

# AUSTRALIAN BUSINESS LAW REVIEW

Volume 32, Number 4

August 2004

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## ARTICLES

### **Prosecuting corporations and officers for industrial manslaughter – recent Australian developments – *Karen Wheelwright***

There have been concerns for some time about whether breaches of duty that cause a worker's death are appropriately dealt with under occupational health and safety legislation, or whether criminal prosecution is warranted in those cases involving recklessness or gross negligence. Defaulting employers are rarely prosecuted under existing criminal laws and there are serious doctrinal barriers to finding a corporation guilty of mens rea offences.

The Australian Capital Territory leads the way in Australia with the recent introduction of new criminal offences of industrial manslaughter for corporations and their senior officers. These laws rely on concepts of corporate liability based on organisational responsibility and corporate culture in the model *Criminal Code Act 1995* (Cth), thus avoiding the limitations of the identification doctrine. Other active Australian jurisdictions, whilst initially open to the notion of industrial manslaughter laws, have preferred to make changes to existing OHS laws to deal with the problem of workplace fatalities.

Whilst it has its limitations, and applies only in Australia's smallest jurisdiction, the Australian Capital Territory legislation reflects a commitment to treating workplace deaths with the seriousness they deserve, and making it easier to prosecute corporations whose operations are conducted recklessly or with gross negligence. .... 239

### **Garcia – surely it's *not* just about sex! – *Murray Brown***

This article compares conflicting approaches taken by the Australian Capital Territory Court of Appeal and the Victorian Court of Appeal on the scope of the *Garcia* principle with that adopted by the House of Lords in relation to the analogous *O'Brien* principle. It argues that the approach of the House of Lords on this question is preferable, both as a matter of law and of policy, to that taken by either Court of Appeal. It suggests that, notwithstanding these decisions, the *Garcia* principle may yet be held to apply wherever the relationship between surety and debtor is non-commercial. .... 254

**When obligations collide – striking the balance between occupational health and safety and disability discrimination responsibilities – *Kelly Godfrey***

Balancing an employer’s competing occupational health and safety and discrimination responsibilities can be a difficult and at times, uncertain task. Workplace policies and procedures may place more emphasis on compliance with one obligation, to the detriment of the other. The high incidence of disability discrimination in employment highlights the importance of this issue and timely consideration of these competing obligations. With the present definitions of “disability” being sufficiently broad to encompass those employees with either a pre-existing medical condition or work related injury, employers must be extremely careful when making decisions which affect these workers, should they be accused of discriminatory conduct. This article examines the scope of an employer’s competing obligations, the range of defences and exemptions available, as well as emerging issues. Strategies for compliance are also discussed, as part of this difficult endeavour to strike the correct balance between these important, yet competing interests. .... 269

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ISSN 0310-1053

Typeset by Lawbook Co., Pyrmont, NSW  
Printed by Ligare Pty Ltd, Riverwood, NSW