DownUnderAllOver

A regular column of developments around the country

Federal Developments

NEW SOCIAL SECURITY DEBT RECOVERY PROVISIONS

Significant changes to the debt recovery provisions in Chapter 5 of the *Social Security Act 1991* (the Act) will take effect on 1 October 1997 as a result of amendments made by the *Social Security Legislation Amendment (Budget and Other Measures) Act 1996*. Broadly, these changes are:

(a) A recoverable debt will now exist whenever a person is paid more than their correct entitlement, even if the overpayment occurred through Departmental error: new s.1223(1). This provision will apply to amounts paid to a person on or after 1 October 1997.

(b) Waiver will continue to be available where a debt has occurred because of Departmental administrative error and the Department of Social Security (DSS) client received the overpayment in good faith. However, such an 'administrative error' waiver will no longer be available where the DSS raises the debt within six weeks of the first payment that caused the debt: new s.1237A(1A). (The Government's original proposal to remove waiver for administrative error altogether was defeated in the Senate). This new provision will apply in relation to debts arising *before*, on or after 1 October 1997.

(c) The general discretion to write-off a debt will be replaced by a power to write-off a debt in circumstances limited to those where: the debt is 'irrecoverable at law' as defined by s.1236(1B); the debtor has 'no capacity to repay the debt'; the debtor's whereabouts are unknown after all reasonable effort have been made to locate the debtor; or, where the debtor is not receiving social security and it would not be cost effective to recover the debt: new s.1236(1A). The amended write-off provisions will apply in relation to debts arising on or after 1 October 1997, and to the amounts of debts arising *before* 1 October 1997 that are still outstanding as at 1 October 1997.

Transitional provisions provide that the new provisions will be applied to cases already in the course of review proceedings. In particular, new cl.105(4) of Schedule 1A of the Act provides:

> Despite section 8 of the *Acts Interpretation Act 1901*, if a legal proceeding or an application for review of a decision: (a) relates to, or otherwise involves, a provision of Part 5.2, 5.3 or 5.4 of this Act; and (b) is not finally determined before 1 October 1997; the proceeding or application must, if continued, be determined as if it had been instituted on that day, and this Act, as amended by Schedule 18 to the amending Act, applies to the proceeding or application accordingly.

The application of changes in social security waiver provisions to cases already in the review process has long been a battleground between the DSS and welfare rights advocates, most recently seen in the decision of the Full Federal Court in *Lee* v *Secretary, Department of Social Security* (1996) 139 ALR 57; 23 AAR 339; 2(5) *SSR* 69, which is on appeal to the High Court.

Undoubtedly there will also be a contest in the Administrative Appeals Tribunal (the AAT) and the Federal Court over the effect of cl.105(4). However, resolution of the dispute could take several years and, in the interim, the DSS will administer the new provisions as it intends them to operate.

In the Explanatory Memorandum to the Bill, the Government estimated that the changes to the debt provisions would save $148 million in 1997-98, suggesting that the new provisions will have a very significant impact at an individual client level.

Social security lawyers and advocates who have a write-off or waiver case likely to reach the SSAT or the AAT should now be looking at ways to expedite the proceedings so that they are completed before 1 October 1997. ● **PS**

ACT

NEW RESIDENTIAL TENANCIES BILL

On 15 May 1997 the ACT Attorney-General, Gary Humphries MLA, tabled the *Residential Tenancies Bill 1997*, which proposes a new scheme for regulating residential tenancies in the ACT, replacing the *Landlord and Tenant Act 1949*.

The Bill is the outcome of a long drawn out reform process initiated by the then Attorney-General, Bernard Collaery MLA, in 1990 when he established the ACT Community Law Reform Committee and gave it a Reference on residential tenancy law.

The new Bill essentially implements the recommendations of the CLRC Report No. 8 (December 1994), with two significant variations: rejection of the concept of a standard tenancy agreement in favour of standard terms read into all agreements; and placing dispute resolution squarely into the Magistrates Court (called a tribunal) rather than with a more arms-length specialist tribunal.

The Bill is expected to be debated in the ACT Legislative Assembly in June, with commencement in September or October (if the Bill survives the inevitable barney between property and tenant interests and is enacted by the Legislative Assembly). ● **PS**

DOMESTIC VIOLENCE

A number of amendments are being made to the domestic violence laws applying in the ACT, following the recommendations made by the Community Law Reform Committee in a report published last year. Their purpose is to give greater protection to victims of domestic violence. The *Bail (Amendment) Bill 1997* will remove the presumption in favour of bail where a person is charged with a domestic violence offence. Bail may only be granted if a police officer is satisfied on the balance of probabilities that the person's release will pose no danger to the victim. If the accused person is released it will be subject to a requirement to appear in court within 48 hours.

The *Domestic Violence (Amendment) Bill 1997* ensures that when a magistrate makes a protection order, any firearms licence held by the respondent is automatically cancelled, and on the making of an interim protection order it is suspended. Also, the court is given additional powers to order not

only seizure and detention of any firearm but also a firearms licence and any ammunition held by the respondent.

The *Crimes (Amendment) Bill (No.2) 1997* clarifies and revises police powers to enter, search for and seize firearms, ammunition and a weapons licence. It also provides a power of arrest without warrant for domestic violence offences. Last year penalties for breaching domestic violence protection orders were increased to a maximum of two years for a first offence and five years for subsequent offences, at the same time as the offence of stalking was introduced *(Crimes (Amendment) Bill (No. 2) 1996).*

Legislation has also been introduced to establish a Domestic Violence Protection Council which will be responsible 'for the implementation of domestic violence policy and programs in the ACT, across all agencies of Government ... so that the outcome of prevention of domestic violence is achieved' *(Domestic Violence (Amendment) Bill (No. 2) 1997).* These amendments should take effect by the end of June 1997.

The Community Law Reform Committee has since produced another report, on 'Domestic Violence — Civil Issues' to which the Government has yet to respond.

Meanwhile, the ACT's excellent Domestic Violence Crisis Service is reeling from an unexpectedly adverse decision of the Federal Court on 2 May 1997 in a long running sex discrimination case against it. Finn J found in favour of the male complainant on a threshold question of jurisdiction under the *Sex Discrimination Act 1984* (Cth) and awarded costs against the community-based service. The case now goes forward to a hearing on its merits before the Human Rights and Equal Opportunity Commission *(Kowalski v ACT Domestic Violence Crisis Service).* ● **JE**

NSW

VICTIMS MAKING AN IMPACT ON SENTENCING

The *Victims Rights Act 1996* (the Act) commenced on 2 April 1997. The Act establishes, a Charter of Rights for Victims of Crime, a Victims of Crime Bureau and a Victims Advisory Board. The controversy surrounding the Act lies in the consequential legislation which allows written victim impact statements (VIS) to be adduced in sentencing proceedings if the court considers it appropriate. This type of legislation is not unique as it exists in South Australia, Western Australia, Victoria, ACT, Canada, New Zealand and the United States.

In NSW a family victim is now able to give evidence about the impact of the death of the primary victim. A primary victim can give evidence on the effect of the offence. A VIS is not mandatory, and the absence of a VIS does not give rise to an inference that an offence had little or no impact on a victim. However, recent comments in the NSW District Court indicate that the presence of a VIS will increase a sentence. Therefore this legislation places extra responsibilities on the Director of Public Prosecutions (DPP) as VIS may be prepared by either the victim/s, the victim's representative or the DPP. Judging from the DPP's attitude in recent press I doubt he will be rushing to prepare VIS.

This legislation is enacted at a time when victims' rights groups have strong political force. Thus it is not surprising that the Act gives victims an opportunity to voice their suffering, which is both therapeutic for the victims and allows the judges who exist in ivory towers to appreciate the impact of a crime. This balances the sentencing process which is dominated by evidence tendered by the accused.

However, such legislation is problematic in sentencing proceedings as it has the potential to lead to the differential valuing of lives. For example, a murder victim with a close family is likely to have a VIS made on his or her behalf whereas it is difficult to imagine someone speaking out on behalf of a murdered vagrant.

In respect of sentencing for sexual assault offences this legislation paves the way for more sexist judgments, for example, the argument that a raped prostitute suffers less harm than a 'chaste' woman (à la *R v Hakopian).* Additionally, the accused may derive satisfaction and power when hearing of the victim's trauma.

It could be argued that the NSW legislation is unfair as it is silent on whether cross examination of the maker of the VIS is permitted. Victorian legislation expressly provides for cross-examination. If a sentence can be increased by virtue of VIS why should the defence be precluded from attacking the victim?

Additionally, this legislation is adopting civil concepts of compensation into the criminal justice system. Is this appropriate?

Of note is the NSW Law Reform Commission's (NSWLRC) recent report on sentencing which recommends that VIS be inadmissible in homicides. The Commission observes that in homicide as death is the impact of the crime, a VIS 'cannot, therefore, supply any information relevant to the effect of the crime on the victim of which the court may be unaware'. The Commission is strongly opposed to family members making VIS as the law is not the place for retribution and a forum for victims to express their grief. ● **MK**

Northern Territory

SAMSON AND DELILAH IN DARWIN

One of the most ubiquitous rituals of imprisonment for men, both in the Northern Territory and elsewhere, is the institutional crewcut. Rationalised on the ostensible grounds of hygiene and security, it exemplifies the coercive imposition of conformity as a key state tactic in the ongoing struggle against subversive individual expression. The prison clip, furthermore, forcefully represents incarceration as emasculation.

Many prisoners have railed against the shears, but few have succeeded. In Darwin, however, one such complaint has found its way into the Supreme Court, and in the process creased the brows of correctional services officers, human rights lawyers and legal aid commissioners.

As fans of the classic soapie *Prisoner* well know, women are allowed to keep their crowning glory in gaol. Accordingly, on being admitted to Berrimah Prison, a Mr H refused to submit to the barber on the ground of sex discrimination.

The response of the prison authorities was, initially, entirely predictable: Mr H's locks, like those of all who had gone before him, soon littered the prison salon's floor. But then, whether on legal advice, or perhaps in a bizarre attack of political correctness, an edict was issued from the Department of Correctional Services: henceforth, the hair of all prisoners, of whatever gender, would be similarly shorn.

A group of women inmates immediately applied for legal aid to challenge

this decision, and an interim injunction was sought even as the scissor blades were being sharpened. For now, their distressed tresses are safe, but, in the context of massive legal aid cuts, there are doubts at the Legal Aid Commission whether the matter merits further assistance.

Even if the women are successful in obtaining continuing representation, and even if an injunction follows, there remains the unpalatable fact that on its face the prevailing practice is indeed discriminatory under both the *Anti-Discrimination Act* (NT) and Commonwealth legislation. Would an exemption need to be sought by means of a special certificate? Of course the simple and obvious solution would be to let nature take its course and permit all prisoners the hair style of their choice. Watch this space. ● **RG**

Queensland

NEW LEGAL AID BODY

The Legal Aid Commission of Queensland has been replaced by Legal Aid Queensland (LAQ). The management structure involves a smaller board (from 10 members down to 5) and, unlike the similar model which was adopted in Victoria with the 1996 establishment of Victoria Legal Aid, no provision has been made for a broader consultative body. The Attorney-General now has power to give written directions to the LAQ Board on a wide range of matters and the Board must comply with those directions. The only area where the Attorney cannot direct the LAQ Board is in respect of whether or not legal assistance should be granted to a particular individual. What might be called a 'full control with limited responsibility' model.

No time was allowed for any public debate about the *Legal Aid Queensland Act 1997*. It appears that the Borbidge Government has taken the opportunity presented by the ongoing stoush between the Federal and State Governments over legal aid funding to give legal aid a new, more corporate look. The Act has a strong commercial focus with an emphasis on pursuing innovative commercial arrangements including 'legal assistance arrangements'. Despite this emphasis, very little detail is given as to what these arrangements will actually involve.

YOUNG OFFENDERS

The Borbidge Government has introduced a new Community Conferencing Program which will see young people accused of criminal offences involved in a form of mediation with crime victims. Attorney-General Denver Beanland gave the example of a young burglar who, after a conference with the victim, might agree to mow the victim's lawn each fortnight for two years. The scheme was not favourably received by youth groups which expressed concerns at the possibility of convictions being recorded against young people without the evidence against them having been tested. The Youth Affairs Network called for young people and lawyers to reject the scheme.

VIOLENT ARRESTS ON VIDEO

In early April, there was widespread media coverage of the arrest of a group of Aborigines outside an Ipswich nightclub. The arrest, in which Queensland police were 'assisted' by two US Marine Military police officers, was captured on video by a surveillance camera. Complaints have been made to the Criminal Justice Commission by several of the people arrested. Further, one person has commenced civil action against police for the assault. ● **PS**

South Australia

WHAT DO YOU BID FOR THIS WIG AND GOWN?

In a move which has been described as 'controversial' the State Government has put up for tender the defence brief in the Garibaldi Smallgoods manslaughter trial. The move has been 'slammed' by the legal profession as a threat to the criminal justice system according to reports in the *Advertiser*. The development arises from the trial being adjourned as a result of a 'Dietrich' application. The tender process is reported to involve a panel of representatives from the legal profession, the Legal Services Commission and the Government 'in conjunction with the defendants' evaluating the bids. The Government has allocated $600,000 for the defence.

The Bar Association wants a full public debate on the implications of such a process. The Advertiser also quotes judicial support for the proposition that such a process would bring the administration of criminal justice into disrepute.

FAST-TRACKING MFP (Multi Functional Premier)

The Premier has announced the fast-tracking of a major development in the CBD of Adelaide along with the a new role for the MFP to refocus some of its efforts on the north-eastern part of the city. Of course, this raises all the usual issues about the extent to which fast-tracking development avoids democratic scrutiny.

And the review of the Adelaide City Council governance is to be completed by the end of the year. There is no doubt that 'cutting red tape', 'fast-tracking development', 'the interests of stakeholders' and 'corporate objectives' will be terms heard a lot of before year's end.

In the meantime the citizens of Adelaide City Council local government area (remember them) have voted in only the second woman Lord Mayor in its history. The candidate who advocated private security patrols in the city (if the police wouldn't do it) came third. Both male candidates ran heavily on getting the city moving. The new Lord Mayor ran a shoe string campaign and refused to be beholden to any large interest group. Voters, it seems, might be just a little reluctant to embrace all things corporatist. ● **BS**

Victoria

ALARMING AMENDMENTS

Never to be accused of the 'softly, softly' approach, the Victorian Government is proposing amendments to a wide range of legislation. Many will no doubt be popular with the public but will be alarming to practitioners already under pressure in an overloaded system.

As with any omnibus Bill, many of the proposed changes in the *Sentencing and Other Acts (Amendment) Bill* will be welcomed, making it difficult to oppose the entire Bill. However, many are deeply concerning, including amendments to the *Sentencing Act 1991:*

- the proposed changes amend s.10 to direct judges not to take into consideration the abolition of remission entitlements as was previous practice.
- maximum penalties will be increased — for example — Level 3 imprisonment will be increased from 15 to 20 years and sentencing will be

calculated on a new scale in terms of years rather than months.

- the Bill will allow magistrates to give aggregate sentences for offences arising out of the same incident and which have similar facts, meaning that one sentence is calculated rather than each offence being awarded separate sentences.
- a new sentencing order will be created with a Combined Custody and Treatment Order which can be applied when the court is satisfied a drug or drinking addiction contributed to the commission of the offence. Whereas previously offenders with addictions were often given suspended sentences enabling the opportunity of rehabilitation, this Bill will direct those sentenced to 12 months or less to serve six months in custody.
- suspended sentences can now be imposed for longer periods (three years up from two, with only two in the Magistrates Courts).

Amendments to the *Drugs, Poisons and Controlled Substances Act 1981* will introduce a method which calculates the amount of drugs based on eventual street value (once cut/mixed/dried). This will have the effect of decreasing the amount of drugs needed for a charge of trafficable or commercial quantities. The Bill also decreases the level at which trafficable and commercial quantities apply. Additionally, an amendment to the *Bail Act 1977* directs courts to refuse bail to a person charged with trafficking or cultivation in a commercial quantity of a drug of dependence unless exceptional circumstances exist.

Of particular concern, an amendment to the *Children and Young Persons Act 1989* prevents the offences of murder, attempted murder, manslaughter, arson causing death and culpable driving causing death being heard in the Children's Court.

An increase in sentences will be likely to receive substantial community support. However, the realities of this combination of amendments will mean that petty criminals and first offenders with substance abuse problems will serve a compulsory minimum six month sentence, but those convicted of trafficking who do not admit to an addiction could now have a sentence of up to three years suspended.

Clearly, the amendments in the Children's Court area will have serious repercussions for young offenders. Additionally, the fact that sentences for Youth Training Centres cannot be suspended may mean that many judges will simply give suspended gaol sentences. This combined with the amendment that any breaches of a suspended sentence will be served in gaol will see the population of children in custody rise dramatically.

A second proposed Bill is the *Law and Justice Legislation Amendment Bill.* While again, some amendments will be welcome, such as the change to the *Crimes (Family Violence) Act 1987* which will widen the application of intervention orders, some are blatant indications of a push further towards limiting judicial independence and the privatisation of justice.

Amendments to the *Legal Aid Act 1978* will replace legal aid review and appeal committees with Independent Reviewers. These are appointed by the Attorney-General from outside Victoria Legal Aid (VLA). The qualifications required for these positions are unclear and the Attorney-General may apparently remove a panel member from office at any time. The amendments also enforce the limits already imposed by VLA and enables VLA to set time limits of seven days or more on appeals of the Independent Reviewers' decisions, meaning that clients and practitioners will have a restricted period in which to appeal their funding applications.

Of particular concern, and a reflection of the focus of the Victorian Government, are the proposed amendments to the *Second-Hand Dealers and Pawnbrokers Act 1989.* More on this next time.

All of these amendments have been proposed without consultation with the Law Institute or the DPP. The changes to the *Legal Aid Act* will further limit the independence and effectiveness of this body. Additionally, proposed changes to the *Magistrates' Court Act* which establish the possibility of outsourcing the administration services of the Traffic Camera Office, PERIN Court, the sheriff and the Fixed Penalties Payment Office indicate a first step towards the privatisation of the judiciary and police operations.

Victorian lawyers need to be aware of the proposed amendments and the serious implications they will have for the administration of justice in this State. ● **EC**

WA

KIERATH'S THIRD WAVE

Radical industrial relations reform has entered its third phase in WA with the passage of *the Labour Relations Legislation Amendment Bill 1997.* Dubbed 'the Third Wave', the legislation targets unions' rights to enter workplaces, to take industrial action, to use funds for political purposes, and introduces by stealth *'essential services legislation'.*

The legislation is contentious for a number of reasons. First, it is contrary to International Labour Organisation (ILO) Conventions on Freedom of Association and the Right to Organise. Second, the legislation is being passed at a time of relative industrial peace in Western Australia; many regard its passage as unnecessary and more likely to provoke industrial conflict than resolve it. Third, the provisions of the new laws will only apply to union members. Finally, longstanding Parliamentary Convention, has been tossed aside by the WA Government to ensure the Bill's safe passage.

The ILO has interpreted the core Labour Right of Freedom of Association to involve three elements: the right to organise into unions, the right to bargain collectively and the right to strike. The ACTU has initiated a formal complaint to the ILO that 'the Third Wave' directly attacks all of these.

The legislation prohibits industrial action unless it is authorised by a secret ballot and is related to a claim over wages and conditions. Under the definition of a strike, any form of industrial action which occurs without a secret ballot will be unlawful — including bans and stopwork meetings. The approval and ballot process, as a minimum, will take seven weeks. Approval can be withdrawn at any stage by the Industrial Relations Commission by the issue of 'resume work orders'.

WA Unions have stated that they are not opposed to the principle of secret ballots before strike action. What they are opposed to is a mandatory requirement for 'pre-strike' ballots to occur before any forms of industrial action

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collection of 10 papers presented at a seminar devoted to s.52 of the TPA, held by the Centre for Commercial and Resources Law of the Universities of Western Australia and Murdoch, in 1993. It is divided into two parts, the first on the nature of misleading or deceptive conduct, the second on remedies for same. The contributors are all experts in the field, although the lone import, Professor Melvin Eisenberg from the University of California at Berkeley, addresses the concept of negotiating in good faith as it occurs in the United States. His is the only article that never mentions the TPA.

The collection is generally excellent. Each article offers something to consider. Those I found especially engaging were: JD Heydon's piece on the relevance of the victim's level of care, Michael Gillooly's comparison with misleading conduct under s.995 of the Corporations Law, Aviva Freilich's paper on comparative advertising, Professor Eisenberg's article referred to above, and Warren Pengilley's review of the aspects of causation and reliance as they relate to misleading conduct.

In any published collection of conference papers, there are bound to be shortfalls or missteps. I found the two-part structure and the ordering of the articles to be ineffective. Inevitably, there will be overlap between articles, but here the problem was worse — some of the later papers provided a better overview and background of the legislation than those preceding. A fuller Introduction or even a reordering of the pieces might have helped provide some cohesiveness, as well as giving the novice in this area a better grasp of some of the issues. Obviously, this book is not intended as a beginners' textbook on the TPA but that is no reason not to present it in the clearest light.

One of the biggest questions for the TPA is what effect it has had on corporate behaviour in Australia. In the Hansard debates, Minister Enderby raised the point that the law in this area needs to be effective and efficient: '[a] law is bound to be ineffective if it commits to the administering authorities more work than they could hope to perform'. As mentioned above, Colin Lockhart notes the huge proliferation of cases under s.52 in the last decade. The TPA has revolutionised some of the traditional concepts in contract law. Is this why litigation has blossomed? Or is it a result of better-informed consumers? Or simply more litigious consumers? We need to see more monitoring and reporting done in this area. In addition, it is important to analyse how corporate behaviour has altered in the modern era. For instance, is the TPA just another arrow corporations use against competitors, with little or no perceivable public benefit? And are we as consumers, ultimately better or worse off than our counterparts of 20 years ago? The seminar papers are heavily legalistic, and one wonders whether quantitative data might help provide some texture to the overall analysis. Even anecdotal evidence would be a start.

That is one reason why Professor Eisenberg's paper is so enjoyable, although it is a shame his knowledge is limited to the US experience. He relates a great story about former US Secretary of Defense, Robert McNamara. Those with an interest in American politics may know of it — one of those vignettes that may be apocryphal, or may be an embellishment, or may be quite accurate, but nevertheless, defines the man. When he was Secretary of Defense, McNamara urged consistency and commonality between the separate US defence services (Army, Air Force, Navy and Marines), in order to promote efficiency and save money. In the early stages of this program, the services were unable to agree on the style for a common belt buckle. The dispute made its way up the various chains of command until, still unresolved, it eventually reached McNamara. As head, McNamara acted decisively — he deliberately chose the ugliest belt-buckle he could find. His purpose in doing so was to ensure such minuscule disputes were never brought to such a high level again.

This approach struck a chord the other day, as I noticed an apology by a major manufacturer in the newspaper. Apparently, a torch and battery package contained the words, 'Made in Australia,' but in fact, only the torch was made in Australia. The batteries used to be made in Australia, but production had recently been contracted elsewhere. The company was trying to use up some of its remaining packages. Obviously, someone had complained about the practice. I do not necessarily condone the manufacturer's decision, but I do wonder whether we, as consumers, are always better off because of someone's eagle-eye. One thing is for certain, in that case, all those packages will need to be thrown away.

On the other hand, what if parties knew in advance that courts may act capriciously, in the fashion of Robert McNamara, by furnishing solutions that 'resolve' problems, but are unpalatable to all? It might radically reinvent our legal system. More problems might be solved internally, with less frequent resort to cumbersome external structures.

In reviewing the formative debates on the Bill, I wondered if this was one rationale for enacting s.52 of the TPA in such general language. Because sometimes, in reading legal decisions related to trade practices, or the scholarly commentary in books such as *Misleading or Deceptive Conduct,* one gets the sense that the courts decide somewhat arbitrarily. Even though the decisions necessarily invoke accepted principles, the cases are more a patchwork quilt than a muslin cloth. Despite this, as evidenced by the numbers of claims before the courts, both the TPA and the *Fair Trading Acts* seem to be suffering from their own success. Perhaps it might be better to take the open language even further and render results as ugly as McNamara's belt buckle. It is not a point discussed in the book, however, it might make an interesting topic for the next conference on misleading conduct.

RICHARD HAIGH

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can take place. Unions argue that this, together with the time it takes to hold the ballots, the requirement that the industrial action be in relation to a claim over wages and conditions, and new powers given to the Industrial Relations Commission to issue 'resume work' orders, limit their right to strike.

A further concern of the Unions is the punitive nature of the legislation. Both workers and their Unions face fines and penalties for taking industrial action not authorised by secret ballots. Furthermore, even if Unions do comply with the legislation, immunity from common law damages claims is not provided. The bottom line for union members; even if they obey the new laws, they can still be sued by employers for going on strike. ● **TK**

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