

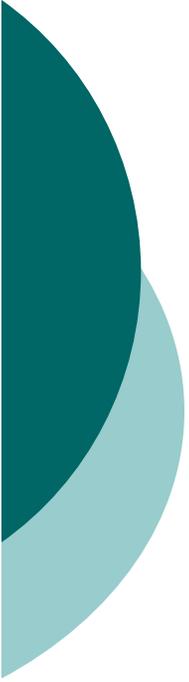


# Workplace Law

*Psychological Issues in the Workplace: An  
Intersection of Legal Obligations*

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# Overview

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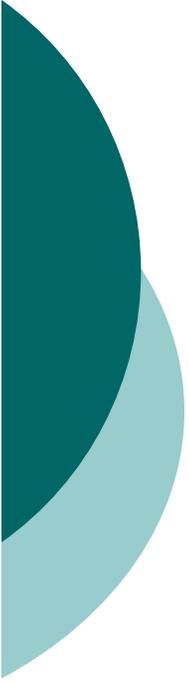


- Today we will try to provide a snapshot of the various areas of the law applicable to psychological issues in the workplace:
  - Occupational health and safety;
  - Disability discrimination;
  - Workers' compensation;
  - Adverse action / Unlawful termination.

# Psychological injury and employer challenges



- For employers – an employee with a psychological condition poses challenges:
  - Can the employee still work?
  - Is the condition work related or not work related?
  - Is the condition a compensable workers compensation injury?
  - What are my legal obligations?
- Increasingly, psychological issues in the workplace must be managed by employers – who must be aware of various legal obligations while doing so.



# Worker's compensation

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- The most common query from our clients in relation to psychological injury arises from workers compensation "stress" claims.
- Once a claim for psychological injury is made, the insurer will decide whether or not the injury is compensable.
  - Some psychological injuries arising from the employment may not be compensable depending on the circumstances of the injury (eg: psychological injury is generally non-compensable if it occurs as the result of reasonable disciplinary action by the employer).
- Importantly, in some States once a claim is made (regardless of legitimacy) – there may be a consequential impact on the premium calculation. This will have bearing on how the employer might respond to the claim.



# Worker's compensation

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- Assuming the claim is accepted by the insurer, employers are generally precluded from termination of the employee's employment as the result of the injury for varying lengths of time depending on the State.
  - In NSW, an employer is prohibited from terminating the employment as the result of the injury for a period of six months from the date of the injury. In other States, the employer is prohibited from terminating the employment as the result of the injury at all.
- In some States it is also worth noting that an obligation to provide rehabilitation opportunities under a return to work program could still exist even after the employment is terminated (regardless of the reason for termination).
- This obligation, as well as the potential premium impact of even a declined claim is the first of the legal obligations that an employer must consider when managing a psychological injury in the workplace.

# Disability discrimination



- Of course, there does not need to be a psychological “injury” to extend obligations to an employer.
- A psychological condition may fit within the definition of “disability”. The same definition occurs in both the Federal *Disability Discrimination Act 1992* and the NSW *Anti-discrimination Act 1977* where disability is defined to include:
  - “a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour”*
- Interestingly, the definition also extends to disabilities that exist now, may have existed in the past, might exist in the future or which are imputed (see s.4(h-k) DDA).
- The point for employers is that generally, Federal and State anti-discrimination laws render it unlawful to treat a person less favourably in their employment as the result of their disability.

# Disability discrimination



- Practically speaking, difficulties arise where an employee is unable to perform the job the employer hired them to perform.
- The question of termination of employment then arises. However, termination of employment would certainly be unlawful as such conduct would certainly be less favourable treatment in employment is the result of the disability.
- There is one possible avenue available for employer's contemplating termination of employment and this lies in the "inherent requirements" defence – ie the employee can not perform the inherent requirements of the job they were hired to perform. This is a defence to an act of disability discrimination (see s.21A DDA).
- Prior to exploring this option – the employer is now obligated under the DDA to consider whether reasonable adjustments can be made to accommodate the employee's disability.

# “Reasonable Adjustments”

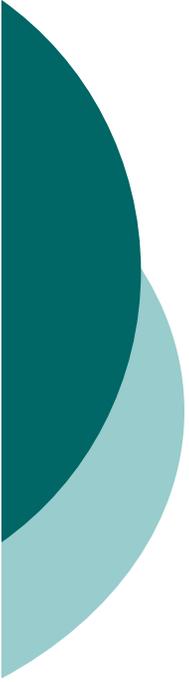


- Contemplating whether “reasonable adjustments” can be made to the inherent requirements of a role first necessitates identification of the inherent requirements.
  - The “inherent requirements” of a role are the critical / core duties that must be performed to carry out the purpose of the position. For example, an inherent requirement of the role of bus driver is the ability to see.
  - A requirement identified in a position description is not necessarily going to be accepted as an inherent requirement of the role. For example, a requirement in an administrative assistant’s position description that he / she have a driver’s licence is not necessarily going to be an inherent requirement of the role given the role involves performing administrative tasks in an office environment.
- Once the inherent requirements are identified, then consideration must be given as to whether reasonable adjustments can be made to allow the employee to continue to perform the role.
  - For example, it might be a reasonable adjustment to allow an employee with a psychological condition arising from bullying by a team of employees to be transferred to another location.

# OHS and Inherent Requirements



- An ability to work safely is likely to be an inherent requirement of a role providing an intersection between disability discrimination and occupational health and safety obligations.
- The case establishing the principle is the case of *X v Commonwealth* [1999] HCA 63 (2 December 1999). In that case, it was held that if a person cannot perform work safely then that person cannot perform the inherent requirements of the role.
- This requirement to be able to work safely reflects an employer's obligation under the various State occupational health and safety legislation to provide a workplace that is safe and without risk to health for all employees.
- This occupational health and safety obligation may prove to be a challenge when trying to also comply with workers compensation obligations and disability discrimination obligations.

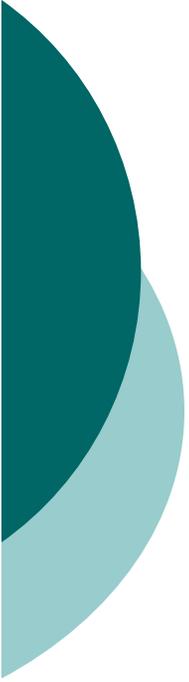


# OHS issues

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- In some instances, practically speaking, compliance with the obligation to provide a workplace that is safe and without risks to health is in stark contrast to an obligation under workers compensation to rehabilitate an employee and / or not treat an employee less favourably in employment as the result of a disability.
  - For example, an employee with a psychological condition cannot work under pressure as he / she suffers relapses of the condition in such circumstances. However, the employee is employed as a journalist and is required to work to deadlines. If the employer allocates the journalist less “exciting” stories where deadlines are not so critical – arguably the employer is treating the employee less favourably by not providing the same opportunities to cover higher profile stories. If the employer allocates the stories with pressing deadlines – it is aware that it is not providing a safe system of work as it is known that the journalist will suffer a relapse (for which the employer is likely to be liable in such circumstances).
- Nevertheless, employers are expected to be able to comply with these (arguably) conflicting obligations.

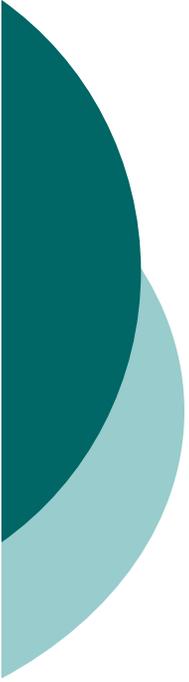


# Fair Work Act

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- Additional obligations may now be found under the *Fair Work Act 2009* (Cth) where the broad “general protections” division now houses the remedy of unlawful termination as well as the relatively new remedy “adverse action”.
- Termination of employment will be “unlawful” under ss.351 & 352 of the FWA if the termination is for a prohibited reason. The prohibited reasons include physical or mental disability and temporary absence from work due to illness or injury
  - Temporary absence = 3 months, or 3 months in a 12 month period – not including paid leave.
- Remedies for unlawful termination still include re-instatement to the employment and penalties for breach of the FWA can also apply.

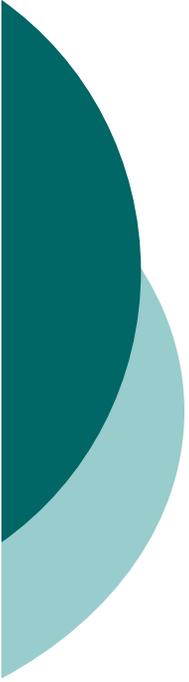


# Fair Work Act

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- Under the FWA it is also unlawful to take “adverse action” against an employee or a prospective employee.
- Adverse action can include dismissing a person from employment, not employing a person, discriminating against someone or otherwise injuring them in their employment (eg: not providing the same opportunities for career progression or promotion).
- Practically speaking, this can be seen to mirror discrimination obligations but provides an alternative remedy and forum where re-instatement to employment is a remedy available.

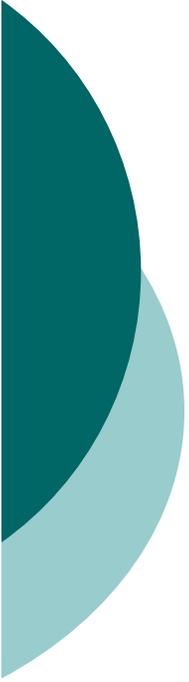


# Consideration

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- What then can an employer do to try to manage these obligations, not just to an employee with a psychological condition – but also the other employees in the workplace to whom duties are also owed?
  - The obligation not to discriminate against or treat adversely an employee with a psychological condition in our experience most often conflicts with the employer's other obligation to provide a workplace that is safe and without risks to health.
  - In complex matters, the obligation to provide a safe workplace to other employees may conflict (or appear to conflict with) the obligation not to discriminate against a single employee.

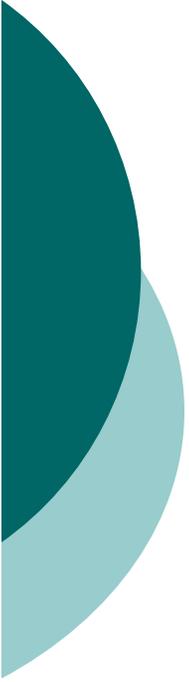


# Consideration

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- Ultimately – there is likely to be some exposure somewhere – this is the reality.
- To minimise exposure employers should carefully consider the unique circumstances of each case:
  - Be aware of all their (competing) obligations;
  - Carefully consider the inherent requirements of the role in question;
  - Assess what reasonable adjustments can be made to those inherent requirements that would allow the employee to continue to work and which also ensure a safe work environment;
  - It may be that there are no reasonable adjustments that can be made in which case contemplation of re-training or else termination of employment may need to be considered (bearing in mind any workers' compensation obligations / costs);
  - Termination should not be contemplated during any period where it is prohibited to do so for reason of the injury or disability (unlawful termination & workers' compensation restrictions);
  - If termination is contemplated (after any prohibited period), procedural and substantive fairness must be provided.



# Summary

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- Managing a psychological condition in the workplace is a complex task, whether the psychological condition arises from a workplace injury or otherwise.
- Employers often feel paralysed by the competing and sometimes conflicting obligations owed under the raft of applicable legislation.
- Making a plan that takes into account competing obligations can prove a prudent resource given the potential consequences of failing to take into account a forgotten obligation.



**Workplace Law**

Thank you for your kind attention.

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