

Legal update: Comcare prosecutes for food allergy death

By: [Michael Tooma](#) , Alena Titterton

06 Jul 09

On 30 June 2009, the Federal Court of Australia handed down a fine of \$210,100 in a Comcare prosecution of the Commonwealth of Australia, acting through the Chief of the Army for a contravention of the *Occupational Health and Safety Act 1991 (Cth)* (the **OHS Act**) by the Australian Army Cadets (**AAC**) in the course of conducting a three day training course known as Bivouac 2007 at the Wombat State Forest in Central Victoria in March 2007.¹

The fine handed down is close to the maximum civil penalty available under the OHS Act, which is \$242,000.

The Federal Court proceedings had two separate parts, one part which related to the supply of food to cadets containing peanuts despite being informed of allergies to peanuts and the second part which related to losing a number of cadets for a period of eighteen (18) hours.

Part 1 – Supply of food containing peanuts

In the course of the training exercise, the AAC supplied the cadets with one-man combat ration packs with beef satay food pouches containing peanuts despite being informed that seven (7) of the cadets were allergic to peanuts.

One of the cadets, 13 year old Nathan Francis, died from the effects of anaphylactic shock after taking a mouthful of food containing peanut. The food was supplied to Nathan Francis despite his parents having advised that Nathan had a severe peanut allergy.

The food was supplied by staff of Scotch College, then acting as officers of the Scotch College Cadet Unit.

Under section 16(1) of the Commonwealth OHS Act, an employer must take all reasonably practicable steps to protect the health and safety at work of the employer's employees. The OHS Act, by virtue of a Ministerial declaration, deems cadets undertaking cadet activities to be employees of the Commonwealth. The Scotch College Cadet Unit is a unit of the AAC and as such, rather than the College, it was the Chief of the Army, as the relevant employing authority for the AAC who owed the duty to Nathan Francis.

The AAC was provided with numerous forms informing them of Nathan's allergy. At the time of the Incident, the AAC's Policy Manual required the listing of medical conditions including allergies and for the list to be available when an emergency occurred. It did not require the information to be circulated in relation to the distribution of food to cadets. The medical information was not provided to the person who distributed the food to the Scotch College cadets.

Part 2 - The lost cadets

At the same Scotch College Cadet Unit camp, six (6) cadets were lost in the bush for eighteen (18) hours (the **Lost Section Incident**). The cadets started the navigation exercise at 10am and were due to return at 4pm. At midday, the Sergeant with supervision responsibilities for the section left them alone in the bush and did not return, taking the sole radio communication device. He was not replaced. From midday, the section was under the command of a year ten (10) student without radio communication equipment. The cadets managed to return to the campsite at 11am the following day.

A risk assessment had been completed for the navigation exercise and had required the section to retain communications equipment for the duration of the exercise.

Once again, the Lost Section Incident involved a failure of the Commonwealth to ensure the safety of the cadets and in particular, by failing to ensure that the lost cadets were in possession of a radio communication device previously issued and which had been identified in the risk assessment.

The Undertakings

This case is the first time the enforceable undertakings provisions of the OHS Act have been considered by a Court.

The OHS Act provides that one of the civil remedies available for a breach of section 16(1) of the OHS Act is giving written undertakings to Comcare pursuant to clause 16 of Schedule 2 of the OHS Act.

The case raises interesting points about the way the written undertakings provisions of the OHS Act operate in practice. The Federal Court was asked by the parties to adjourn the Lost Section Incident part of the proceeding pursuant to clause 16(3) of Schedule 2 of the OHS Act. This section of the OHS Act, however, does not stipulate whether the adjournment ordered is ever to come to an end. Both Comcare and the Commonwealth intended that proceedings would be struck out without a declaration being made in the event that the Commonwealth does not default on the terms of the undertaking.

However, Justice North of the Federal Court took the view that while it may be the general intent of the section, the result may not be available in the case as the undertaking provided by the Commonwealth effectively involved an admission of the contravention. Under clause 2(1)(a) of Schedule 2 of the OHS Act, the Court is obliged to make a declaration of a contravention if it considers that the person has breached the general duty in section 16(1) of the OHS Act.

Findings in relation to this issue have been postponed for the adjourned date for hearing, set down for 1 April 2010, and it will be interesting to see whether a declaration of contravention is made against the Commonwealth in relation to the Lost Section Incident.

While not discussed in Justice North's reasons for judgment, Schedule 2 of Comcare's Enforcement Policy (which deals with enforceable undertakings) states that "an enforceable undertaking need not admit liability". As a result of this decision, one would expect to see other Commonwealth employers in a similar position steering clear of making any admissions when negotiating enforceable undertakings with Comcare in future.

The breadth and detail of the terms of the undertaking provided by the Commonwealth to Comcare in this case demonstrate that Comcare will expect significant undertakings if they are to be accepted. In all, the Commonwealth entered into 50 specific undertakings arising from the Incidents. The specific undertakings included the following:

On allergies

- a new warning to appear on AAC activity joining instructions regarding the inability of the ADF to provide a severe food allergy free environment
- a restriction on the use of combat ration packs already distributed to ADF personnel and a prohibition on the distribution of combat ration packs to members of the public and the AAC
- the provision of compulsory pre-activity instructions and training for all Army Cadet Staff on food allergies, allergic reactions and medical treatment of allergies
- an apology in writing to the family of Cadet Nathan Francis
- payment for publicity of the undertaking in an advertisement in a daily metropolitan newspaper in each capital city of each State and Territory of Australia
- the publication of a statement in internal ADF publications
- the development and implementation of an Anaphylaxis Policy to be developed in conjunction with medical advisors

On the lost cadets

- the production of a field activities handbook to assist in the planning and conduct of AAC field activities
- the development of a standard operating procedure for mandatory reporting requirements for lost or overdue cadets
- the implementation of a revised AAC OHS Risk Management Policy and procedures
- the commencement of an AAC internal OHS audit program with results to be provided to Comcare on a quarterly basis regarding the progress and outcome of such audit procedures, and
- a presentation on the Army's approach to planning and conduct of youth development related field activities at a public forum such as the Safety in Action conference in 2009 or 2010.

Lessons: Risk management is key

This case serves as a reminder of how important it is to ensure that risk management processes are linked together in an overall risk management system. It is not enough to simply collect medical forms and consent forms and have those forms available when medical emergencies occur. Risk assessments in all facets of activities must:

- be undertaken prior to commencing activities
- be implemented in practice
- be specific to the activities being undertaken, and
- take into account the specific characteristics of the persons undertaking the activities.

Schools should particularly take note of the case and assess whether they have appropriate policies and procedures in place for managing the risks associated with allergies and extra-curricular activities.

¹ *Comcare v Commonwealth of Australia* [2009] FCA 700.