INSTITUTIONAL ABUSE CLAIMS IN VICTORIA—LEGAL IDENTITY OF DEFENDANTS (ORGANISATIONAL CHILD ABUSE) ACT 2018 APPLIES TO SECONDARY VICTIMS

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Australia Litigation and Dispute Resolution Alert

By: Christien Corns, Sam Rappensberg

On 8 February 2024, the High Court of Australia refused to grant the Catholic Archdiocese of Melbourne (Archdiocese) special leave to appeal from the Victorian Court of Appeal's decision in *The Catholic Archdiocese of Melbourne v. RWQ (a pseudonym)* [2023] VSCA 197 on the basis that the proposed appeal had insufficient prospects of success.

The Victorian Court of Appeal had refused to grant the Archdiocese leave to appeal from the Supreme Court of Victoria's decision in *RWQ v. The Catholic Archdiocese of Melbourne & Ors* [2022] VSC 483 (First Instance Judgment).

Therefore, damages claims made by secondary victims of child abuse (for example, the parents of the victim child) are captured by the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (the Act), meaning nongovernment organisations must nominate a proper defendant to incur any liability arising from such claims.

FACTS

RWQ alleges that he is entitled to recover damages from the Archdiocese for nervous shock caused by him learning of the alleged abuse of his deceased son by George Pell sometime between July and December 1996.

RWQ contends that the Archdiocese breached its duty to not cause him pure mental harm and is otherwise vicariously liable, or directly liable, for the abuse of his son and his own injury.

The Archdiocese relevantly denied that the Act applied to RWQ's claim, such that it was obliged to nominate a proper defendant to incur any liability from that claim. The Archdiocese contended that RWQ's "secondary victim" claim was not "founded on or arising from child abuse" for the purposes of section 4(2) of the Act.

FIRST INSTANCE JUDGMENT

The First Instance Judgment answered the following two preliminary questions as follows:

1. Does section 4(2) of the Act apply to RWQ's claims against the Archdiocese? YES

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2. Would a proper defendant nominated by the Archdiocese in accordance with section 7 of the Act (because it is an unincorporated nongovernment organisation, rendering it unable to be sued) incur any liability arising from RWQ's claims against the Archdiocese? YES

The single judge, McDonald J, held that the use of the words “arising from” in the phrase “founded on or arising from child abuse” put “beyond doubt” that RWQ's “secondary victim” claim was captured by section 4(2) of the Act. Otherwise, the words “arising from” served no purpose because all “primary victim” claims will always be “founded on” child abuse.

In any event, McDonald J considered it strongly arguable that RWQ's “secondary victim” claim was “founded on” child abuse for the purposes of section 4(2) of the Act.

Further, his Honour considered the regular repetition of the phrase “founded on or arising from child abuse” throughout the Act indicated strongly that the application of the Act was not restricted to “primary victim” claims.

In other words, section 4(2) is to be construed broadly and as encapsulating “secondary victim” claims. McDonald J also found that the second reading speech in respect of the *Legal Identity of Defendants (Organisational Child Abuse) Bill 2018* did not disclose any intention by the Victorian Parliament to limit the benefit of the Act to primary victims, even in accepting that is its primary intention.

His Honour also held that it was not inconsistent with the main purpose of the Act to make provision for “child abuse plaintiffs” (see section 1 of the Act) if it applied to “secondary victim” claims. This was consistent with the express acknowledgment of Chrissie Foster and Anthony Foster (parents of victims of child sexual abuse that had made similar damages claims to that made by RWQ “founded on or arising from child abuse”) as “survivors” in the second reading speech referred to above.

Turning to section 7 of the Act, McDonald J held that the right to nominate a proper defendant was only enlivened if there was a claim “founded on or arising from child abuse.”

In so doing, his Honour rejected the Archdiocese's submission that sections 7(4)–(5) and 8(8)–(9) support a limited construction of the Act as applying to “primary victim” claims only. Instead, the “words 'found liable for child abuse in respect of the claim' in ss 7(4)–(5) and 8(8)–(9) [of the Act] mean 'found liable for a claim founded on or arising from child abuse.'”

VICTORIAN COURT OF APPEAL JUDGMENT

The Victorian Court of Appeal was satisfied that the Act “clearly and unequivocally” applied to “secondary victim” claims, such as RWQ's claim against the Archdiocese.

The Victorian Court of Appeal agreed with McDonald J's construction of sections 4 and 7 of the Act as outlined above, finding that:

- The natural and ordinary meaning of the expansive phrase “founded on or arising from child abuse” included an action for damages based on the abuse of a plaintiff's child, with the words “*arising from*” putting that “beyond doubt”;
- The failure of Parliament to limit categories of plaintiffs to primary victims for the purposes of the Act suggests there was no intention on its part to do so;

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- There was no merit in the attempts made to qualify the regularly repeated words “founded on or arising from child abuse” by reference to other sections of the Act; and
- McDonald J's construction was consistent with the purpose of the Act, which is aimed at overcoming the perceived unfairness of the Ellis defence. There is no reason to limit the application of the Act to one class of plaintiffs.

TAKEAWAYS

The Archdiocese has failed to persuade the High Court of Australia to grant it leave to appeal from the Victorian Court of Appeal's judgment outlined above, which endorsed the First Instance Judgment.

This means that:

- “Secondary victim” institutional abuse claims (like RWQ's claim) can be pursued in Victoria with the benefit of the Act; and
- Institutions and insurers will inevitably be exposed to a greater number of claims moving forward, perhaps dealing with both primary and secondary victim claims together.

In particular, primary victim plaintiffs and their solicitors should exercise caution moving forward in the context of settlement discussions, especially when considering the question of granting indemnities in relation to related claims “founded on or arising from [the subject] child abuse” (e.g., secondary victim claims).

KEY CONTACTS



CHRISTIEN CORNS
PARTNER

MELBOURNE
+61.3.9640.4248
CHRISTIEN.CORNS@KLGATES.COM



SAM RAPPENSBERG
SPECIAL COUNSEL

MELBOURNE
+61.3.9205.2073
SAM.RAPPENSBERG@KLGATES.COM

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