$10 billion each year;
- A survey of over 5000 workers indicated that 25% of workers took time off each year for stress-related reasons;
- In relation to psychological injury claims, work pressure accounts for around half of all claims and harassment and bullying for around a quarter of claims; and
- Preliminary research shows that Australian businesses lose over \$6.5 billion each year by failing to provide early intervention/treatment for employees with mental health conditions.

(Source: Australian Human Rights Commission 'Workers with Mental Illness, - a Practical Guide for managers')

# Risk analysis

- Research is available in support of the following propositions:
  - long work hours are implicated in a range of mental health problems including stress, depression, anxiety, high blood pressure and insomnia [1](#);
  - long work hours – particularly in care based professions such as nursing – are associated with a deleterious impact on competence [2](#);
  - sociologists have implicated long work hours in the emerging care deficit in developed countries where there is a steady trend of declining time spent with children and the elderly [3](#) ; and
  - output per hour rapidly declines after 50 hours of work per week, rendering it ineffective [4](#).

# Work, Health and safety

*Work, Health and Safety Act (NSW) 2011*

- Primary duty under the WHS Act is that every PCBU (person conducting a business or undertaking) must ensure, so far as is reasonably practicable, the health and safety of workers engaged in the business;
- Relevantly, this includes the requirement to provide safe systems of work; and
- Is a work system that causes burnout or requires excessive hours to be performed a safe system?

— Exclusive

## King & Wood Mallesons investigated for overworking employees

**Sarah Thompson**, **Jemima Whyte** and **David Marin-Guzman**

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Top-tier legal firm King & Wood Mallesons is the subject of an unprecedented WorkSafe investigation for overworking lawyers and staff to meet punishing royal commission deadlines.

The investigation was triggered by a complaint about employee fatigue during high-pressure situations at the firm's Melbourne office, and is thought to relate to the work the law firm did in the first months of the Hayne royal commission. KWM represented AMP, Suncorp, Youi and IOOF during the commission.



# Powers of the regulator

- Right to attend the workplace to inspect records;
- Power to issue infringement notices;
- Power to issue prohibition notices – can require work to cease; and
- Power to initiate prosecutorial proceedings for a breach of the Act:
  - maximum penalty of \$1.5 million for a corporation in the event of a breach that is likely to cause death or serious illness or injury; and
  - maximum penalty of \$500,000 for other breaches.

# Legislation governing working hours

- Section 62 of the *Fair Work Act* (Cth) 2009 sets out the maximum hours a week that an employee can work;
- The maximum hours in any one week is 38 hours;
- An employer must not request or require an employee to work more than the maximum hours unless the request is reasonable;
- Fair Work Ombudsman has the power to investigate and prosecute breaches of the Act; and
- Courts have traditionally been reluctant to remedy psychiatric injury brought about by 'workplace stress' in circumstances where the injury arises from the work performed under a contract of employment that the parties consented to and for which the employee was remunerated **unless** the injury was reasonably foreseeable [*Koehler v Cerebos* [2005]HCA 15].



# Flexible workplace arrangements?

- The *Fair Work Act (Cth) 2009* provides a right to **request** flexible workplace arrangements in some circumstances; and
- The right extends to the following categories of employee:
  - the parent of a school aged child;
  - a carer;
  - a person with a disability;
  - a person over 55 years old; and
  - a person experiencing violence from a member of their family, or caring for a person experiencing violence from a member of their family.

# Right to request flexible workplace arrangements

- The right extends to a request to change hours of work, patterns of work or the location of work; and
- The request can be refused, on reasonable business grounds.

# Contract law analysis

- Express terms:
  - a contractual right to supervision?
  - a contractual right to reasonable work hours?
- Implied terms:
  - provision of a safe workplace; and
  - trust and confidence?
- Importance of workplace policies.

# Common law analysis

- Liability may exist in circumstances where there is:
  - a duty of care;
  - vicarious liability;
  - evidence of an injury; and
  - a reasonably foreseeable risk of injury.

# Common law analysis

## ***Naidu v Group 4 Securitas Pty Ltd* [2005] NSWSC 618**

- Severe depression and post traumatic stress disorder - humiliating and harassing treatment by Manager at Nationwide News:
  - violent and financial threats;
  - racial and sexual vilification;
  - frequent overwork, often without pay; and
  - required to perform personal tasks at the Manager's home.

# Common law analysis

- Recognition of the obligation to provide a safe workplace and safe systems of work;
- A duty of care to protect employees from reasonably foreseeable workplace injuries;
- BUT only in circumstances where:
  - there is actual notice of the conduct said to be causative of the injury; AND
  - the injured party had a propensity, or was developing, symptoms of a psychological injury which were capable of being detected.
- Possible consequences for employers on notice of employee issues of psychological symptoms associated with overwork?



# Common law analysis

## ***Damages:***

- Compensation for past and future medical expenses, income lost from inability to work and exemplary damages; and
- Apportioned 35% for Group 4, 65% for Nationwide News:
  - \$1.9 million against Nationwide News; and
  - \$100,000 against Group 4 .

# Questions?



# Contact



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# References

1. [Iwasaki, K, Takahashi, M & Akinori, N. Health problems due to long working hours in Japan: working hours, workers' compensation \(Karoshi\) and preventative measures. Industrial Health 44, 537–540 \(2006\)..](#)
2. [Rogers, A, Hwang, WT, Scott, L, Aiken, L & Dinges, D. The working hours of hospital staff nurses and patient safety. Health Affairs 23\(4\) \(2004\)..](#)
3. [Nock, SL & Kingston, PW. Time with children: the impact of couples' work-time commitments. Social Forces 67, 59–85 \(1988\)..](#)
4. [A 2014 study \(<http://ftp.iza.org/dp8129.pdf>\) by John Pencavel from Stanford University showed that longer working hours backfire on employers.](#)

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