about a contravention at their own expense. An example would be an advertisement stating that the Act was contravened by the person and providing details of orders made against the person.

The Act now provides that if an order for compensation is made together with an order for payment of a fine in relation to a breach of the Act, the compensation must be paid first. This provision ensures that victims of breaches are compensated in preference to Commonwealth government funds being raised.

4. ACCC Powers

The ACCC has been given power to undertake a representative action in relation to an alleged breach of Part IV of the Act, relating to restrictive trade practices, other than an alleged secondary boycott. This allows the ACCC to take action on behalf of consumers and small businesses that are affected by certain conduct but do not have the resources to challenge the conduct.

The ACCC must obtain written consent of the persons on whose behalf action is taken and may seek compensation for loss or damage on their behalf. The power may only be used in relation to conduct that occurred on or after 26 July 2001.

The ACCC has intervened in proceedings on two occasions – however there has been doubt about its power to intervene. This doubt has been removed with the insertion of section 87CA, which allows the ACCC to intervene in third party proceedings with the leave of the court. In the event that the ACCC intervenes, it is treated as a party to the proceedings.

5. ACCC Reporting Requirements

Finally, the annual report prepared by the ACCC must now provide details about the way in which the ACCC has exercised its powers. These reporting requirements relate to the circumstances in which the ACCC exercised its powers, the complaints received by the ACCC about its work and the general matters investigated by the ACCC.

workplace bullying

proposed code of practice

By Jacqui Kaplan, Freehills

A significant amount of publicity has surrounded the effects of bullying on children in the schoolyard. However, the stark reality is that "bullying" extends far beyond the playground and is prevalent in the workplace. Despite the obvious financial costs to employers and employees, many are still not doing enough to prevent such bullying. To combat the problem the Victorian WorkCover Authority (VWA) has released an Issues Paper to assist in the development of a Code of Practice. The Code is intended to ensure that Australian workplaces are free from bullying.

What constitutes bullying?

Despite the common stereotype, bullying is not limited to acts of violence, but includes aggressive behaviour that intimidates, humiliates or undermines a person or group. The VWA Issues Paper outlines several examples of what would constitute bullying, including:

- Continual criticism;
- Isolating or ignoring a worker;
- Sabotaging someone's work by not providing the employee with vital information and resources;
- Putting workers under unnecessary pressure with overwork or impossible deadlines; and
- Abusive electronic mail.

Who is at risk?

According to the Issues Paper those most likely to be subjected to workplace bullying include women, young people, and those in a precarious or insecure employment role. The proponents of the bullying will generally be managers and supervisors who can exert control over the victim. The Issues Paper outlined high-risk sectors as being protective services, retail trade, hospitality, travel and tourism, and health and community services.

However, in the past such victims of workplace bullying have had few avenues through which to seek a remedy. Those avenues included relief through unfair dismissal laws under the *Workplace Relations Act 1996 (Cth)*, complaints made under State or Federal discrimination laws (if the bullying is based on a "discriminatory" ground).

A new hope – The Code of Practice

However, the VWA hopes to change this through the development of a Code of Practice preventing workplace bullying. The Code will rely on the *Occupational Health and Safety Act 1985 (Vic)* (OHS Act) as a tool for regulating such behaviour. Employers under this Act are required to provide a safe system of work for all employees. This necessarily extends to a workplace being free from bullying and violent behaviours.

In effect, the OHS legislation codifies employers' common law duty and imposes obligations on employers to

ensure the health, safety and welfare of both employees and others who may be exposed to risks to their health and safety. A breach of the OHS Act is a criminal offence, and as such, victims may recover damages from an offender under the *Sentencing Act 1991*. Therefore the employer bears the primary responsibility to provide a safe workplace.

What will be the extent of the Code of Practice?

The Issues Paper released by the VWA suggests several options for outlining the possible extent of the Code, which could extend to:

- Bullying within the organisation; or
- Bullying and workplace violence within the organisation; or
- Bullying and workplace violence within the organisation and certain types of violence in client/service/user interactions; or
- All forms of bullying and workplace violence including intrusive violence (including random, one-off violence such as robbery or assault).

However, it will be important that in finalising the Code, the VWA makes a clear distinction between workplace bullying and the legitimate exercise of managerial authority. For example, an employee who is subject to the advanced stages of performance counselling should not be left open to assume that appropriate authority exerted by the manager is equivalent to bullying. On the other hand, managers will have to be cautious when exerting authority, as the ramifications could be costly. Employers can also be pro-active and supplement the proposed Code by implementing strategies against bullying within their own workplaces. Although an employer is not compelled to adhere to the VWA proposed Code, it will be an indicator of whether an employer has complied with its OHS obligations. If an employer fails to adhere to the Code, the incident of bullying may become a basis of a prosecution under OHS legislation. It may also assist in providing proof with respect to complaints made under equal opportunity or unfair dismissal laws.

Conclusion

The VWA has signalled that the Code should be released in early 2002. The implications of non-compliance are likely to provide a sufficient deterrent and thereby significantly reduce workplace bullying.

industrial relations

garden leave: it's no walk in the park

By Leigh Johns, Mallesons Stephen Jaques

In a recent decision of the Federal Court of Australia (*Wesoky v Village Cinemas International Pty Ltd [2001] FCA 32 (2 February 2001)*), Justice Merkel decided that an employer may have an obligation to provide an employee with work where the employee's remuneration is linked to their performance.

Facts

In 1996 Village Cinemas entered into an agreement with Charles Wesoky ("Wesoky") and his company, ICFC, to help Village Cinemas to establish and control their European operations. ICFC was a company established by Wesoky to offer his services to companies engaged in the international cinema and film industry.

Under the agreement ICFC was entitled to annual remuneration and a no less than five percent equity interest in all new cinema exhibition investments in Europe which fell under Wesoky's direction and management.

In early 1999 the relationship between the parties broke down. Village Cinemas wished to remove Wesoky from any role in relation to Village Cinema's activities in Europe, however it continued to pay ICFC the agreed fees pursuant to the agreement. This arrangement was intended to prevent Wesoky from working with competitors. In November 1999, ICFC and Wesoky purported to terminate the agreement with Village Cinemas.

ICFC and Wesoky argued that Village Cinemas was obliged to provide Wesoky with the duties necessary to discharge his function of establishing new cinema investments. Village Cinemas denied such an obligation and contended that it was entitled to place Wesoky on 'garden leave', that is, being stood down with full pay, provided that it paid the remuneration under the agreement.

Decision

In determining whether an employer was obliged to provide an employee with work, Justice Merkel suggested that the question depended on the construction of the contract in question.

Where a contract provides that benefits accrue to an employee as a consequence of work, this was thought likely to imply a contractual obligation to provide work unless the employer has an express contractual right not to do so.

In light of the terms of the agreement between ICFC and Village Cinemas and