

STRESS TESTING THE BANKS:
AN EXAMINATION OF SOME OF THE LEGAL ISSUES
RELATING TO WORKPLACE STRESS AND MENTAL HARM
WITHIN THE BANKING INDUSTRY

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ABSTRACT

This paper examines some of the legal issues relating to workplace stress and mental harm within the Australian banking industry. It is noted that whilst the finance sector and the banking industry have a generally low rate of occupational injury, the rate of workplace stress is a significant concern. Until recently the high rate of stress claims in this industry might have been attributed to violent bank and ATM hold-ups, but changes to bank procedures have reduced the incidence of these stressors. This paper argues that a number of systemic factors contribute to the high rate of workplace stress in the banking industry, which include a continual process of restructure and change in the industry combined with implications arising from the current economic climate. These factors, among others, have recently been noted by the Australian Senate Economics References Committee which examined the effects of bank mergers on the morale and health of bank workers. In this context the paper examines whether the existence of workplace health and welfare policies exposes banks to liabilities to pay claims to employees compensating them for mental harm in negligence, as well as breach of contract

I INTRODUCTION

Much is currently written about stress in the finance and banking industry, but mostly the focus is on debt stress and stress testing of the financial securities held by banks in the context of the global financial crisis rather than work-related stress experienced by those employed in this sector. Internationally there have been a number of media reports which speculate upon the link between a global financial crisis and the apparent increased rate of suicide among bankers. The UK Guardian, for example, reports that '[a]t least six documented suicides in the financial industry have been linked to the credit crunch.'¹ Similar media reports have appeared in the United States² and Europe.³ Many of these reported suicides relate to high profile finance and corporate managers. In this paper we speculate that the Australian banking industry involves work in an environment which presents an array of stressors which are from time to time accentuated by serious financial turmoil. We argue that on a day to day level the stress of working in the banking industry may be insidious and cumulative and may be of particular concern in time of economic collapse. Those experiencing work stress are more likely than other workers to take sick leave and the costs of work absence can be significant.⁴ The manner in which a bank, as an employer, deals with the cost pressures which arise from workplace stress may vary from

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1 Andrew Clark, 'The Masters of the Universe who cannot live with Failure', *The Guardian* (online), 8 January 2009 <<http://www.guardian.co.uk/business/2009/jan/08/credit-crunch-suicide>> at 23 April 2009.

2 Daniel Nasaw, 'Freddie Mac chief found dead in apparent suicide', *The Guardian* (online), 22 April 2009 <<http://www.guardian.co.uk/business/2009/apr/22/david-kellermann-freddie-mac>> at 23 April 2009.

3 Jason Kirby, *Market Crash exacts a toll in suicides* (2009) Macleans.ca <<http://www2.macleans.ca/2009/01/12/market-crash-exacts-a-toll-in-suicides/>> at 23 April 2009.

4 Michael F Hilton et al, 'Mental Ill-health and the Differential Effect of Employee Type on Absenteeism and Presenteeism' (2008) 50(11) *Journal of Occupational and Environmental Medicine* 1228 and see, particularly, footnote 3.

direct attempts to prevent harm to more covert methods, involving innovative approaches to reduction of staff absences.

This paper will focus on the theme of work stress as it relates to the Australian banking industry. The first part of this article provides a profile of the banking industry which includes consideration of the major participants in Australian banking, the diversity of working arrangements within that industry, and consideration of the gender make-up of the workforce. It also briefly examines the progressive restructuring of the Australian banking industry as a potential source of work-related stress. Finally consideration is given to the manner in which banks manage workplace injury and disease through workers' compensation self-insurance processes. The second part of the paper considers the issue of work stress as a medico-legal issue and reviews the statistical evidence available in relation to the incidence of workplace stress in the finance and banking industry. The third part of the paper examines a number of cases which have resulted from claims made by employees for workplace stress arising from breaches of occupational health laws, employer negligence and breach of contract by the employer. In this context we also examine the employer banks' responses to the challenges resulting from these decided cases. Finally the paper concludes with reflections on these issues.

II PROFILE OF THE AUSTRALIAN BANKING INDUSTRY

In Australia an institution wishing to take deposits as an authorised deposit-taking institution (ADI) must be authorised under the *Banking Act 1959* (Cth). ADIs in Australia are generally classed as either banks, building societies or credit unions, though there are a few other institutions that do not fall within one of these categories. The Australian banking sector is dominated by the Big Four banks, namely National Australia Bank, Commonwealth Bank, Westpac Banking Corporation and Australia and New Zealand Banking Group (ANZ).⁵ There are, in addition, approximately seven⁶ other domestic banks operating in Australia as well as a number of foreign subsidiary banks and foreign branch banks.⁷ To the 2008 year end, the total operating income of banks in Australia was A\$84.3 billion, with the four major banks accounting for over 67 per cent of this figure.⁸

In 1981 the Australian Financial System Inquiry undertaken by the Campbell Committee⁹ recommended deregulation within the Australian banking industry, one consequence of which was the eventual access of foreign banks into Australia.¹⁰ Deregulation has also, as noted by Joseph and others, resulted in the significant restructuring and redesigning of the service delivery methods offered by banks.¹¹ The merging of banks in Australia to create the Big Four involved branch closures and staff cuts, as banking executives had to capitalise on economies of scale.¹² Concern over the effects of takeovers and the off-shoring of banking operations continue to be raised by

5 See generally, Senate Economics References Committee, Parliament of Australia, *Report on Bank Mergers* (September 2009) <http://www.aph.gov.au/SEnate/committee/economics_ctte/bank_mergers_08/report/index.htm> at 5 October 2009.

6 This does not include banks such as Bank of Western Australia Ltd and others which are now a subsidiary of one or other of the Big Four.

7 Australian Prudential Regulation Authority (APRA), *List of Authorised Deposit-Taking Institutions* (last updated 22 September 2010) <<http://www.apra.gov.au/adi/ADIList.cfm>> at 12 October 2010.

8 Australian Prudential Regulation Authority (APRA), *Statistics, Quarterly Bank Performance to December 2008* (issued 23 June 2009) <www.apra.gov.au> at 12 October 2010.

9 Australian Financial System: Final Report of the Committee of Inquiry, September 1981, Canberra: Australian Government Publishing Service, 1981.

10 Jan-Egbert Sturm and Barry Williams, 'Foreign bank entry, deregulation and bank efficiency: Lessons from the Australian experience' (2004) 28(7) *Journal of Banking & Finance* 1775, 1780.

11 Matthew Joseph, Cindy Mclure and Beatriz Joseph, 'Service quality in the banking sector: the impact of technology on service delivery' (1999) 17(4) *International Journal of Bank Marketing* 182, 183.

12 Ibid. See also Neil Argent, 'A global model or a scaled-down version: geographies of convergence and divergence in the Australian retail banking sector' (2002) 33(3) *Geoforum* 315, 317.

unions and some consumer groups today and have recently been noted by the Senate Economics Reference Committee on Bank Mergers (the Reference Committee).¹³

The redesign of banking services involved a shift from traditional lending services, such as loans and mortgages, to retail services involving sale of ancillary banking products such as insurance, income protection and loan restructuring. At the same time banks adopted technologies which substituted branch offices with technology-supported banking kiosks, phone and PC banking and automotive teller machines (ATM's).¹⁴ Sappey and Sappey note that this change in working modes led to a change in the form of training programs adopted by banks. Their case study of one bank showed that:

[After 1994], in response to continuing market pressures, the Bank moved to adopt a stronger sales culture and there was a slight increase in training staff numbers. The Bank's executive course focused less upon personal growth and more upon sales and lending.¹⁵

These researchers noted that over time social skills were more likely to be valued in material terms than technical skills. French and Strachan observe that restructuring in the banking industry has resulted in the banks seeking:

...part time and casual staff to meet demands of peak business hours. Older women with family responsibilities provided a ready source. The resultant collapse of the traditional careers structure which supported promotion of males through a pipeline of 'the long apprenticeship' highlighted a new approach of 'stratum staffing,' which divided employees into career and non-career areas. The emergence of this division heralded a new career blockage within the industry. Now with increased family friendly policies and flexible hours, people with family responsibilities, predominantly women, continue to provide a ready source of labour for support roles and service jobs outside the career structure.¹⁶

The banking industry, being part of the wider finance industry, is characteristically 'dominated by women' and yet, according to Metz, 'women are still under-represented in management and senior management'.¹⁷ In 2004 for example, women made up 57 per cent of the finance industry workforce and up to 81 per cent of those employed on a part-time basis in that industry.¹⁸ French and Strachan noted that in 2003 only 15 per cent of management/professional positions were held by women in the finance and insurance sector¹⁹ and that eight banks listed in the ASX200 had an average of only 14 per cent women in executive management and 15.8 per cent in board positions.²⁰

Prior to the implementation of the Rudd Labour Government's *Fair Work* regime, the existing *Work Choices* collective agreements were allowed to remain in operation without change. According to Lynnaire Stacey, Secretary of WA Financial Services Union, the failure by some banks to renegotiate collective agreements with unions allowed the banks to negotiate wage increases outside those agreements and in many cases this has meant that

13 See, for example, regarding a campaign in relation to the proposed takeover of St George and BanksSA by Westpac, Finance Sector Union Australia, *Account: A year in review: 2007-2008* (2008) 10, <http://www.fsunion.org.au/Upload/FSU%20Publications/Annual_Report_2007_08.pdf> at 15 June 2010 and see Senate Economics References Committee, above n 5, ch 6.

14 Beverley Lloyd-Walker and Yen Ping Cheung, 'IT to support service quality excellence in the Australian banking industry' (1998) 8(5) *Managing Service Quality* 350, 358.

15 Richard B Sappey and Jennifer Sappey, 'Different skills and knowledge for different times: training in an Australian retail bank' (1999) 21(6) *Employee Relations* 577, 582.

16 Erica L French and Glenda Strachan, 'Equal opportunity outcomes for women in the finance industry in Australia: Evaluating the merit of the EEO plans' (2007) 45(3) *Asia Pacific Journal of Human Resources* 314, 327.

17 Isabel Metz, 'Individual, interpersonal, and organisational links to women's advancement in management in banks', (2003) 18(5) *Women in Management Review* <<http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=Published/EmeraldFullTextArticle/Articles/0530180502.html>> at 4 August, 2009.

18 Finance Sector Union of Australia, *The Finance Sector Workforce Report* (2005) vol 2, 5. Note the finance industry includes not only banks and other ADIs but also other financiers and financial asset investors.

19 French and Strachan, above n 17, 315.

20 Ibid 316.

banks were able to negotiate incentives for additional payments based on sales performance. This has, in turn, placed considerable pressure on customer service officers to increase sales of banking products and drives a range of behaviours and management practices which, as noted below, may in some circumstances multiply work stressors.²¹ Interestingly, with the enactment of the *Fair Work Act 2009* (Cth) there are signs that some banks are prepared to enter into negotiations for the renewal of collective agreements.²² The restructuring of industrial relations towards a bonus payment system, driven by a change in banking services and products and underpinned by a predominantly female workforce, leads to particular concerns in relation to occupational health and safety, not least concerns regarding the role that occupational stress has on health and safety of workers within the industry. This aspect of the banking industry is discussed below.

III OCCUPATIONAL STRESS

The term stress is often used colloquially to refer to symptoms arising from any number of potential causes and very often individuals describe themselves as being stressed or under stress. In medical terms, however, stress may be viewed rather more as analogous to a cause (rather than a symptom) of various health-related problems, which may be physical or mental in nature and which may or may not amount to a diagnosable condition (such as a major depressive disorder).²³ McGrath suggests that stress may arise in situations where there is a perceived imbalance between demands imposed on a person and their ability to meet those demands.²⁴ Mendelson, quoting Cox, noted that occupational stress exists in the person's recognition of their inability to cope with demands relating to work and in their subsequent experience of discomfort.²⁵

Workers' compensation legislation in Australia does not define stress because stress in itself is not a medical condition, although as noted above, it may be a cause or a trigger of a medical condition. A workers' compensation claim requires the employee/worker to establish that they have suffered from an 'injury', which includes disease.²⁶ Claims in which an individual has suffered a recognised injury or disease which has been caused by or contributed to by a work-related stressor are generally referred to by practicing lawyers as 'mental stress' or 'work-related stress' claims, as a form of shorthand.²⁷ All Australian jurisdictions provide access to compensation as a statutory remedy for work-related stress.²⁸ These statutory remedies in the main provide for limited income support and medical and rehabilitation expenses, but not generally for pain and suffering or long term economic loss.²⁹ With the exception of South Australia and the Northern Territory some

21 Interview of the second named author with Lynnaire Stacey, Secretary of WA Financial Services Union (Perth, 18 March 2009).

22 Financial Services Union, *Let's make a Westpac Agreement BankSA friendly* (2009) <<http://www.fsunion.org.au/News-Views/BankSA-Lets-make-a-new.aspx>> at 14 September 2009.

23 See, for example, J Herbert, 'Fortnightly review: Stress, the brain, and mental illness' (1997) 315 *British Medical Journal* (BMJ) 530 <<http://www.bmj.com>> at 15 June 2010.

24 Joseph McGrath as referred to in Randall S Schuler, 'Definition and Conceptualization of Stress in Organizations' (1980) 25 *Organizational Behaviour and Human Performance* 184, 188.

25 George Mendelson, 'Occupational Stress Part 1: An Overview' (1990) 6 *Journal of Occupational Health and Safety: Australia and New Zealand* 176.

26 See definition of 'injury' in *Workers' Compensation and Injury Management Act 1981* (WA) s 5; *Workers' Compensation Act 1951* (ACT) s 4; *Workers' Compensation Act 1987* (NSW) s 4; *Workers' Rehabilitation and Compensation Act* (NT) s 3; *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32; *Workers' Rehabilitation and Compensation Act 1988* (Tas) s 3 and *Workers' Compensation Act 1958* (Vic) s 3 and definition of 'disability' in *Workers' Rehabilitation and Compensation Act 1986* (SA) s 3.

27 See, for example, Australian Government, Australia Safety and Compensation Council, *Compendium of Workers' Compensation Statistics Australia 2004-05* (2007) Part E: Feature Article: The Mechanism: Mental Stress <<http://www.safeworkaustralia.gov.au>> at 15 June 2010.

28 See above n 28.

29 See *Workers' Compensation and Injury Management Act 1981* (WA) sch 1, which is typical of the forms of entitlements provided in relation to workers' compensation systems

form of common law remedy for employer based negligence allows workers to proceed against an employer.

IV STRESS WITHIN THE BANKING INDUSTRY

As noted in the Australian Safety and Compensation Council 'Compendium of Workers' Compensation Statistics Australia', while bank workers experience relatively low levels of work injury³⁰ they do experience relatively high levels of work stress.³¹ So called mental stress claims present challenging issues as current data suggests such claims are costly to employers and that:

...*mental stress* consistently had the longest median time lost from work: around 10 working weeks. This was more than double the median of 3.8 weeks for all serious claims in 2005–06. The high median time lost for *Mental stress* claims resulted in those claims also having the highest median payments: \$15 500 in 2005–06, more than double the median for all claims of \$6100.³²

There are no doubt various reasons why the finance industry, which includes the banking industry, has such a high rate of mental stress claims. The banking industry receives considerable publicity for bank hold-ups and more recently ATM hold-ups³³ which in some cases result in serious physical and/or psychological harm to banking industry workers.³⁴ However, such claims may no longer be the prime cause for concern in relation to workplace stress in the banking industry.³⁵ Perhaps more central to the bank work-stress issue is the nature of the work and the industry itself.

Recent research by Medibank Private Australia has shown that workplace change invariably creates pressures within the workforce to achieve certain outcomes and outputs and that an insecure work environment is a major stressor.³⁶ Such pressures often lead employees to experience stress or to describe themselves as stressed. For the Western Australian Branch of the Finance Sector Union (FSU), the issue of work-related stress has become prominent in recent years and this can be related to a number of different factors.³⁷ The Union identifies as a cause of increased stress the level of 'downsizing' in the industry over recent years due to changes in management practices and work intensification.³⁸ Indeed, a National FSU review for the financial year 2007-08 identifies inadequate staffing in the finance sector as a cause of increased pressure and a higher workload. This review reports on the results of an audit among 300 branches of the National Australian Bank which revealed that 70 per cent of the 1 000 plus respondents interviewed reported an

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- 30 Australian Government, Australian Safety and Compensation Council, *Compendium of Workers Compensation Statistics Australia 2006-07* (2009) 4 <<http://www.safeworkaustralia.gov.au>> at 14 September 2009.
- 31 Australian Government, Australian Safety and Compensation Council, *Compendium of Workers Compensation Statistics Australia 2004-05* (2007) Part E: Feature Article: The Mechanism: Mental Stress <<http://www.safeworkaustralia.gov.au>> at 15 June 2010.
- 32 Australian Government, Australian Safety and Compensation Council (2009), above n 32, 26 (emphasis in original).
- 33 Ewa Kretowicz, 'Criminal idiots in ATM raids', *The Canberra Times* (Canberra), 19 December 2008, 7.
- 34 See, for example, Carol Grainger, 'How controllable is Occupational Violence?' (1996) 3(1) *International Journal of Stress Management* 17, 18.
- 35 The rate of bank hold-ups has been declining; see 'Bank hold-ups lose their old cost-benefit appeal', *The Age* (online), 26 April 2003, <<http://www.theage.com.au/articles/2003/04/25/1050777404374.html>> at 27 May 2009.
- 36 Medibank Private, *The Cost of Workplace Stress in Australia* (August 2008) 4 <<http://www.medibank.com.au/Client/Documents/Pdfs/The-Cost-of-Workplace-Stress.pdf>> at 14 September 2009.
- 37 Workers' compensation data in relation to stress at work does not provide a breakdown within the finance industry so as to isolate the data for the banking industry separately. Therefore there is no comparable material available from sources other than the trade union surveys; see, for example, Australian Government, Australian Safety and Compensation Council (2007), above n 29, which provides data for the finance industry generally.
- 38 Interview with Lynnaire Stacey, above n 23.

increase in workload.³⁹ A survey conducted by the National FSU of over 2000 of its members showed that 66 per cent of respondents agreed that their work/life balance suffered because of work targets and 88 per cent agreed that the higher their work targets, the higher their stress.⁴⁰ This report also asserted that '[j]ust the act of setting an unreasonable or unachievable target can create stress...' and that '[t]he exacerbation of this stress, when targets aren't met or are unilaterally increased, can have a serious impact on worker's health.'⁴¹ Restructuring of an organisation, such as a business being acquired or merged with another, may also be a cause of distress for workers.⁴² For example, multiple take-overs have occurred in the banking industry. As one bank employee noted;

Before we even knew what jobs we had under the Colonial [bank] structure, we found out that Colonial was being bought out by CBA, so no matter what people were feeling not knowing what jobs that had under Colonial, it was doubled when they realised that they were going to get maybe a job in the Colonial structure and then have to go through the same thing again in six months time with CBA. There is a human cost to this.⁴³

Importantly the phenomenon of offshoring jobs in the banking industry has also been identified as a significant stressor. The Senate Economics References Committee noted that offshoring refers to businesses moving jobs to overseas posts: in banking this usually refers to call centre operations and back office processing.⁴⁴ There is evidence that up to 110 000 jobs in the banking and insurance industry could be shifted offshore in the near future. The Reference Committee referred to significant offshoring in recent years⁴⁵ and evidence given to the committee on this point noted that;

The current [as at 2009] financial crisis may mean that the employees made redundant find it difficult to obtain new positions. There is also a large emotional cost involved which doesn't seem to concern the decision makers. A large number of employees were long standing and loyal workers who feel that their services have not been appreciated.⁴⁶

The above factors are not, of course, the only stressors that impact on bank workers. The Compendium of Workers' Compensation Statistics Australia 2004-05 reveals that the second most common category of mental stress claims, after work pressures, is harassment in the workplace.⁴⁷ Significantly, in recognition of these issues, many banks, including the Big Four, have specific polices dealing with issues of bullying and harassment in the workplace, the significance of which are discussed below. In recognition of the impact that work-stress may have on an employee's physical and mental wellbeing (and no doubt upon the bank's organisational wellbeing), several banks have implemented programs to

39 Finance Sector Union, above n 14, 9.

40 Financial Services Union, *Debt Stress: Sales pressure, debt and professional customer service*, 2 <www.fsunion.org.au> 22 July 2009.

41 Similarly, in New Zealand a Christchurch coroner investigating the suicide of an ANZ bank worker, Michael Smith, in 2002 attributed the depression which culminated in Mr Smith's eventual suicide to his 'constant battle to meet difficult sales targets' see John Braddock, *Coroner blames work stress for New Zealand bank worker's suicide* (2002) World Socialist Web Site <www.wsws.org> at 5 March 2009.

42 This phenomenon is not limited to Australia. A report in 2008 refers to the stress of workers at the UK offices of investment bank Bear Stearns which 'topped the list' of a 'stressed-out bankers' firm league table' published on the internet and notes comments by a spokeswoman for that firm that the stress is '...almost purely a reflection of the fact that we're in the process of being acquired by JPMorgan.' See Michael Taylor, 'Growing stress takes toll on financial workers', *International Herald Tribune* (online), 5 May 2008 <www.ihf.com> at 5 March 2009. The league table is published on <http://news.hereisthecity.com/news/news/business_news/7724.cntns> at 22 July 2009

43 See Senate Economics References Committee, above n 5, 64.

44 Ibid 65.

45 Ibid 66-7.

46 Ibid 67.

47 Australian Government, Australian Safety and Compensation Council (2007), *above n 29*, 73 and note that this data also reveals that 65.8 per cent of mental stress claims falling into the harassment category were made by women which suggests that work-stress in the banking industry is likely to be a gendered issue, not simply an issue of workplace safety.

promote wellbeing and assist employees in dealing with stress and related issues.⁴⁸ The Commonwealth Bank, for example, works in partnership with *BeyondBlue* (an organization devoted to the support of sufferers of depression) to offer various workshops and information on wellbeing and issues such as depression.⁴⁹

It is clear that the banking industry operates at the confluence of a number of major work stressors. These include, as noted above, the well known stressors relating to violent hold-ups and the resultant psychological and psychiatric harm, as well as the stressors of almost constant change management, relocation and restructure and the prevalence of harassment in the workplace. Not surprisingly these stressors manifest in a high rate of workers' compensation claims for mental stress. The remainder of this paper will consider the availability of workers' compensation for mental harm, including mental harm arising from work-related stress, and the liability of employers in tort and contract to compensate an employee for symptoms related to work-stress.

V WORKERS' COMPENSATION

In Australia, as in most jurisdictions which retain workers' compensation schemes, workers' compensation claims are broadly divided into two groups: claims for injury on the one hand, or claims for disease and disease-related conditions on the other.⁵⁰ In both cases, to establish a workers' compensation claim, an individual will need to show that the injury or disease was work-related.⁵¹

In the case of injury claims it is necessary to show the event led to a sudden physiological change to the worker, though it is not necessary to show that the event occurred whilst the worker was actually working, as long as it occurred within the scope of employment.⁵² Proving a stress related injury, therefore, usually requires proof that the

48 The National Australia Bank works in conjunction with BeyondBlue and Lifeline to promote awareness and provide information in relation to mental health issues, as noted in National Australia Bank, *2009 Corporate Responsibility Review* (2009) <<http://annualreports.nabgroup.com/cr/people-our-focus-areas>> at 15 June, 2010. ANZ provides access to health and well-being websites for its staff, as well as providing counselling services; see ANZ, *Corporate Responsibility: Health, Safety and Well-being* <<http://www.anz.com/about-us/corporate-responsibility/employees/employee-relations/health-safety-wellbeing/>> at 15 June 2010. Westpac also provides access to counselling services for its staff, according to its website; see Westpac, *Westpac as an employer* <<http://www.westpac.com.au/about-westpac/careers/westpac-as-employer/benefits/>> at 15 June 2010.

49 Commonwealth Bank, *A Healthy Approach* <<http://www.commbank.com.au/about-us/careers/our-workplace-and-you/healthy-approach/default.aspx>> at 24 July 2009.

50 This is still typically the division applied in United States in the various State jurisdictions and also in Canada.

51 *Workers' Compensation and Injury Management Act 1981* (WA) s 3: definition of injury refers to accidents or diseases which arise in the course of employment; *Workers' Compensation Act 1951* (ACT) s 27(b): applies to death or incapacity through disease to which employment was a substantial contributing factor and see also s 31(1) which applies to injury arising in the course of employment; *Workers Compensation Act 1987* (NSW) s 3: definition of 'injury' refers to an injury or disease arising out of or in the course of employment; *Workers Rehabilitation and Compensation Act* (NT) s 3: definition of 'injury' refers to an injury or disease arising out of or in the course of employment; *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 32: definition of 'injury' refers to injuries or diseases arising out of or in the course of employment; *Workers' Rehabilitation and Compensation Act 1988* (Tas) s 25(1): deals with the liability of employers to pay compensation in respect of injuries which arise out of or in the course of employment; *Workers Compensation Act 1958* (Vic) s 5(1): deals with the liability of employers to pay compensation in respect of personal injury arising out of or in the course of employment and *Workers Rehabilitation and Compensation Act 1986* (SA) s 30(1): a disability is compensable if it arises from employment.

52 The Australian courts have established that a wide scope of activities may be regarded as 'arising out of' or 'in the course of employment'. Such activities include the worker doing something reasonably required by the employer. This is so even if it is not part of their normal duties and even if the injury occurred in an interval between active work. See *Kavanagh v Commonwealth* (1960) 103 CLR 547 (Dixon CJ, Fullagar and Menzies JJ). Injuries which occur during intervals or interludes which occur in the course of employment where the employer had induced, or encouraged, the employee to spend that interval or

medical condition arose out of a specific event, usually traumatic in nature: for example, a physical assault, bank robbery, train accident or the witnessing of such an event.⁵³ Conditions contracted by a gradual onset or process will not normally fall within the definition of injury, but may fall within compensable work-related disease.⁵⁴

The definition of disease is similar under most Australian compensation schemes. For example disease is defined under the *Workers' Compensation and Injury Management Act 1981* (WA) as 'any physical or mental ailment, disorder, defect, or morbid condition whether of sudden or gradual development'.⁵⁵ In marked contrast to injury claims, in order for a disease to be compensable, there must be an employment contribution to the development of the condition. Since the mid 1990s all Australian jurisdictions have attempted to reduce the increasing rate of claims for workplace stress by making specific provisions to exclude so-called stress claims in certain circumstances.⁵⁶ The effect of provisions of this kind is that workplace stress claims are invariably extensively scrutinised, often delayed and frequently hotly contested.⁵⁷ Where claims are delayed or hotly contested, the outcome is increased stress for the worker, protracted periods of treatment, and consequent extended periods off work and increased medical and other costs.⁵⁸ Some employees choose to avoid this process altogether by claiming sick leave, especially in those occupations where such leave is accrued from year to year.⁵⁹ In many cases banks, which are often self-insured for the purposes of workers' compensation, have responded to the high incidence of work-stress claims by putting in place alternate benefits such as extended sick leave entitlements, and this is discussed further below. In other cases, where the worker suffers significant harm, some attempt may be made to pursue a claim outside the statutory workers' compensation system for damages.

VI BANKS AS SELF-INSURERS

Most of the Big Four banks are self insurers for workers' compensation purposes.⁶⁰ In general terms this means that these organisations do not obtain indemnity insurance to cover workers' compensation liabilities from either a private insurer or a central government administered insurance fund. Instead when an employer becomes self-insured it effectively assumes direct responsibility for the statutory workers' compensation obligations and processes and administers claims internally.⁶¹ The significance of most

interlude at a particular place or in a particular way may also be compensable. See *Hatzimandis v ANI Corp Ltd* (1992) 173 CLR 473, 485 (Mason CJ, Deane, Dawson and McHugh JJ).

53 *Weston v Great Boulder Gold Mines* (1964) 112 CLR 30 and *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562

54 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310.

55 *Workers' Compensation and Injury Management Act 1981* (WA) s 5.

56 These efforts were twofold. First the threshold work contribution requirement for workplace diseases was generally increased across all jurisdictions to raise the level of work contribution to the claimed condition. Generally all jurisdictions now require either a *significant, material* or *substantial* work contribution to be shown as the cause of the onset of a workplace disease, including stress-related conditions. More importantly, in the case of workplace stress claims all jurisdictions specifically exclude claims which arise from reasonable management or administrative action such as the transfer, redeployment, dismissal, disciplinary action or retrenchment of a worker. In some jurisdictions stress-related conditions arising from reasonable performance appraisal are also excluded. See generally Robert Guthrie, 'The Australian Legal Framework of Stress Claims' (2007) 14 (4) *Journal of Law and Medicine* 528-550.

57 See generally Katherine Lippel, 'Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation' (1999) 22(5-6) *International Journal of Law and Psychiatry* 521.

58 See generally Christine Roberts-Yates, 'The concerns and issues of injured workers in relation to claims/injury management and rehabilitation: the need for operational frameworks' (2003) 25(16) *Disability and Rehabilitation* 898.

59 Interview with Lynnaire Stacey, above n 23.

60 WorkCover Western Australia, *Self-Insurance in Western Australia – A Historic and Current Overview* (2008) 5 <http://www.workcover.wa.gov.au/NR/rdonlyres/798914B5-4E64-4365-9D9A-5C347E49D026/0/HistoricOverviewApril2008_Final_2_.pdf> at 9 December 2009.

61 In general terms this involves providing a bond or bank guarantee to cover projected liabilities. Self-insurance has a number of consequences. Firstly, as noted, it requires effective internal administration of

banks being self-insurers is that the close relationship between bank workers and their employer is maintained in the event of a workplace injury or disease and is not interposed by an insurer who is not generally familiar with the worker's environment.

Banks in most instances manage injury prevention and return to work on a more holistic basis than those employers who are subject to direction by their insurers.⁶² This has a number of important consequences. Firstly, banks frequently put in place work health or wellness programs designed to retain staff and promote fitness and health. Secondly, banks collect their own data on work absences, although they are bound to share this with workers' compensation scheme administrators. Thirdly, wellness programs and workers' compensation often become merged so that data in relation to work-caused absences may become blurred. A bank may be focussed on reducing workplace absence, no matter what the cause. For example the National Australia Bank has for the past five years implemented a range of schemes which extend the entitlements of workers to sick leave in a calculated effort to reduce workplace absence. This has involved allowing workers to have extended sick leave as an alternative to making claims for workers' compensation. The benefits of managed sick leave schemes which put in place early return to work programs are that they may reduce compliance costs and the overall duration of claims.⁶³ The same sorts of initiatives have been adopted by other banks which have put in place workplace wellbeing programs which focus on providing workers with facilities which allow them to achieve and maintain fitness. Overall fitness has been shown to be a determinant of productivity, so that whilst employers may outlay funds to cover facilities, they reap the benefits of a more productive workforce and one which is also less likely to make workers' compensation claims.⁶⁴

So far as data collection in relation to workplace injury and disease is concerned, wellness schemes and extended sick leave programs have the capacity to distort data collection in relation to particular medical conditions. As noted above, through a series of legislative developments workplace stress claims have been made progressively more difficult since the mid 1990s. Therefore workers may find it convenient, less time-consuming and financially advantageous to avoid lodging a workers' compensation claim altogether and simply claim sick leave. As a consequence, official data collection in relation to workplace stress may be understated as sick leave absences are not publically

claims. Secondly, self-insurers are required to administer and promote return to work programs, which in many instances they are able to do because they employ large numbers of people and generally have a greater capacity than smaller employers to modify duties and provide suitable return to work programs for workers. Thirdly, self-insurers commonly operate across several jurisdictions at once. This is certainly true of the banking industry. In other words, self-insured employers are not insured as such, but they cover the costs of claims directly. Naturally, only large, well funded and well administered employers are able to become self-insured and not surprisingly each jurisdiction places strict prudential requirements upon those employers who seek to be self-insured. The following provisions apply to self insurers: *Safety Rehabilitation and Compensation Act 1986* (Cth); *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 71, 72, 75; *Workers' Compensation Act 1987* (NSW) pt 7 div 5; *Workers' Compensation Act 1951* (ACT) ss 151, 168A, 168AA, 170HA, 170HB, 171E; *Accident Compensation Act 1985* (Vic) pt 5; *Workers' Rehabilitation and Compensation Act 1988* (Tas) pt IX div 2; *Workers' Rehabilitation and Compensation Act 1986* (SA) ss 60, 61; *Workers' Compensation and Injury Management Act 1981* (WA) ss 164,165; *Work Health Act 1986* (NT) ss 119, 120.

62 One of the consequences of being a self-insurer is that there tends to be a broader view taken of worker absences. See, for example, Self Insurers South Australia Inc, 'Annual Report 2007-2008' <http://www.sisa.net.au/upload_docs/20080919014235.2007-08%20Annual%20Report%20FINAL.pdf> at 7 December 2009.

63 Paul Robinson, 'Bank launches pooled sick leave' (*The Age*), 11 November 2003; National Bank of Australia, 'Annual Financial Report 2008 – Additional Financial Information available at <http://nab2008annualreports.textpacific.com.au/corporate_responsibility_review/our> at 15 January 2009.

64 OHS Alert, *Bicycle Safety and dengue fever: tailoring health and wellbeing programs* (2008) <<http://www.ohsalert.com.au>> at 14 January 2009.

recorded and published in the same way as workers' compensation data is and are often not reflected in the annual reports of banks.⁶⁵

As noted above, there may be reasons why workers avoid lodging a workers' compensation claim at all, and even when such a claim is available there will be limits to the maximum amount that can be claimed.⁶⁶ For this reason, an employee who suffers from symptoms related to work-stress may seek other grounds upon which to base a claim for income support or damages from an employer, including for breach of the employment contract (for example if their job requires them to work longer hours or take on work of a different nature than that envisaged under the contract) or in tort (usually, alleging that the employer was negligent). Whilst such actions are generally less commonplace than the incidence of workers' compensation claims, they have become evident in the last decade and it is suggested that given the current financial climate, in so far as it may contribute to the stress factors present for those working in the banking sector, such actions may grow in significance.

VII LIABILITY IN TORT AND CONTRACT OF EMPLOYERS FOR WORK-RELATED STRESS

In order for an employer to be liable in negligence for psychiatric injury which is not consequential on any physical harm (pure psychiatric injury) suffered by any of its employees, it must be the case that the employer was able to reasonably foresee such injury to the particular employee. In a decision of the High Court of Australia in *Koehler v Cerebos (Australia) Ltd*⁶⁷ (*Koehler*) the employee's psychiatric injury was held not to have been foreseeable by the employer. Whilst the employee had frequently complained about her workload, it was found that her complaints were all '...directed to whether the work could be done; [and] none [of the complaints] suggested that the difficulties she was experiencing were affecting her health.'⁶⁸ Given that the employee's psychiatric injury was *not* foreseeable by the employer there could be no duty of care (and thus, no damages awarded).⁶⁹

The High Court found that Mrs Koehler had 'voluntarily' accepted the position as a part-time merchandiser and by doing so had agreed to perform the duties that she later complained of as excessive.⁷⁰ This decision therefore reflects a view that the freedom of parties to contract is paramount and that, within the 'bounds set by applicable statutory regulation' parties should be 'free to contract as they choose about the work one will do for the other.'⁷¹

Whilst employers and industry associations may have welcomed the *Koehler* decision,⁷² others have criticised the '...conception of the employment relationship as a contract between robust autonomous individuals' as a fiction which leaves '[i]mpecunious people

65 We were unable to detect with any meaningful accuracy the rate of sick leave in any banking institutions from their annual reports.

66 See for example, WorkCover Western Australia, *Variations in Prescribed Amount and other Workers' Compensation Payments* (2009) 1 <http://www.workcover.wa.gov.au/NR/rdonlyres/76A87704-2D3F-4742-9B19-C6FF37B8E1EB/0/Prescribed_Amount_2009_10_web_version_0609.pdf> at 24 August 2009.

67 (2005) 222 CLR 44.

68 Ibid at 5 (*McHugh, Gummow, Hayne and Heydon JJ*).

69 The findings in *Koehler* on foreseeability do not, however, preclude claims for damages where the nature of the work is inherently stressful, and where psychiatric injury to an employee may be considered reasonably foreseeable by an employer even if the particular employee did agree to perform the work in question and had not specifically put the employer on notice of being at risk of psychiatric injury. See, for example, *NSW v Fahy* (2007) 232 CLR 486, 506 (*Gummow and Hayne JJ*).

70 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 56 (*McHugh, Gummow, Hayne and Heydon JJ*).

71 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 56 (*McHugh, Gummow, Hayne and Heydon JJ*).

72 See, for example, Gary Chan, '*Koehler v Cerebos (Australia) Ltd*: Work Stress and Negligently Inflicted Psychiatric Illnesses' (2005) 47 *University of New South Wales Law Journal* 821, 828.

who must find work to feed themselves and [who] cannot afford to reject any job offer..' at the mercy of employer's 'take it or leave it' terms.'⁷³

In the context of the banking industry, the significance of *Koehler* is that an employee who agrees to perform a particular job is unlikely to be able to successfully sue the employer in negligence if the workload proves excessive, or the job gives rise to other stresses which manifest themselves in psychiatric illness. One exception to this may be where the employee specifically brings to the employer's notice the fact that they are at risk of suffering from psychiatric illness. Another possible exception is where the relevant stress-factor triggering the psychiatric injury (whether it is an increase in workload or something else) has (a) been brought about by a variation in the terms of the original employment contract or (b) amounts to a breach of an express contractual term.⁷⁴

Even where an employer is put on notice that an employee is at risk of psychiatric illness, it is far from clear what an employer would be required to do in response such a risk, though what emerges from *Koehler* is that this will largely depend upon the terms of the contract between the parties. Thus, it may be that an employee will only succeed in an action brought in negligence to compensate psychiatric illness, where the employee also has a contractual remedy against the employer for breach of contract.

The contractual remedy for psychiatric injury and mental distress that falls short of psychiatric injury is worth considering in more detail in light of another High Court decision involving a claim for psychiatric injury arising from an employer's breach of contract. Unlike Mrs Koehler, Peter Nikolich argued his case on the grounds of breach of an *express* contractual term in his claim on the part of his employer, the investment bank Goldman Sachs JBWere Services Pty Limited.⁷⁵ Nikolich's employment contract with the bank was found to have consisted of a formal letter of offer, along with certain provisions in a document entitled *Working with Us*.⁷⁶ *Working with Us* was a substantial document which covered various topics and contained many different sections, including specific information on the firm's policies towards health and safety, harassment and grievance handling procedures. When Nikolich suffered psychiatric illness, in the form of a depressive illness, as a result of bullying by a manager and of the way that his complaints had been handled by the firm's human resources department, the trial judge found that the bank was contractually bound to '...take every practicable step to provide and maintain a safe and healthy work environment for all people'⁷⁷ and that it had breached this term. As noted in the Full Court of the Federal Court: 'the finding of such a term had its basis in the judge's conclusion that the explicit promises made by the firm in the *Working with Us* document should be regarded as express terms of Nikolich's contract of employment.'⁷⁸ It was this finding that was challenged by the bank on appeal to the Full Court of the Federal Court, which appeal they lost.

The Full Court of the Federal Court agreed with the trial judge that the *Working with Us* document contained various express terms that were incorporated into the employment

73 Joellen Riley, 'Mental Health and Employment: Issues for Lawyers' (2007) 38 *University of New South Wales Faculty of Law Research Series 5* <www.austlii.edu.au> at 11 March 2009.

74 Whether a worker has a right to bring a private claim for breach of a statutory duty arising under Occupational Health and Safety laws will vary from State to State. In New South Wales, Victoria, the Northern Territory and the Australian Capital Territory, no such private right of action will arise from the relevant OHS legislation, and neither will it arise for those employed by the Commonwealth under relevant Cth legislation. See generally Richard Johnstone, *Occupational Health and Safety Law and Policy Text and Materials* (2nd ed, 2004) 303.

75 *Nikolich v Goldman Sachs JBWere Services Pty Ltd* [2006] FCA 784 (unreported, Wilcox J, 23 June 2006). Nikolich also alleged unlawful dismissal under the *Workplace Relations Act 1996* (Cth) and misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth).

76 *Ibid* [247].

77 *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (unreported, Black CJ Marshall and Jessop JJ, 7 August 2007) [24] (Black CJ referring to the judgment of the trial judge in the Federal Court).

78 *Ibid*.

contract.⁷⁹ According to the majority judgment, the employer had breached its contractual obligation to ‘...take every practicable step to provide and maintain a safe and healthy work environment for all people’ by not dealing with Mr. Nikolich’s grievances and attempting to resolve the problem promptly.⁸⁰ Interestingly, whilst it was accepted by the judges in the Full Court that it may have been ‘...impossible to reconcile Mr Nikolich and his manager’,⁸¹ this fact did not, according to the majority, excuse the bank’s failure to attempt a reconciliation without delay, especially given that the bank would have been, as the trial judge found, ‘on notice “from the beginning”...that Mr Nikolich was in an extremely distressed state as a result of on-going conflict with his manager’.⁸² Black CJ referred to an article in the *Australian Financial Review*⁸³ linking workplace stress and health problems and commented that those findings

could come as no surprise to anyone with significant management experience.....[and] [c]ertainly there was no suggestion in the evidence....that such a link was novel and beyond the reasonable contemplation of a human resources manager dealing with a complaint about a manager accused of ‘insults and abuse’ and who was said to have caused ‘a considerable degree of anxiety, stress and discomfort.’⁸⁴

The *Nikolich* decision may therefore support a claim for a worker’s psychiatric illness resulting from breach of contract where the employer has made specific commitments to health and safety or otherwise to the standards to be achieved in the workplace. Whilst these commitments may not appear in a document entitled ‘Contract of Employment’ but rather be found in an organisation’s policy documents, they may nevertheless be incorporated into an employment contract, as was the case in *Nikolich*. This is significant as many banks have very detailed statements about the working environment in their human resources policies, which go beyond the requirements imposed by health and safety legislation. These are discussed below.

VIII HEALTH AND WELFARE POLICIES IN BANKING

Australian banks are subject to the occupational health and safety laws which apply in each State.⁸⁵ These laws may be a source of civil action by an employee if they are injured as a consequence of a breach of such a law.⁸⁶ Those statutory laws in general terms require the employer to exercise a duty of care so as to ‘promote and secure the safety and health of persons at work’; and to ‘reduce, eliminate and control the hazards to which persons are exposed at work.’⁸⁷ They have in fact been invoked in a series of cases involving bank

79 Although the Full Court did not necessarily agree that all the terms deemed incorporated as express terms by the trial judge were, in fact, incorporated.

80 *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (unreported, Black CJ Marshall and Jessop JJ, 7 August 2007) [155], [156] (Marshall J).

81 *Ibid* [50].

82 *Ibid* [46], Black CJ referring to findings of the trial judge Wilcox J.

83 *Ibid* [49].

84 *Ibid*.

85 *Occupational Health and Safety Act 1991* (Cth); *Occupational Health, Safety and Welfare Act 1986* (SA); *Occupational Health and Safety Act 2000* (NSW); *Occupational Safety Act 2000* (Vic); *Workplace Health and Safety Act 1995* (Qld); *Workplace Health and Safety Act 2007* (NT); *Occupational Safety and Health Act 1989* (ACT); *Workplace Health and Safety Act 1995* (Tas); *Occupational Safety and Health Act 1984* (WA).

86 See for example *Carlile v Council of the Shire of Kilkivan and Brietkreutz* (Unreported, Queensland District Court, Dodds J, No 12 of 1992, 2 December 1995). The facts of this case (which is not readily available online) are reported in Max Spry, ‘Workplace Harassment: What Is It and What Should the Law Do about It?’ (1998) 40(2) *Australian Journal of Labour Law* 232. In *Carlile* the employee was awarded damages for bullying behaviours which were in breach of the *Workplace Health and Safety Act 1989* (Qld) s 9.

87 For example, as per section 5 of the *Occupational Safety and Health Act 1984* (WA) which is typical of most jurisdictions. It should be noted that New South Wales and the Australian Capital Territory do not allow civil actions arising from occupational health and safety law breaches.

hold-ups. In those cases it was alleged (and proven) that the banks had breached occupational health and safety laws in failing to provide adequate protection to staff in the design of the workplace so as to reduce or eliminate the potential for bank hold-ups.⁸⁸

Occupational health and safety requirements are often reflected in employer policy documents in very general terms. The ANZ Bank, for example, in its Human Resources Policy document states that: ‘ANZ commits to: ensuring that the way in which ANZ conducts its operations does not put the health and safety of any person at risk.’⁸⁹ Whether some of the terms of these health and safety policies will be incorporated into the contract of employment as express terms will depend on a number of factors and will turn on the facts of each specific case. Generally the question of whether a term was intended to form part of the contract:

...depends on the conduct of the parties, on their words and behavior, rather than on their thoughts. If an intelligent bystander would reasonable infer that a term was intended, that will suffice.⁹⁰

In deciding what would reasonably be inferred by the intelligent bystander the court will consider, among other factors, the ‘precise words used.’⁹¹ Statements of belief may not amount to contractual promises, whereas language which is promissory in nature may be more likely to suggest that a term should be inferred.⁹² Accordingly, it is submitted that clear statements of obligation made by one or both parties are more likely to be considered promissory and incorporated as express contractual terms than are statements of belief or intention.

Referring back to the example of the ANZ policy given above, language such as ‘commits’ to and ‘ensuring that’ *is* probably promissory in nature.⁹³ This can be contrasted with statements such as the following, taken from National Australia Bank:

Across the Group, we focus on a preventative approach to Health and Safety (H&S), aiming to provide a safe, secure and fulfilling workplace. We are focused on moving beyond compliance to looking after the well-being of our employees.⁹⁴

The National Australia Bank policy carefully avoids imperative language such as ‘commit’ but uses, rather, words such as ‘focus’ and ‘aim’ that reflect intent rather than obligation. At this stage it is worth noting a passage of Marshall J in the Full Court of the Federal Court judgment of *Nikolich*:

Counsel for Goldman submitted that Wilcox J erred in construing the relevant obligations as other than indications of Goldman’s general philosophy and approach to dealing with its staff. This is tantamount to saying that the statements by Goldman were not intended to be

88 See for example *Geoff Derrick v Australian and New Zealand Banking Group Ltd* [2003] NSWIRComm 406 (unreported, Boland J, 21 November 2003); *Geoff Derrick v ANZ Group Limited* [2005] NSWIRComm 59 (unreported, Boland J, 3 March 2005); *Presdee v Commonwealth Bank of Australia*, [2005] NSWIRComm 389 (unreported, Staunton J, 31 October 2005); *Geoff Derrick v Westpac Banking Corporation* [2006] NSWIRComm 76 (unreported, Staunton J, 30 March 2006). Whilst these cases may also involve claims for resultant stress, those claims are not dealt with in this paper, which focuses rather on organisational stressors. For a full discussion of the bank hold-up cases see Anna Bunn and Robert Guthrie, ‘Occupational Health and Safety in the Banking Industry’ (2009) 11 *Legal Issues in Business* 79.

89 ANZ, *Health & Safety Policy* <<https://www.anzmoneymanager.com/resources/e/9/>> at 14 March 2009.

90 *Oscar Chess Ltd v Williams* [1957] 1 WLR 370, 375 (Denning LJ).

91 *Ibid.*

92 *Ibid.* See also *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 194 when the court noted that determining the parties’ intentions is ‘...a matter of sifting through everything that was said on what was undoubtedly a ‘contractual occasion’ in order to reject some statements as representational and to retain others as promissory.’

93 Note, however, that we are not submitting that such a statement is necessarily incorporated into the ANZ contract of employment. Whether this is the case would depend on a number of factors, the promissory nature of the language being just one.

94 National Australia Bank, *Safety in the Workplace* <<http://www.nabgroup.com/0..91287.00.htm>> at 20 October 2010.

taken seriously – then why commit them to paper and parade them as Goldman’s way? This submission must be rejected.⁹⁵

Also relevant will be the timing of when the various commitments are brought to the employee’s attention and how much influence they have on the employee’s decision to enter into the employment contract in the first place. It is notable here that many of the banks make their health and safety policies available online, and some of them are included in the section on careers or ‘working with us’.⁹⁶ As such, these policies may well have been read by a prospective employee who may be able to prove that commitments contained within them influenced their choice of employer. This would strengthen any argument that the policies are incorporated into the contract, though this is not by itself conclusive.

In addition, it may be argued that a bank has a contractual obligation towards one employee to enforce its contractual obligations with another. For example, the Bank of Queensland incorporates a Code of Conduct into its employment contract which contains mostly unilateral obligations on the part of employees, such as the obligation to ‘work as a team with other staff and....treat each other with trust, courtesy and respect.’⁹⁷ Although the obligations in this code appear unilateral, it is possible to argue that they impose a contractually binding obligation upon the bank to enforce them against any staff member not in compliance. This is particularly the case considering statements such as that made by the Bank of Queensland’s Managing Director in the ‘Message from the Managing Director’ that forms the first page of the Code of Conduct and in which he asserts that ‘Our shared commitment to the maintenance of these standards and compliance with legislative requirements helps create a positive work environment for all employees.’⁹⁸ Other banks have similar provisions contained in behavioural codes and, likewise, whilst they appear mostly unilateral usually involve commitments by the bank as well. Consider the following introduction to National Australia Bank’s Code of Conduct which is signed by the group Managing Director and CEO, as well as the Executive Director and CEO of National Australia Bank Australia. ‘We are all responsible for ensuring compliance with our code of conduct.’⁹⁹

In summary, then, where there is an express or an implied term incorporated into the employment contract which imposes obligations on employers to take care of their workers’ health and safety, an employee may be able to base a claim for psychiatric injury on breach of contract. Where any express contractual terms go further than any terms implied by statute, as was the case in *Nikolich*, particularly if they involve specific commitments to an employee’s general wellbeing and security, an employee is in a better position than he or she would otherwise be in a claim for breach of implied (rather than express) contractual terms. In addition, it is contended that an employee who has express contractual commitments to health and safety, especially if these involve commitments to

95 *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (unreported, Black CJ Marshall and Jessop JJ, 7 August 2007) [132] (Marshall J).

96 See, for example, Commonwealth Bank, *Occupational Health and Safety* <<http://www.commbank.com.au/about-us/careers/our-workplace-and-you/Occupational-health-and-safety/default.aspx>> at 23 July 2009. See also National Australia Bank, *Our Principles, Policies and Management Systems* <<http://www.nabgroup.com/0..91276.00.html>> at 15 June 2010 and National Australia Bank, *Career Opportunities: Health, Wellbeing and Lifestyle* <<http://nab.com.au/wps/wcm/connect/nab/careers/home/1/1/3>> at 15 June 2010. See also Westpac, *Westpac as an Employer, People Policies* <<http://www.westpac.com.au/about-westpac/careers/westpac-as-employer/people-policies/>> at 15 June 2010.

97 Bank of Queensland, *Bank of Queensland Code of Conduct: Your Guide to Working With Us* <http://www.boq.com.au/uploadedFiles/CODE_OF_CONDUCT.pdf> at 21 August 2009.

98 David Getty, ‘Message from the Managing Director’, *Bank of Queensland, Code of Conduct: Your Guide to Working With Us* <http://www.boq.com.au/uploadedFiles/CODE_OF_CONDUCT.pdf> at 21 August 2009.

99 National Australia Bank, *National Australia Bank Code of Conduct: Our behavioural guidelines* <<http://www.nabgroup.com/vgnmedia/download/CodeOfConductOctober2007.pdf>> at 21 August 2009.

their general health and wellbeing, may be more likely to succeed in an alternative claim in negligence than an employee who does not have such express commitments. In *Koehler*, the majority of the High Court were of the view that Mrs Koehler's '...agreement to undertake the tasks stipulated...runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed risks to [...her...] psychiatric health.'¹⁰⁰ Conversely, it is submitted that where the agreement to undertake tasks is also subject to an agreement on the part of the employer, to ensure that no employee's health and safety is put at risk, there is no contradiction in finding that an employer should have foreseen that performance of even contractually stipulated tasks must not be at the expense of the employee's physical or mental health.¹⁰¹

Finally, on the issue of the capacity of workers to claim damages, it should be noted that a claim for damages against the employer for negligence will only succeed for mental harm that is not consequential on physical injury or property damage, where that harm amounts to a recognised psychiatric illness or injury.¹⁰² In contract, too, the usual rule is that damages are not recoverable for disappointment or distress, which falls short of psychiatric illness.¹⁰³ However, an exception to this usual rule may be made where the very object of the contract itself is to protect a contracting party against the very disappointment and distress later complained of.¹⁰⁴ Justice Wilcox, the primary judge in *Nikolich*,¹⁰⁵ suggested that a claim might be grounded in contract for distress which falls short of recognised psychiatric illness because, he said, in relation to the *Working with Us* document:

The purpose of the relevant sub-sections of *Working with Us* was to provide assurance to existing and prospective GSJBWS employees concerning the manner in which they would be treated in their workplace and, in particular, about the support they would be offered by their employer. The 'very object' was to provide peace of mind. It was foreseeable that, if the employer's promises were broken in relation to a particular employee, that employee might suffer distress.¹⁰⁶

Wilcox J did not consider it necessary to express a final view on this matter given that *Nikolich* was, on the evidence, clearly suffering from a recognised psychiatric illness: though his comments were noted without disapproval by Black CJ on appeal. This does at least raise the possibility that where contractual terms seek to provide reassurances and commitments to protect employees' peace of mind, disappointment and distress, even where they do not amount to or lead to a recognised psychiatric illness, may give rise to a claim for damages in contract. This proposition might raise significant issues, taking into account statements commonly found in various banks' health and safety policies and other documents (which may be contractual statements, for the reasons set out above) which refer to the wellbeing of employees. For example the following appears on the ANZ website under the heading of Health and Safety Management Systems:

- ANZ believes the safety, security, and the physical and mental wellbeing of our people lies at the heart of each person's ability to contribute to ANZ's success.
- ANZ has moved from a purely compliance-based approach to Health, Safety and Security to one that also proactively supports the physical and emotional wellbeing of our people.

100 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 22, 58 (McHugh, Gummow, Hayne and Heydon JJ).

101 *Johnstone v Bloomsbury Health Authority* (1991) 2 All ER 293.

102 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 394 (Windeyer J).

103 This rule is often associated with the decision in *Addis v Gramophone Co Ltd* [1909] AC 488.

104 This is in line with the decision in *Baltic Shipping v Dillon* (1993) 176 CLR 344 referred to in *Nikolich v Goldman Sachs JBWere Services Pty Ltd* [2006] FCA 784 (unreported, Wilcox J, 23 June 1996) [315], [316].

105 *Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784 (unreported, Wilcox J, 23 June 1996).

106 *Ibid* [317].

- ANZ's vision is of a workplace where staff can be assured of going home no less healthy than when they arrived at work.¹⁰⁷

This example might allow a court to find, following the dicta of Wilcox J that a policy of this kind incorporates contractual terms whose 'very object' is to provide peace of mind, such that it is foreseeable that, if the employer's promises were broken in relation to a particular employee, that employee might suffer distress and ground a claim for damages in respect of it.

IX CONCLUSIONS

Whilst the banking industry enjoys a relatively low overall rate of occupational injury, the finance sector, of which the banking industry is part, experiences the highest number of mental stress claims of all sectors. These claims are significant due to the long duration of absence that typifies such claims. The incidence of occupational stress within the banking industry may be attributed to a number of different factors, not least among which are the nature of the industry itself, significant and on-going restructuring of the industry involving mergers, off-shoring and a change in work practices, and the current economic downturn.

It is also to be noted that wellness schemes, extended sick leave programs, and other innovative responses to health and safety that many banks adopt, may obscure the true rate of occupational injury within the sector, effectively hiding the rate of work-related stress by inducing employees to take sick leave.

In addition to claims for workers' compensation, for which many banks are self-insured, this article has explored the fact that banks may be exposed to claims brought in negligence and contract. Recent High Court cases involving work-related negligence claims brought by employees in respect of psychiatric illness have generally tended to favour employers. The High Court decision in *Koehler* giving, as it does, precedence to the content of duties established in the employment contract, represents to some a 'new contractualism' in the field of employment relations.¹⁰⁸ The effect of this approach is that an employee who experiences work-related mental stress may find it difficult to bring a common law claim against an employer who is doing no more than insisting on the performance of the tasks stipulated for in the employment contract, even if those tasks impose an excessive workload or otherwise take a toll on the worker's mental health. Whilst there are some exceptions to this position, those exceptions mostly either relate to situations in which an employee would in any event have a claim against the employer for breach of the employment contract or leave an employee in the perilous position of having to inform their employer that the job may pose or is posing risks to their mental health (even assuming that the employee him/herself is aware of such risks).

Cases such as *Nikolich* reveal the extent to which policies and procedures may be taken to have contractual effect and give rise to a claim for breach of contract in cases where those policies have not been followed. In situations where there are express contractual promises to protect an employee's well-being the issue of foreseeability of psychiatric illness may more easily be resolved in favour of an employee. This is significant, because many banks do make specific commitments around health and safety and some of these may have contractual effect.

Although breach of contract claims generally do not allow for the recovery of damages for mental distress (falling short of a psychiatric illness), there may be circumstances in which such damages may lie, notably in cases where the very object of the contract is to provide for an employee's peace of mind. Whilst the line of authority in this respect is by no means authoritative, it is now at least arguable that detailed commitments made by

107 ANZ, *ANZ Health & Safety Management System – an Overview* <<http://www.anz.com/about-us/corporate-responsibility/employees/employee-relations/health-safety-wellbeing/>> at 21 August 2009.

108 Riley, above n 75, 5.

some banks to the emotional and mental wellbeing of its employees could, if found to be contractual in nature, allow an employee suffering distress as a result of work-related stress to succeed in a claim for damages for breach of contract against the employer. It follows that the commitment to occupational health and safety needs to be grounded in substance rather than in words and policy. It also follows that, given that banks are self-insurers in most instances, with a capacity to remove data in relation to occupational injury and disease from the public arena, further investigation of the cost of sick and related leave to the banking industry is warranted. Given the public statements of the major banks made via their websites in relation to the occupational health and safety of employees, there appears to be an asymmetry in relation to the policies of some banks which profess a concern for employee health and the decisions of managers to engage in almost constant restructuring, corporate mergers and offshoring of jobs which almost certainly have adverse effects on the health of employees.