

Australian Journal of Labour Law

Volume 38 Part 2

(Articles and Book Review included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[The Rise of 'Pure Risk' Work Health and Safety Prosecutions in New South Wales and Queensland](#)

— *Richard Johnstone*

81

This article examines the legal and policy issues involved in initiating 'pure risk' prosecutions under the Australian harmonised Work Health and Safety Acts (WHS Acts). Pure risk prosecutions are WHS prosecutions that are initiated in circumstances where workers or others have been exposed to serious risks to their health and safety which have not yet materialised in circumstances resulting in injury, disease, death, actual contact with a hazardous substance, virus or bacterium or a 'near miss'. The article argues that there are strong policy arguments (including those drawn from regulatory policy and the legal architecture of the WHS Acts) for regulators to make more strategic use of pure risk prosecutions. It shows how in the period 2021 to 2023, the WHS regulators and prosecutors in Queensland and New South Wales brought 21 successful pure risk prosecutions for hazards that have frequently been the subject of prosecution (dangerous plant and work at height), for infrequently prosecuted hazards (exposure to asbestos, and the risks of collapsing trenches) and, most significantly, for newly emerging or unusual hazards — exposures to respirable crystalline silica dust, and deficiencies in procedures for handling restricted drugs that could impair the ability of paramedical staff to perform their work safely. It argues that the main reasons that these pure risk prosecutions have been successful are that WHS investigators are now more skilled at investigating systems of work than they were in the past, and that WHS investigators and prosecutors now can draw upon a range of legal and other authoritative advisory instruments outlining reasonably practicable measures that a PCBU should implement to eliminate or minimise risks to which workers and/or others are exposed. Further, prosecutors now focus on deficiencies in the defendant's approach to systematic WHS management and/or their systems of work, and/or their failure to comply with provisions in the WHS regulations.

[Surveillance, Data Collection and Privacy at Work: A New Application of Equitable Obligations?](#)

— *Alysia Blackham*

116

Employers are gathering a sizeable body of employee data, some of which is sensitive and highly personal. However, privacy law in Australia remains fundamentally ill-adapted for protecting employee interests, due to significant exceptions for small businesses and employee records, and minimal protection of privacy rights at the federal level. Drawing on comparative doctrinal analysis of the UK and Australia, this article frames the dramatic regulatory gaps for employee data in Australia. It argues that equitable breach of confidence might prove to be a critical complement to the employment contract and other forms of legal regulation, to enable the protection of employees' sensitive data. This is particularly pertinent in jurisdictions like Australia, with limited statutory or human rights

protection of privacy. However, it could also prove to be an important complement to other protections in jurisdictions like the UK, with statutory privacy law, human rights, contract law and equitable doctrines offering complementary protections.

Vulnerable to Redundancy: Examining Access to Justice for Pregnant Women and New Mothers

— *Emma Graham*

144

This article compares the legislative options available to women at the federal level who believe that they have been discriminated against or treated unfairly by being made redundant while pregnant or on parental leave. Part II offers an analysis of recent case law concerning Pts 2-2, 3-1 and 3-2 of the Fair Work Act 2009 (Cth). Despite national attention and calls for reform to address the vulnerability of pregnant women and mothers to redundancy, the case law reveals that little has changed in the past 10 years, with decision-makers still deferring to managerial prerogative in respect of organisational restructures. Part III examines the risks and benefits to women of pursuing legal redress under the different legislative schemes and highlights challenges in respect of access to justice. The article concludes with a discussion of possible reforms.

Book Review

Contract, Labour Law and the Realities of Working Life,
Eugene Schofield-Georgeson, Routledge

— *Anthony Forsyth*

169

Style Guidelines

In preparing material for submission of articles, authors should be guided by the following points.

1. Where an earlier version of a submission has been published as a working paper or conference paper, the Journal will only proceed with the submission where it is significantly different to the earlier working paper or conference paper.
2. Manuscript Presentation All article manuscripts should be emailed as a Microsoft Word document to law-ajll@unimelb.edu.au. Case notes and other short pieces should be emailed direct to the appropriate section editor. Electronic submissions need not be accompanied by paper copies.
3. Title Each manuscript should have a title which is both succinct and descriptive.
4. Abstract An abstract of no more than 150 words must be supplied at the beginning of each article. The abstract should briefly outline the structure and content of the article and summarise its conclusions.
5. Footnotes These should be numbered consecutively throughout. All bibliographical details, case citations etc should be contained in the footnotes and not in the text. Footnotes should not be used to make substantive points.
6. Word length policy In making editorial decisions we will accept articles up to 12,000 words (including footnotes), and section contributions up to 5,000 words (including footnotes).

Please see

<http://law.unimelb.edu.au/centres/celrl/research/publications/australian-journal-of-labour-law#style-guidelines> for a copy of the Style Guidelines.

In this issue...

Articles

The Rise of 'Pure Risk' Work Health and Safety Prosecutions in New South Wales and Queensland — *Richard Johnstone*

Surveillance, Data Collection and Privacy at Work: A New Application of Equitable Obligations? — *Alysia Blackham*

Vulnerable to Redundancy: Examining Access to Justice for Pregnant Women and New Mothers — *Emma Graham*

Book Review

Contract, Labour Law and the Realities of Working Life, Eugene Schofield-Georgeson, Routledge — *Anthony Forsyth*