Benchbook

Orders to stop sexual harassment:

Transitional arrangements

This Benchbook applies in relation to the alleged sexual harassment of a worker that occurred (or commenced) before 6 March 2023.

For alleged sexual harassment occurring on or after 6 March 2023 (that is not part of a course of conduct that commenced before 6 March 2023) see:

Sexual Harassment Disputes Benchbook

About this Benchbook

This Benchbook has been prepared by staff of the Fair Work Commission (the Commission) to assist parties lodging or responding to applications to stop sexual harassment at work under the *Fair Work Act 2009* (Cth) (the Fair Work Act). Information is provided to parties to assist in the preparation of material for matters before the Commission.

For information about applications to seek orders to stop bullying at work, see the Commission's Orders to stop bullying Benchbook (also known as the Anti-bullying Benchbook).

This Benchbook applies in relation to the alleged sexual harassment of a worker at work that occurred, or was part of a course of conduct that commenced, before 6 March 2023.

If the alleged sexual harassment occurred on or after 6 March 2023 (and is not part of a course of conduct that commenced before 6 March 2023) see:

Sexual Harassment Disputes Benchbook.

Disclaimer

The content of this Benchbook should be used as a general guide only. The Benchbook is not intended to be an authority to be used in support of a case at hearing.

Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this Benchbook or on any linked site.

The information provided, including cases and commentary, are considered correct as of the date of publication. Changes to legislation and case law will be reflected in updates to this Benchbook from time to time.

This Benchbook is not a substitute for independent professional advice and users should obtain any appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish the names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this Benchbook may inadvertently contain such names.

Case examples

Individual cases, including from other jurisdictions, have been selected as examples to help users gain a better understanding of the issues covered. These cases should not be considered exhaustive.

The case examples used in this Benchbook are accompanied by interpretations of the decisions by Commission staff on specific issues which are addressed within the text. The case examples may not reflect all of the issues considered in the relevant decision. In the electronic version of the Benchbook the original text of the decision can be accessed by clicking the link.

Links to external websites

Where this site provides links to external websites, these links are provided for the visitor's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

The Commission acknowledges the services provided by AustLII, Thomson Reuters and LexisNexis which were utilised in compiling this Benchbook.

Copyright

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Quick Links

General

Employer or principal

Employee or worker

Person named

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Part 1 – How to use this Benchbook

This Benchbook has been designed for electronic use and works best in that form. This Benchbook has links to all of the cases referenced in the footnotes, as well as links to the legislation and other websites.

To access the Benchbook please visit: www.fwc.gov.au/hearings-decisions/case-law-benchbooks

About the Commission

The Fair Work Commission (the Commission) is Australia's national workplace relations tribunal.

Australia has had a national workplace relations tribunal for more than a century and it is one of the country's oldest key institutions. Over time it has undergone many changes in jurisdiction, name, functions and structure. Throughout its history, the tribunal, currently known as the Fair Work Commission, and its predecessors, have made many decisions that have affected the lives of working Australians and their employers. The Commission recognises the importance of promoting public understanding of the role of the tribunal and of capturing and preserving its history for display and research.

The Commission is responsible for applying provisions of the *Fair Work Act 2009* (the Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act).

The Commission has a range of powers and functions under the Fair Work Act including powers to make orders to stop workers being sexually harassed or bullied at work.

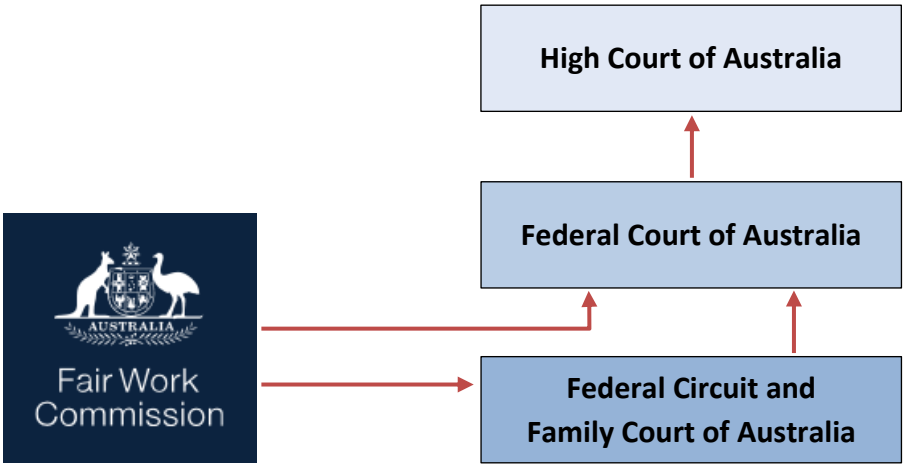
Relationship between the Fair Work Commission and the Courts

See Fair Work Act ss.563–568.

The High Court of Australia is the highest court in the Australian judicial system. The functions of the High Court are to interpret and apply the law of Australia; to decide cases of special federal significance including challenges to the constitutional validity of laws and to hear appeals, by special leave, from Federal, State and Territory courts.

The Federal Court of Australia is a superior court of record and has a broad jurisdiction including over all civil and criminal matters arising in the Fair Work jurisdiction. The Court also has a substantial and diverse appellate jurisdiction, including dealing with applications for judicial reviews of certain Commission decisions.

Some matters lodged with the Commission are conciliated first at the Commission. If the matter does not settle, an applicant can then apply to start proceedings in the Federal Court or the Fair Work Division of the Federal Circuit and Family Court of Australia.



The Commission Structure

The Commission is headed by a President, who is also a Judge of the Federal Court of Australia. Commission Members perform quasi-judicial functions under the Fair Work Act, including conducting public hearings and private conferences for both individual and collective matters. They also perform certain functions under the Registered Organisations Act, including determining applications for registration and cancellation of registration and for alterations to eligibility rules of employee and employer organisations. Commission Members are independent, statutory office holders appointed by the Governor-General on the recommendation of the Australian Government of the day. There are a number of different titles that may apply to Commission Members:

- President
- Vice President
- Deputy President
- Commissioner
- Expert Panel Member.

General information about appearing at the Commission

There are standards for the conduct of all people attending a hearing or conference at the Commission. The standards help the Commission to provide fair hearings for all parties.

Providing fair hearings involves allowing all parties to put their case forward, and to have their case determined impartially and according to law.

The Commission and all parties appearing before it, including representatives, have responsibilities to each other to ensure a fair hearing for all participants.

When coming to the Commission:

- it is important to arrive early for the conference or hearing so that proceedings begin on time
- notify the Commission staff of your arrival by approaching them in the hearing or conference room
- if delayed it is important that contact is made with the appropriate Commission staff before the hearing is due to start
- switch off mobile phone or other electronic devices in the hearing or conference room
- address the Member of the Commission by his or her title (eg Deputy President or Commissioner)
- in a hearing, stand when addressing the Member of the Commission or to question a witness, and
- bring enough copies of documents so everyone involved can have a copy (eg 3 copies: one to keep, one for the other party and one for the Member).

Part 8 – Commission process – Hearings and conferences contains further information about what will happen at the Commission when you make or respond to an application for an order to stop sexual harassment.

Name of the Tribunal

The name of the national workplace relations tribunal has changed throughout its history. For consistency, in this document it is referred to as the 'Commission'. The table below outlines the name of the national workplace relations tribunal at various times.

Name	Short title	Dates
Fair Work Commission	the Commission or FWC	1 January 2013–ongoing
Fair Work Australia	FWA	1 July 2009–31 December 2012
Australian Industrial Relations Commission	AIRC, the Commission	1989–2009
Australian Conciliation and Arbitration Commission	the Commission	1973–1989
Commonwealth Conciliation and Arbitration Commission	the Commission	1956–1973
Commonwealth Court of Conciliation and Arbitration		1904–1956

Workplace relations legislation, regulations and rules

The following table sets out legislation dealing with workplace relations and the dates that the law was in operation. The current legislation is the Fair Work Act.

Name of legislation	Commencement dates
Fair Work Act 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Workplace Relations Act 1996 **(Cth)** (incorporating the ***Workplace Relations Amendment (Work Choices) Act 2005*** **(Cth)**)	27 March 2006
Workplace Relations Act 1996 **(Cth)**	25 November 1996
Industrial Relations Act 1988 **(Cth)**	1 March 1989
Fair Work Regulations 2009 **(Cth)**	1 July 2009 and 1 January 2010 (Staged commencement)
Fair Work Commission Rules 2013 **(Cth)**	6 December 2013

Case law

Case law is comprised of previous decisions made by courts and tribunals which help interpret the meaning of legislation and how it applies in a specific case. When a decision is made by a court or tribunal, that interpretation of the law may form a precedent. Decisions of the High Court of Australia are authoritative in all Australian courts and tribunals.

A ***precedent*** is a legal decision which provides guidance for future, similar cases.

An ***authoritative*** decision is one that must be followed on questions of law by lower courts and tribunals.

Referencing

References in this Benchbook use the following formats.

Note: In the electronic version of this Benchbook the cases referenced in the footnotes are hyperlinked and can be accessed by clicking the links.

Cases

[41] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 | (Harrison SDP, Richards SDP, Williams C, 30 June 20011) at para. 13.
[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361].
[43] ibid.
[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22, [(2008) 174 IR 21]; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23, [(1995) 185 CLR 410 at p. 427].

The name of the case will be in italics.

The link will be to the original reference. If a case has been reported then there will also be a reference to the journal the case has been reported in. For example, some of the abbreviations used are:

'HCA' for 'High Court of Australia

'FCAFC' for a 'Full Court of the Federal Court of Australia'

'FWCFB' for a 'Full Bench of the Fair Work Commission'

'FWA' for 'Fair Work Australia'

'IR' for 'Industrial Reports'

'CLR' for 'Commonwealth Law Reports'

Page or paragraph numbers are included at the end of the reference, to provide a pinpoint in the document where appropriate.

If a reference in a footnote is identical to the one immediately before, the term 'ibid.' is commonly used.

Where one case refers to another case, the term 'citing' is used.

Item	Example
Case names	*Elgammal v BlackRange Wealth Management Pty Ltd* *Visscher v The Honourable President Justice Giudice*
Link to case	[2011] FWAFB 4038 | (Harrison SDP, Richards SDP, Williams C, 30 June 2007) [2009] HCA 34 (2 September 2009), [(2009) 239 CLR 361]
Page number	(1995) 185 CLR 410 at p. 427

Paragraph number	[2008] AIRCFB 1088 … at para. 22.
Identical reference	[42] *Visscher v The Honourable President Justice Giudice* [2009] HCA 34 (2 September 2009) at para. 81, [(2009) 239 CLR 361]. [43] ibid.
Reference to other case	[44] *Searle v Moly Mines Limited* [2008] AIRCFB 1088 (Giudice J, O'Callaghan SDP, Cribb C, 29 July 2008) at para. 22; citing *Byrne v Australian Airlines Ltd* [1995] HCA 24 (11 October 1995) at para. 23.

Legislation and Regulations

[3] *Acts Interpretation Act 1901* (Cth) s.36(2).
[4] Fair Work Act s.381(2).
[5] Fair Work Regulations reg 6.08(3).
[6] *Police Administration Act* (NT) s.94.
[7] *Fair Work (Commonwealth Powers) Act 2009* (Vic).
[8] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).
[9] *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld).

The name of the legislation will be in italics unless a shortened version is being used.

The jurisdiction of the legislation is included in brackets if the full name is used:

'(Cth)' is a Commonwealth law

'(ACT)' is an Australian Capital Territory law

'(NSW)' is a New South Wales law

'(NT)' is a Northern Territory law

'(Qld)' is a Queensland law

'(SA)' is a South Australian law

'(Tas)' is a Tasmanian law

'(Vic)' is a Victorian law

'(WA)' is a Western Australian law

Section, regulation or rule numbers are included at the end of the reference to provide a pinpoint in the legislation where appropriate.

Item	**Example**
Legislation names	*Acts Interpretation Act 1901* Fair Work Act

	Fair Work Regulations *Industrial Relations (Commonwealth Powers) Act 2009*
Jurisdiction	*Acts Interpretation Act 1901* (Cth) *Police Administration Act* (NT) *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld)
Section or regulation number	*Acts Interpretation Act 1901* (Cth) s.36(2) Fair Work Act s.381(2) Fair Work Regulations reg 6.08(3)

Guide to symbols

The symbols used in this Benchbook are designed to provide assistance with identifying specific issues or to point to additional information that may assist the reader with their understanding of a particular issue.

Important information

Related information – Links to information on related topics

Helpful information

Links to sections of legislation

Links to forms

Glossary of terms

The glossary explains common terms used throughout this Benchbook while legislative terms are defined in the relevant sections.

Naming conventions

The parties to workplace sexual harassment matters have generally been referred to in this Benchbook as 'worker', 'person named' (as allegedly having engaged in sexual harassment) and 'employer' or 'principal'.

After an application for an order to stop sexual harassment is lodged, the parties are referred to as:

- Applicant (usually the person who lodged the application – the worker),
- Employer/principal (the business or undertaking that employs or otherwise engages the worker making the application or a person named as allegedly having engaged in sexual harassment), and
- Person named (person who has allegedly engaged in sexual harassment).

In the case of an appeal the parties are referred to as:

- Appellant (the party who lodges the appeal), and
- Respondent (the party who is responding to the appeal).

References to provisions in Part 6-4B of the Fair Work Act

Unless the context indicates otherwise, references in this Benchbook to Part 6-4B of the Fair Work Act are to the Act as it was just before 6 March 2023. These provisions are extracted in full at **Appendix A**.

On 6 March 2023, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) amended the sexual harassment provisions in the Fair Work Act. However, the transitional arrangements in the Secure Jobs Better Pay Act mean that Part 6-4B of the Fair Work Act, as it was just before 6 March 2023, continues to apply in relation to the sexual harassment of a worker at work that occurred (or commenced) before 6 March 2023.

What is a day?

Section 36(1) of the *Acts Interpretation Act 1901* (Cth)[1] deals with how time is calculated in interpreting the Fair Work Act. It reads:

[1] The *Acts Interpretation Act 1901* (Cth) as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).

> *(1) Where in an Act any period of time, dating from a given day, act, or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.*

This means that when calculating time you do not count the day on which the relevant act or event occurs or occurred unless the Fair Work Act says otherwise.[2]

Adjournment (Adjourn)	When a hearing or conference is rescheduled to a later time or day, or postponed for an indefinite period.
AHRC	Australian Human Rights Commission.
Appeal	An application made to the Commission for a single Commission Member's decision to be reviewed by a Full Bench. A person must have the permission of the Commission to appeal a decision. See **Full Bench** and the information about Appeals in Part 11.
Applicant	A person who makes an application to the Commission.
Application	The way of starting a case before the Commission. An application can usually only be made using a form prescribed by the *Fair Work Commission Rules 2013* (Cth).
At work	See Part 5 of this Benchbook.
Balance of probabilities	The standard of proof in civil matters. A fact is proved to be true on the balance of probabilities if its existence is more probable than not.
Commission	Fair Work Commission. The Commission is also known as the FWC.
Commission Member	A person appointed by the Governor-General as a Member of the Commission. A Member may be a Commissioner, a Deputy President, a Vice President or the President of the Commission.
Conciliation	A confidential and informal way of trying to resolve a dispute without requiring a decision of the Commission. A Commission Member or a staff conciliator assists the parties to identify the issues and explore options to settle the dispute by agreement. The conciliator will not decide the case but may make procedural decisions, explain risks and make suggestions.

[2] *Re White's Discounts Pty Ltd t/as Everybody's IGA Everyday and Broken Hill Foodland* PR937496 (AIRCFB, Giudice J, Drake SDP, Lewin C, 12 September 2003) at paras 15–16, [(2003) 128 IR 68].

Conference/ Determinative conference	A proceeding conducted by a Commission Member. A conference must be held in private unless the Commission directs otherwise. A Member conference could be a preliminary conference, where the Member tries to resolve the dispute with the parties, including by conciliation, making a recommendation to the parties or expressing an opinion. Where a matter is not resolved, a Member may hold a **determinative conference** to decide the matter. Determinative conferences are also held in private and are less formal than hearings, but may be recorded and will usually result in the Member issuing a binding decision.
Constitutionally-covered business	See Part 4 of this Benchbook
Court	In this Benchbook, a reference to 'Court' generally means the Federal Court or the Federal Circuit and Family Court of Australia.
Decision	A determination made by a single member or Full Bench of the Commission.[3] A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.
Discontinue	Where an applicant elects to end a matter before the Commission, for example, where their matter has settled. Once a matter has been discontinued it cannot be restarted.
Employer or Principal	An employer is the legal entity that engages an employee to do work for them. A principal is the legal entity that engages a contractor to do work for them.
Error of law	An error of law is a common ground for legal review. It occurs when a Member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.

[3] The General Manager of the Commission, or a member of staff delegated powers under ss.625 or 671 of the Fair Work Act may also make a decision.

Evidence	Information provided to the Commission which tends to prove or disprove the existence of a particular belief, fact or proposition relevant to a party's case. This can include oral or written witness statements, other documents and objects. Certain evidence may or may not be accepted by the Commission. The Commission is not bound by the rules of evidence but usually follows them in the interests of procedural fairness.
Explanatory Memorandum	Each Bill that is introduced into Commonwealth Parliament has an 'explanatory memorandum' that explains the objectives of the Bill and how it is intended to operate, and provides a plain language rewriting of each provision of the Bill.
Fair Work Act or **FW Act**	The *Fair Work Act 2009* (Cth) is Commonwealth legislation dealing with workplace relations in Australia.
First instance	A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter.
Full Bench	A Full Bench of the Commission comprises at least 3 Commission Members, one of whom must be a presidential member. Full Benches hear appeals, matters of significant national interest and other matters specifically provided for in the Fair Work Act. A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members' opinions differ.
Hearing	A proceeding conducted before the Commission which is generally open to the public and results in a binding decision.
Individual	A natural person.
Industrial association	An association of employees or independent contractors, or both, (such as a union) or an association of employers.
Industrial instrument	A generic term for a legally binding industrial document that details terms and conditions of employment, such as an enterprise agreement or modern award.
Jurisdiction	The scope of the Commission's powers to deal with matters. The Commonwealth Parliament determines the extent of the Commission's powers, including the types of matters it can deal with and what it can and cannot do.
Lodge	The act of delivering an application or other document to the Commission.

Matter	Cases at the Commission are referred to as matters.
Mediation	An informal way of resolving a dispute without requiring a decision of the Commission. A Commission Member or a mediator assists the parties to identify the issues and explore options to resolve the dispute by agreement. Mediation is a voluntary, private and confidential process.
Member	See **Commission Member**
Mention	A short, recorded hearing before a Commission Member, usually to set a timetable or discuss procedural matters with parties.
Notice of Listing	A formal notice sent by the Commission setting out the time, date and location for a hearing, conference or mention. A Notice of Listing can also include specific directions or requirements that a party must follow.
Order	A formal direction of the Commission which gives effect to a decision and is legally enforceable.
Party	A person or organisation involved in a matter before the Commission (other than a member of Commission staff or a Commission Member).
Pecuniary penalty	An order to pay a sum of money which is made by a Court.
Person conducting a business or undertaking or **PCBU**	The legal entity running the business or undertaking, including incorporated entities, sole traders, partners of a partnership and certain senior 'officers' of an unincorporated association.
Person named	A person who is named in an application under s.789FC of the Fair Work Act as having engaged in sexual harassment.
Principal	See **Employer or Principal** A principal is the legal entity that engages a contractor to do work for them. An employer is the legal entity that engages an employee to do work for them.

Procedural fairness	Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made. Procedural fairness is concerned with the decision-making process followed or steps taken by a decision-maker rather than the actual decision itself. The terms 'procedural fairness' and 'natural justice' have similar meanings and can be used interchangeably.
Quash	To set aside or revoke a decision or order so that it has no legal effect.
Representative	A person who acts on a party's behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else. Generally, a lawyer or paid agent can only represent a party in a conference or hearing before the Commission with permission of the Commission. However, there are some exceptions to this – see Part 8 of this Benchbook.
Respondent	A party against whom an application is made. In the case of an application to stop sexual harassment this can be the: - employer or principal, and/or - person named (a person who is named as engaging in sexual harassment).
Secure Jobs Better Pay Act	The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth).
Service (Serve)	Service of a document means delivering the document to another party or their representative, usually within a specified period. Documents can be served in a number of ways. These are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.
Serving documents	See **service**.
Settlement	An agreed resolution of a dispute. Generally, a negotiated outcome which all parties agree to be bound by.
Sex Discrimination Act	The *Sex Discrimination Act 1984* (Cth) is Commonwealth legislation dealing with sex discrimination and sexual harassment in Australia.
WHS	Work health and safety.

WHS Act	The *Work Health and Safety Act 2011* (Cth) is Commonwealth legislation dealing with workplace health and safety.
Witness	A person who gives evidence to the Commission in a matter in relation to something they saw, heard or experienced. An applicant is usually a witness in their own case. A witness is required to take an oath or affirmation before giving evidence at a formal hearing. The witness may be asked questions by the party that called them and may be cross-examined by the opposing party to test their evidence.
Worker	An individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer. A worker has the same meaning as in the WHS Act (but does not include a member of the Defence Force). See also Definition of 'Worker' in Part 4 of this Benchbook.

Part 2 – Overview of this Benchbook

This Benchbook has been arranged to reflect the process users would follow when applying for an order to stop sexual harassment at work, **where the alleged sexual harassment occurred, or was part of a course of conduct that commenced, before 6 March 2023**.

Issues that may arise at a certain point during the process will be addressed as they come up. As a result, this Benchbook may not deal with issues in the same order as the Fair Work Act.

If the alleged sexual harassment at work occurs (or commences) **on or after 6 March 2023**, please refer to the **Sexual Harassment Disputes Benchbook**.

See also the **Orders to stop bullying Benchbook** (also known as the Anti-bullying Benchbook), for information on the process users would follow when applying for an order to stop bullying at work.

Overview of the Commission's sexual harassment jurisdiction

From 11 November 2021, Part 6-4B of the Fair Work Act provided for persons to apply to the Commission for orders to stop sexual harassment at work, to stop bullying at work, or both.

The way the Commission deals with orders to stop sexual harassment at work is changing from 6 March 2023 as a result of amendments to the Fair Work Act made by the Secure Jobs Better Pay Act.

Under transitional arrangements, the stop sexual harassment provisions in Part 6-4B of the Fair Work Act, as it was just before 6 March 2023, continue to apply in relation to the sexual harassment of a worker at work that occurred (or commenced) before 6 March 2023. In these circumstances, workers can continue to apply for orders to stop sexual harassment under the provisions in Part 6-4B (as they were just before 6 March 2023). These provisions are extracted at **Appendix A**.

This Benchbook explains this 'transitional' jurisdiction and the Commission's processes for dealing with applications under these provisions. Please note: the Commission is **not** able to make orders for the payment of money under these provisions.

For sexual harassment disputes involving conduct that occurred or began **on or after 6 March 2023**, an application to deal with a sexual harassment dispute can be made under new Part 3-5A of the Fair Work Act. Part 3-5A allows a person to apply to the Commission for orders to stop sexual harassment in connection with work, and/or for the Commission to deal with the sexual harassment dispute (other than by arbitration).

The new sexual harassment provisions and the process for making a sexual harassment dispute application are explained in the Sexual Harassment Disputes Benchbook.

For information about applications for orders to stop bullying at work, please refer to the Orders to stop bullying Benchbook (also known as the Anti-bullying Benchbook).

Who can apply for orders to stop sexual harassment?

A person can apply for orders to stop sexual harassment if they:

- are a worker (as defined in the *Work Health and Safety Act 2011* (Cth))[4]
- are not a member of the Defence Force[5], and
- experience sexual harassment while at work in a constitutionally-covered business.[6]

Related information

- Part 4 – Who is covered by the laws in Part 6-4B to stop sexual harassment at work?

When does sexual harassment at work occur?

See Fair Work Act ss.789FD(2A) and 12 and Sex Discrimination Act s.28A

A worker is sexually harassed at work if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.

'Sexually harass' has the same meaning as in s.28A of the Sex Discrimination Act. Section 28A(1) provides that a person sexually harasses another person if:

- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

A worker could be sexually harassed by another worker or by another person when they are at work (for example, by a customer or client of the employer or principal, a supplier of the employer or business or a visitor to the worker's place of work).

[4] Fair Work Act s.789FC(2).
[5] Fair Work Act s.789FC(2).
[6] Fair Work Act s.789FD(2A).

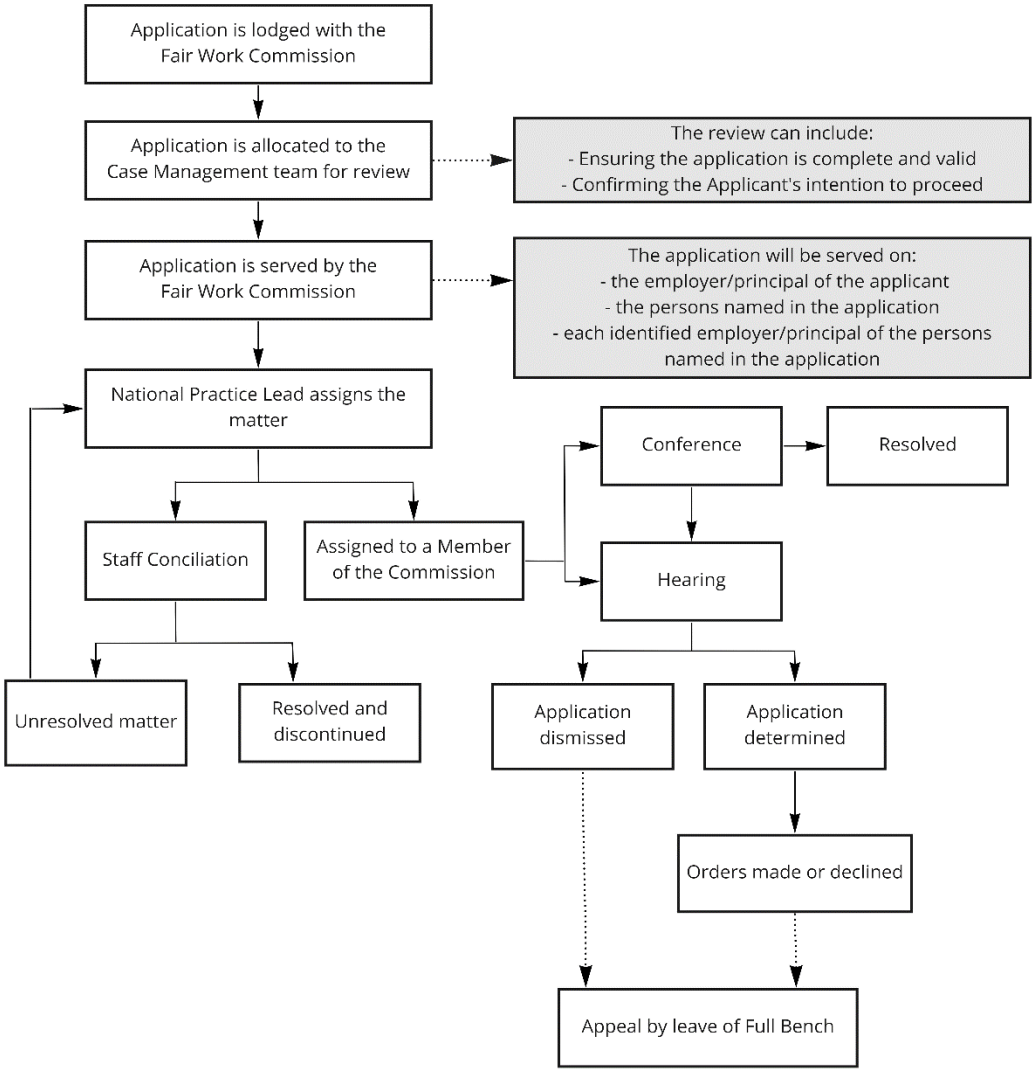
Related information

-
- Part 3 –What is sexual harassment?
- Part 4 – Who is covered by the laws in Part 6-4B to stop sexual harassment at work?
- Part 5 – When is a worker sexually harassed at work?

Process for dealing with sexual harassment under Part 6-4B of the Fair Work Act

The role of the Commission, and the orders it can make are **preventative** – not remedial, punitive or compensatory. This means that Commission orders are intended to prevent the risk of further harm, not to punish or to provide financial compensation.

Note: The diagram below sets out the Commission's usual process for dealing with applications for orders to stop sexual harassment:



Other avenues for dealing with sexual harassment

When dealing with applications for orders to stop sexual harassment under Part 6-4B, the Commission can make any order it considers appropriate **to prevent the worker from being sexually harassed at work** by the named individual or individuals.[7] However, the Commission **cannot order the payment of compensation** to an applicant and cannot make any orders if there is no risk that the applicant will continue to be sexually harassed at work by the named individual or individuals.

There are also other options for people who want to make a complaint about workplace sexual harassment.

Complaints may be made under federal, state and territory laws dealing with human rights, anti-discrimination and equal opportunity. For example, the Sex Discrimination Act prohibits sexual harassment in the workplace and in other areas of public life, and each state and territory also has its own anti-discrimination legislation which prohibits sexual harassment in the workplace and in other areas of public life.[8]

The AHRC and anti-discrimination bodies in the states and territories can deal with complaints about sexual harassment (depending on matters including where the conduct occurred). To find out more about the requirements for making a complaint to those bodies, how to do so and the remedies available, visit:

- the AHRC website, which includes information about sexual harassment
- the human rights, anti-discrimination or equal opportunity commission in your state or territory:
    - ACT Human Rights Commission
    - Anti-discrimination New South Wales
    - Northern Territory Anti-Discrimination Commission
    - Queensland Human Rights Commission
    - Office of the Commissioner for Equal Opportunity [SA]
    - Equal Opportunity Tasmania
    - Victorian Equal Opportunity and Human Rights Commission
    - Equal Opportunity Commission [WA]

Workplace sexual harassment may also be dealt with under work health and safety (WHS) laws. Since 2012, the Commonwealth and most states have adopted the national model WHS laws. As a result, the WHS legislation in most jurisdictions is very similar.

Under the model WHS laws, businesses and organisations must provide a safe workplace, including by reducing the risk of exposure of people in their workplace to health and safety risks. Sexual harassment is a known health and safety risk. To find out more, visit:

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[7] Fair Work Act ss.789FF(1)(c), (d) and (e).

[8] *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1998* (Tas), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 2010* (Vic), *Equal Opportunity Act 1984* (WA).

- Fair Work Ombudsman for advice on sexual harassment in the workplace
- Safe Work Australia, the statutory body that develops national WHS policy
- federal, state and territory work health and safety authorities:
    - Comcare
    - WorkSafe ACT
    - SafeWork NSW
    - NT WorkSafe
    - Workplace Health and Safety Queensland
    - SafeWork SA
    - WorkSafe Tasmania
    - WorkSafe Victoria
    - WorkSafe WA.

Workplace sexual harassment that involves criminal behaviour may also be the subject of a complaint to, and investigation by, the police.

Finally, depending on the circumstances, there may be other options for the Commission to deal with sexual harassment. These include general protections, unfair dismissal and unlawful termination applications.

Related information

- General Protections Benchbook
- Unfair Dismissal Benchbook
- Unlawful Termination

Applications cannot be made under the Commission's new sexual harassment disputes jurisdiction in Part 3-5A of the Fair Work Act, unless the alleged sexual harassment in connection with work occurred, or was part of a course of conduct that commenced, on or after 6 March 2023.

Where to get legal help

Workplace Advice Service

The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections, workplace bullying or sexual harassment.

The Commission's role is to connect eligible persons with lawyers who may be able to help them. These lawyers work at law firms and other legal organisations that are completely independent of the Commission. The eligibility quiz on the Commission's website helps employers and employees to find out if they are eligible for up to 1 hour of free legal advice through the service.

Other legal help

You can find a community legal centre in your area by searching the Community Legal Centres website. The 'Where to get legal help' page of Commission's website includes contact details for some of the main community legal centres in each state and territory who may be able to assist with free legal advice or other advisory services.

Law Institutes and law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance for their members.

Part 3 –What is sexual harassment?

Definition of sexual harassment

See Fair Work Act ss.789FD(2A) and 12 and Sex Discrimination Act s.28A

A person sexually harasses another person if:

- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[9]

The circumstances to be taken into account include, but are not limited to, the following:

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstances.[10]

'Conduct of a sexual nature', for the purposes of the definition of sexual harassment, includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.[11]

Examples of sexual harassment

Sexual harassment can be a single incident[12] or something that happens more than once.

Examples of conduct of which may constitute a sexual advance, a request for sexual favours or other conduct of a sexual nature include:

[9] Fair Work Act s.12 and Sex Discrimination Act s.28A(1).
[10] Fair Work Act s.12 and Sex Discrimination Act s.28A(1A).
[11] Fair Work Act s.12 and Sex Discrimination Act s.28A(2).
[12] *Hall v Sheiban* (1989) 20 FCR 217 (15 March 1989).

- sexually suggestive comments or jokes;
- intrusive questions about private life or physical appearance;
- unwanted invitations to go on dates, or requests or pressure for sex;
- unwanted written declarations of love;
- sending sexually explicit or suggestive pictures or gifts to a worker, or displaying sexually explicit or suggestive pictures, posters, screensavers or objects in the work environment;
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, or following, watching or loitering;
- inappropriate physical contact, such as deliberately brushing up against a person, or unwelcome touching, hugging, cornering or kissing;
- behaviours that may be offences under criminal laws, such as actual or attempted rape or sexual assault, indecent exposure or stalking;
- sexually explicit or suggestive emails, SMS or social media (including the use of emojis with sexual connotations), indecent phone calls, circulating pornography or other sexually graphic imagery, unwelcome sexual advances online, or sharing or threatening to share intimate images or film without consent.[13]

Effects of sexual harassment

Sexual harassment at work often has significant negative consequences for an individual's health and wellbeing.[14] These can include:

financial loss

impacts on career progression, such as diminished productivity and performance, negative career expectations, reduced job satisfaction, increased absences, and job loss

strained relationships

stress and psychological distress

symptoms of or development of mental health conditions, such as anxiety disorders, depressive disorders, post-traumatic stress disorder, and adjustment disorders

[13] See, eg Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* Report 2020, pp 17-18. Note also, in respect of unwelcomed sexual intercourse, *Aldridge v Booth* [1988] FCA 170 at paras. 63, 72 and 73; *Ewin v Vergara (No 3)* [2013] FCA 1311 at paras. 25, 444 and 465 (not disturbed on appeal: *Vergara v Ewin* [2014] FCAFC 100).

[14] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* Report 2020 at p. 299.

symptoms of or development of physical health conditions, such as headaches, hair loss, weight fluctuation, sleep deprivation and sleep disturbances, gastric issues, respiratory issues, exhaustion, nausea, musculoskeletal pain and muscle tension. [15]

To obtain an order to stop sexual harassment, an applicant does not need to show that sexual harassment poses a risk to their health and safety. Sexual harassment is a known safety risk. This is different to the Commission's power to make orders to stop bullying, where an applicant must demonstrate that there is a risk to health and safety as a result of the bullying behaviour.[16]

Related information

Part 5 – When is a worker sexually harassed at work?

[15] ibid.

[16] *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 50.

Part 4 – Who is covered by the laws in Part 6-4B to stop sexual harassment at work?

See Fair Work Act ss.789FC, 789FD(1) and 789FD(3)

A person is covered, and therefore eligible to make an application for orders to stop sexual harassment under Part 6-4B of the Fair Work Act, if they:

- are a worker (as defined in the *Work Health and Safety Act 2011* (Cth) (WHS Act)))[17]
- are not a member of the Defence Force[18], and
- have experienced sexual harassment at work in a constitutionally-covered business on or before 6 March 2023.[19]

The laws also cover:

- constitutionally-covered businesses for whom the worker performs work, and
- persons who are named in applications under s.789FC of the Fair Work Act as having engaged in the alleged sexual harassment.

Related information

- Definition of 'Worker'
- Definition of 'constitutionally-covered business'

Definition of 'Worker'

Contains issues that may form the basis of a jurisdictional issue

The *Work Health and Safety Act 2011* (Cth) (WHS Act) states that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking, including any of the following:[20]

- an employee[21]

[17] Fair Work Act s.789FC(2).

[18] Fair Work Act s.789FC(2).

[19] Fair Work Act s.789FD(2A).

[20] WHS Act s.7(1).

[21] For a discussion of the difference between employees and contractors, see, for example, *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1, 96 ALJR 89, 312 IR 1; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, 398 ALR 603; *Murphy v Chapple* [2022] FCAFC 165; *Chambers and O'Brien v Broadway Homes Pty Ltd* [2022] FWCFB 129 at [74]; *Deliveroo Australia P/L v Franco* [2022] FWCFB 156; 317 IR 253.

- a contractor or subcontractor[22]
- an employee of a contractor or subcontractor[23]
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking
- an outworker[24]
- an apprentice or trainee
- a student gaining work experience
- a volunteer – except a person volunteering with a wholly 'volunteer association' with no employees (whether incorporated or not).[25]

A person is also a 'worker' if they are a member of the Australian Federal Police (including the Commissioner and Deputy Commissioner) or a Commonwealth statutory office holder.[26]

If a person performs work but does not do so for a person conducting a business or undertaking, the person is not a 'worker' for the purposes of the laws to stop workplace sexual harassment.

The following case examples are drawn from the Commission's stop bullying case law. The definition of 'worker' in s.789FC(2) of the Fair Work Act applies to both applications for orders to stop sexual harassment and bullying.

[22] ibid.

[23] ibid.

[24] Fair Work Act s.12.

[25] WHS Act ss.5(7) and 5(8); see also *Workplace Health and Safety Regulations 2011* (Cth), reg 7(3). For a discussion on the definition of worker regarding volunteers, see *Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others* [2019 FWCFB 1314 (Hatcher VP, Sams DP, Hampton C, 13 March 2019) at paras 17–21. For factual circumstances involving volunteers from the stop bullying case law, see *Re Cowie* [2016] FWC 7886 (Hampton C, 21 November 2016) at paras. 1, 8 and 9; *Ryan v RSL Queensland* [2018] FWC 761 (Asbury DP, 6 February 2018) at para. 6; *Re Legge* [2019] FWC 5874 (Hampton C, 4 September 2019); *Collins v Team Rubicon Australia* [2020] FWC 2412 (Clancy DP, 7 May 2020) at para. 13.

[26] WHS Act s.7(2).

Summary of case examples

Examples of someone who is a Worker*	Examples of someone who is NOT a Worker*
Chairperson of statutory corporation	Carer – recipient of social security payments
Participant in a government-funded work program	Member of the Australian Defence Force

*Each case depends on its own facts and circumstances. Outcomes for similar work may be different because of the context in which the work is performed.

Case example: **Recipient of carer's payment – NOT a worker**

Balthazaar v Department of Human Services (Commonwealth) [2014] FWC 2076 (Watson VP, 2 April 2014).

Facts

An application was made for an order against the Commonwealth Department of Human Services (Department) to stop bullying. The applicant received a carer's payment and submitted that, because of those payments, he was an employee and/or outworker and/or volunteer who carried out work for the Department.

Outcome

The Commission found that a person in receipt of carer payments was not a person performing work of the Department and there was no sound basis to classify the relationship as 'employer and employee', 'principal and contractor' or one involving a volunteer. The applicant did not meet the definition of 'worker' in the Fair Work Act.

Relevance

The Commission found that, while providing constant care constitutes 'work' in the broad sense, the question was whether the applicant carried out work **for** the Department. In receiving a carer payment under s.198 of the *Social Security Act 1991* (Cth) (SS Act), a carer is not carrying out work for the Department. The applicant's work as a carer was carried out as part of his parental responsibilities for the benefit of his child. The Commission concluded that payments arising from the SS Act are social security payments aimed at assisting people in the applicant's situation and the receivers of their care.

Case example: **Chairperson of Board of statutory corporation - a worker**

Application by Trevor Yawiriki Adamson [2017] FWC 1976 (Hampton C, 19 May 2017).

Facts

Mr Adamson was the Chairperson of the Executive Board of the Anangu Pitjantjatjara Yankunytjatjara Inc (APY Inc). He alleged that he experienced bullying behaviour from the General Manager and the Deputy Chairperson of the Executive Board.

Outcome

The Commissioner found that Mr Adamson as Chairperson had a specific role under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) and was paid significant remuneration for this work. This remuneration was well beyond the sitting fees for general members of the Executive Board and exceeded cost reimbursement. This fact, while not decisive, was more consistent with the notion that work was being undertaken. The Commissioner found that Mr Adamson was a worker for the purposes of the WHS Act and the Fair Work Act.

Relevance

When determining whether an applicant is a worker, it is necessary to examine if the applicant meets the definition of a worker for the purpose of the Fair Work Act and/or the WHS Act. In general terms the WHS Act provides that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking. In this matter, the Commissioner found that the Mr Adamson's activities in attending to his duties as Chairperson amounted to the carrying out of work for APY Inc.

Case example: **Volunteer participant in government-funded program – a worker**

Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others [2019] FWCFB 1314
(Hatcher VP, Sams DP, Hampton C, 13 March 2019).
Decision at first instance [2018] FWC 7471 (Booth C, 14 December 2018).

Facts

Stepping Stone is a community organisation which provides services and support for people living with mental illness. It operates a 'clubhouse' in which persons suffering from mental illness may voluntarily participate in order to engage in social, working, educational and recreational activity as well as to access support services. Mr Bibawi participated in a number of programs offered by Stepping Stone since he became a participant in 2012. From 2012 he participated in a program known as the 'Work-ordered Day'.

As a result of his participation in the Work-ordered Day program, Mr Bibawi became eligible for a Mobility Allowance. This is a benefit paid by Centrelink to assist persons with a disability, illness or injury to defray travel costs for work, study or looking for work. In order to become eligible, the person must undertake paid work, self-employment, voluntary work, vocational training, independent living or life skills training or any combination of these for at least 32 hours every 4 weeks on a continuing basis. Stepping Stone assisted Mr Bibawi to obtain the allowance in 2015.

Mr Bibawi made an application for an order to stop bullying against Stepping Stone alleging that a number of employees of the service had engaged in bullying behaviour such as continuous intimidation, aggressive behaviour, threatening and stalking.

Outcome

At first instance the Commission dismissed Mr Bibawi's application for an order to stop bullying. An application to stop bullying can only be made by a 'worker' defined in s.789FC of the Fair Work Act as having the same meaning as s.7 of the WHS Act. The Commission found that Mr Bibawi did not satisfy the definition and that it had no jurisdiction to determine the application. It was not in dispute that Stepping Stone is not a volunteer association as it employs a number of mental health support workers.

On appeal Mr Bibawi argued he undertook work 'in any capacity for' Stepping Stone, consistent with the WHS Act definition. The Full Bench found Mr Bibawi satisfied the definition of 'worker' and could make an application for an order to stop bullying under s.789FC.

Relevance

The Full Bench found that even though the work performed by Mr Bibawi was done as part of a program funded by the Government, s.7(1) of the WHS Act did not exclude Mr Bibawi from the definition of 'worker' for this reason. Mr Bibawi's performance of the work was intended to improve his well-being and mental health, but that did not mean it was not work. The definition does not require that work be performed for a particular purpose and, in respect of volunteer and unpaid work in particular, there may be a wide range of motivations and objectives for the work being done.

Exclusions

Officers and enlisted members of the Australian Defence Force (Army, Navy & RAAF)

See Fair Work Act s.795(5)(a) and *Fair Work Regulations 2009* (Cth) reg 6.08(2)

A member of the Australian Defence Force (ADF) (Army, Navy and Air Force) is excluded from the definition of 'worker'.[27]

A member of the Defence Force is excluded from the definition of 'public sector employment' in the Fair Work Act.[28] Declarations that laws dealing with orders to stop sexual harassment do not apply

See Fair Work Act ss.789FJ–789FL

The following declarations may only be made with the approval of the Commonwealth Minister:[29]

Declarations by the Chief of the Defence Force

The Chief of the Defence Force[30] may, by legislative instrument, declare that all or some provisions of Part 6-4B do not apply in relation to a specified activity.

Declarations by the Director-General of Security

The Director-General of Security[31] may, by legislative instrument, declare that all or some provisions of Part 6-4B do not apply in relation to a person carrying out work for the Director-General.

Declarations by the Director-General of the Australia Secret Intelligence Service (ASIS)

The Director-General of the ASIS[32] may, by legislative instrument, declare that all or some provisions of Part 6-4B do not apply in relation to a person carrying out work for the Director-General.

The laws dealing with orders to stop sexual harassment at work do not require or permit a person to consider any action which could be prejudicial to Australia's defence or national security, or an existing or future covert or international operation of the Australian Federal Police (AFP).[33]

This means the Commission may be unable to make orders, or a person may be excused for contravening orders of the Commission, if doing so could reasonably be expected to compromise Australia's defence or national security, or an operation of the AFP.

[27] Fair Work Act s.789FC(2).
[28] Fair Work Act s.795(5)(a) and *Fair Work Regulations 2009* (Cth) reg 6.08(2).
[29] Fair Work Act ss.789FJ–789FL.
[30] See *Defence Act 1903* (Cth) s.9.
[31] See *Australian Security Intelligence Organisation Act 1979* (Cth) s.7.
[32] See *Intelligence Services Act 2001* (Cth) s.17.
[33] Fair Work Act s.789FI.

Definition of 'constitutionally-covered business'

Contains issues that may form the basis of a jurisdictional issue

- See Fair Work Act s.789FD(3)

To be eligible to apply to the Commission for an order to stop sexual harassment, a worker must be at work in a **constitutionally-covered business.**

If a person conducts a business or undertaking (PCBU) (within the meaning of the WHS Act) it is a constitutionally-covered business if either:

the person is:

- a constitutional corporation, or
- the Commonwealth, or
- a Commonwealth authority, or
- a body corporate incorporated in a Territory, or

the business or undertaking is conducted principally in a Territory or Commonwealth place.

To be eligible to apply for an order to stop sexual harassment, a worker must be:

'at work' in a business or undertaking conducted by a person who is:

- a constitutional corporation
- the Commonwealth
- a Commonwealth authority
- a body corporate incorporated in a Territory, or

'at work' in a business or undertaking conducted principally in a Territory or Commonwealth place.

A ***person*** is recognised by the law as having rights and obligations. There are 2 categories of person:

- a natural person (a human being), and
- an artificial person (an entity to which the law attributes a legal personality – such as a company registered under Corporations law).[34]

Related information

[34]LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (online at 21 July 2021) 'legal person' (def).

- What is a person conducting a business or undertaking (PCBU)?
- What is a Territory or a Commonwealth place?
- What is a constitutional corporation?
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- What is the Commonwealth?
- What is a Commonwealth authority?
- What is a body corporate incorporated in a Territory?

What is a person conducting a business or undertaking (PCBU)?

The term ***person conducting a business or undertaking*** or PCBU refers to the legal entity running the business or undertaking, and includes incorporated entities, sole traders, partners of a partnership and certain senior 'officers' of an unincorporated association. It also refers to the Commonwealth including its Departments, local governments and other government businesses and undertakings.

Not all PCBUs are covered by the laws to stop sexual harassment in the Fair Work Act.

Public and private sector employers (including the self-employed) are the largest category of PCBU, but the term is broader and also includes principals that use contractors or subcontractors as well as franchisors and bailors.

A person (including a corporate entity)[35] may conduct a business or undertaking alone or with others.[36] It is irrelevant whether the business or undertaking is conducted for profit or gain.[37]

Exclusions

The following are examples of persons or bodies that are not a business or undertaking under these laws:

[35] See *Acts Interpretation Act 1901* (Cth) s.2C. Note: This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).
[36] WHS Act s.5(1)(a).
[37] WHS Act s.5(1)(b).

- a person engaged solely as a worker in, or as an officer of, that business or undertaking[38]
- an elected member of a local authority (acting in that capacity),[39] or
- a wholly 'volunteer association' that does not employ anyone (whether incorporated or not).[40]

[38] WHS Act s.5(4).
[39] WHS Act s.5(5). It is however possible that an elected member could be an individual whose conduct could be relied upon as sexual harassment under Fair Work Act s.789FD(2A).
[40] WHS Act s.5(7).

Volunteer associations

Volunteer associations (whether incorporated or not) that do not employ anyone, do not conduct a business or undertaking[41]. The Commission does not have power to deal with workplace sexual harassment claims made by persons who may be at work in a volunteer association.

A ***volunteer association*** is a group of volunteers acting together for one or more community purposes where none of the volunteers, either alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.[42]

'Acting together for one or more community purposes' includes 'philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity' and 'sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations'.[43]

If a person is employed to carry out work,[44] the volunteer association may be considered a business or undertaking.

Businesses are usually enterprises operated with the aim of making a profit, and 'have a degree of organisation, system and continuity'.[45]

Undertakings usually have 'elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature'.[46]

Related information

- What is a Territory or a Commonwealth place?
- What is the Commonwealth?
- What is a Commonwealth authority?
- What is a body corporate incorporated in a Territory?

The following case examples are drawn from Commission decisions in relation to applications to stop bullying at work. The phrase 'at work in a constitutionally-covered business' and the definition of 'constitutionally-covered business' (in s.789FD of the Fair Work Act) apply to the Commission's stop bullying at work jurisdiction in Part 6-4B and its stop sexual harassment at work jurisdiction in preserved Part 6-4B.

[41] WHS Act s.5(7).
[42] WHS Act s.5(8).
[43] Explanatory Memorandum, Work Health and Safety Bill 2011 at para. 26.
[44] For a discussion on the difference between employees and contractors, see the cases referenced at footnote 26.
[45] SafeWork Australia – *Interpretive Guidelines to model WHS Act* – The meaning of 'person conducting a business or undertaking', at p. 1.
[46] ibid.

Summary of case examples

Constitutionally-covered business	**NOT a constitutionally-covered business**
Caretaker/owner of holiday resort business	State public school
Local government employer (substantial trading activities)	Foreign government ministry
	Local government employer (incidental trading activities)

Case example: **Caretaker/owner of holiday resort business - Constitutionally-covered business**

Re Manderson [2015] FWC 8231 (Hampton C, 7 December 2015).

Facts

The applicant was both a director and a worker of a business that provided caretaking services at a holiday resort that also had long term owners of properties.

The applicant alleged that he was experiencing unreasonable behaviour from some of the owners of the properties, some of whom were also committee members for the bodies corporate for the resort.

The applicant and the respondent parties were in dispute as to whether the bodies corporate were constitutionally-covered businesses.

Outcome

The Commission did not need to determine whether the bodies corporate were constitutionally-covered businesses because it found that, as the applicant was an employee of his own business which also employed other people, he was engaged by a PCBU and was therefore a 'worker' for the purposes of the WHS Act and the Fair Work Act. The applicant's business was also a trading corporation. These 2 elements taken together meant that the applicant was at work in a business which was constitutionally covered. The necessary jurisdiction for the applicant to pursue his application was met.

Relevance

In this case, it was irrelevant whether the respondent parties were persons conducting a business or undertaking that is a constitutionally-covered business. Rather, what was significant was that the worker was at work in a constitutionally-covered business (when allegedly being bullied).

Case example: **State Government – NOT a constitutionally covered business**

Re A.B. [2014] FWC 6723 (Hampton C, 30 September 2014).

Facts

A.B. made an application under s.789FC of the Fair Work Act for an order to stop bullying. The application cited the Department of Education in New South Wales (the NSW Department) as his employer. The workplace was a New South Wales public school.

Outcome

The Commission found that A.B. was at work in an undertaking conducted by the NSW Department and the employer of A.B. was the Crown in the right of the State of New South Wales. The Department and/or the State of New South Wales are not corporations (and therefore not constitutional corporations). Accordingly, A.B. was not at work in a constitutionally-covered business. The Commission had no jurisdiction to deal with the application. The application was dismissed.

Relevance

A business can be a 'national system employer' but not a 'constitutionally-covered business'. The 2 concepts are defined differently in the Fair Work Act. In order for the Commission to deal with an application to stop bullying and/or sexual harassment, the alleged conduct must take place while the worker is at work in a constitutionally-covered business.

Case example: **Foreign Government Ministry – NOT a constitutionally covered business**

Re Stancu [2015] FWC 1999 (Lee C, 26 March 2015).

Facts

The applicant made an application under s.789FC of the Fair Work Act for an order to stop bullying. He was a volunteer with Australian Volunteers International (AVI). The bullying was alleged to have taken place while he was engaged as a volunteer to perform work as a Sanitation Engineer in The Ministry of Public Works and Utilities (The Ministry) in South Tarawa, Kiribati. The applicant did not dispute that he performed work for The Ministry; however, he claimed that AVI also assumed an employer role and acted as the main employer 'sub-contracting' volunteers to the host organisation.

Outcome

The Commission found that, as a volunteer with the Australian Volunteers for International Development Program, the applicant was placed with a host organisation, The Ministry, for which the applicant worked.

The Ministry was located in Kiribati and was not a constitutionally-covered business. As the applicant was not at work in a constitutionally-covered business when the alleged behaviour occurred, the application fell outside the Commission's jurisdiction to deal with bullying at work. The Commission found there was no jurisdiction for the application to proceed and the application was dismissed.

Furthermore, the applicant would have been outside the geographic application of the Fair Work Act. The applicant was not an Australian-based employee within the meaning of s.35 of the Fair Work Act. His primary place of work was not in Australia and his attendance at pre-departure briefings in Australia was an insubstantial part of his duties.

Relevance

Although AVI was a constitutionally-covered business, the applicant was not at work in that business but was instead at work in the Ministry.

Where workers are located outside of Australia, it may be necessary to consider both the geographical limits on the application of the Fair Work Act and whether the applicant was at work in a constitutionally-covered business when the alleged bullying and/or sexual harassment took place.

Case example: **Local government employer - NOT a constitutionally-covered business**

Applications by Mr Martin Cooper and Mr Lancelot Bagster [2017] FWC 5974 (Anderson DP, 15 November 2017)

Facts

The applications for orders to stop bullying were made against a local government employer in South Australia. The City of Burnside objected to the Commission's jurisdiction on the grounds that the applicants were not at work in a constitutionally-covered business.

Outcome

The workplace bullying applications were dismissed. The Commission found that the applicants were not working in a 'constitutionally-covered business' and it had no jurisdiction to hear the applications.

The Commission was satisfied that the City of Burnside, a local government authority, conducted a 'business or undertaking' within meaning of s.789FD(3) of the Fair Work Act as it had elements of organisation, systems and continuity.

The Commission held that the City of Burnside provided services overwhelmingly funded by mandated rate revenue and its activities primarily concerned community services and local representation.

The Commission noted that the fact that trading activities were not a predominant activity of the City and that it did not return a profit of any significance from its trading activities were not determinative of whether it should be classed as a trading corporation. The test is whether the trading activities are substantial rather than peripheral. Ultimately this is a question of fact and degree.

The City of Burnside's trading activities were incidental and supplementary to its purposes as well as its operations. The Commission concluded that the trading activities of the City, at least as currently undertaken, were peripheral – they were neither substantial nor sufficiently significant for the local council to be reasonably characterised as a trading corporation.

Relevance

The Commission observed that while this decision may be of some interest to the broader local government sector in South Australia, it was based on the facts presented concerning the activities of the City of Burnside at that point in time.

Whether other councils are trading corporations will also be a question of fact and degree based on their particular circumstances and activities, and the Commission made no assessment either in-principle or in practice on this.

Case example: **Local government employer – Constitutionally-covered business**

Matina Bastakos [2018] FWC 7650 (McKinnon C, 18 December 2018)

Facts

The City of Port Phillip objected to the application for an order to stop bullying on jurisdictional grounds. The City argued that it was not a trading corporation and thus not a 'constitutionally-covered business' for the purpose of s.789FD of the Fair Work Act.

Outcome

The jurisdictional objection was dismissed.

The Commission noted that the City was established to operate for the benefit of its local community and municipal district, and has a range of powers and functions, many of which are regulatory in nature. The City performs its regulatory functions in addition to, and in conjunction with, its trading activities.

The Commission noted that the City engages in trading activity for the benefit of its community, providing services to that community but also to consumers at large who engage with the City in a multitude of ways, including as visitors, customers and tenants.

The Commission held that while trading may not be its predominant activity, it is a significant one. On the Commission's assessment, and notwithstanding the limited evidence, the value of the City's trading activities was almost $56 million per year, or more than a quarter of total revenue. That is an amount that is not minimal, trivial or insignificant, either in an absolute or relative sense.

Relevance

The Commission noted that it was not the point that the City is a local government entity, or that some of its activities may be subject to Ministerial direction, or that its functions are predominantly to be exercised for the public good. The City was found to trade in services in a way that was considered a substantial, and not merely peripheral activity of the City.

What is a Territory or a Commonwealth place?

What is a Territory?

Any land within Australia's national border that is not part of one of the states is called a territory.

Mainland

The Northern Territory, the Australian Capital Territory and Jervis Bay are mainland territories.

External

Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, and Norfolk Island are external territories.

The Australian Antarctic Territory and the sub-Antarctic Territory of Heard Island and McDonald Islands are also external territories (however, they are governed differently to the other external territories).

What is a Commonwealth place?

Commonwealth place means a place acquired by the Commonwealth for public purposes, other than the seat of government (Canberra).[47]

Examples of Commonwealth places include airports, defence bases, and office blocks purchased by the Commonwealth to accommodate employees of Commonwealth Government Departments.

What is a constitutional corporation?

The Fair Work Act defines 'constitutional corporation' as 'a corporation to which paragraph 51(xx) of the Constitution applies'.[48]

Paragraph 51(xx) of the Constitution applies to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[49]

There are 2 types of constitutional corporation.[50] These are 'foreign corporations' and 'trading or financial corporations formed within the limits of the Commonwealth'. A foreign corporation is a constitutional corporation even though it is not formed within the limits of the Commonwealth and is not a trading or financial corporation.[51]

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[47] *Australian Constitution* s.52(i); Fair Work Act s.12.

[48] Fair Work Act s.12.

[49] *Australian Constitution* s.51(xx).

[50] *The State of New South Wales v the Commonwealth of Australia* [1990] HCA 2 (8 February 1990) at para. 3 (Deane J), [(1990) 169 CLR 482 at p. 504].

[51] ibid.

For the great majority of incorporated employers in the private sector, the fact that they sell goods or provide services to customers will mean they are trading corporations.[52]

The issue of whether an employer is a constitutional corporation usually arises where the employer is a local government or not-for-profit organisation in industries such as health, education and community services.[53]

Foreign corporations

A foreign corporation is a corporation formed outside of Australia.[54]

A corporation which is formed outside of Australia which employs an employee to work in its business in Australia, is likely to be a constitutional corporation that is covered by the Commission's jurisdiction to stop sexual harassment at work.

[52] A Stewart, *Stewart's Guide to Employment Law* (7th ed, 2021), at p.38.
[53] ibid. at p. 34.
[54] *The State of New South Wales v the Commonwealth of Australia* [1990] HCA 2 (8 February 1990) at para. 3 (Deane J), [(1990) 169 CLR 482 at p. 504].

Case example: **Foreign corporation – Employer company formed in New Zealand but applicant worked in Australia (unfair dismissal application)**

Gardner v Milka-Ware International Ltd [2010] FWA 1589 (Gooley C, 25 February 2010).

Facts

The applicant alleged the termination of his employment was harsh, unjust or unreasonable. The respondent raised a jurisdictional objection as it was a New Zealand Registered, Directed and Owned company; traded in New Zealand only; employed the applicant in New Zealand and paid the applicant in New Zealand dollars into a New Zealand bank account. The applicant however worked in both New Zealand and Australia.

Outcome

The Commission determined that the respondent was incorporated in New Zealand. This meant that it was a foreign corporation within the meaning of s.51(xx) of the Australian Constitution and therefore, to the extent that it employed employees to perform work in Australia, it was a national system employer.

The respondent was covered by the Commission's jurisdiction in relation to its employees working in Australia. This included the applicant whose primary place of work at the time of his dismissal was Australia.

Relevance

The Commission found that it has jurisdiction to deal with applications against foreign corporations in relation to employees employed to work in Australia.[55]

[55] See, however, *Fair Work Ombudsman v Valuair Limited (No 2)* [2014] FCA 759 (24 July 2014) per Buchanan J, in relation to the employment of foreign-based cabin crew by foreign corporations where those crew spend a small and transient proportion of overall time on duty in Australia.

Trading or financial corporation formed within the limits of the Commonwealth

Trading denotes the activity of providing goods or services for payment.[56]

The Commission will consider the nature of a corporation with reference to its activities, rather than the purpose for which it was formed.[57]

It does not matter if trading activities are a corporation's 'dominant' activity or whether they are merely an 'incidental' activity or entered into in the course of pursuing other activities.[58]

A corporation will be a trading corporation if the trading engaged in is 'a sufficiently significant proportion of its overall activities'.[59]

A corporation can be a trading corporation even if it was not originally formed to trade.[60]

One factor that may be considered is the commercial nature of a corporation's activity.[61] When considering this, the Commission will look at a number of factors, including:

- whether the corporation is involved in commercial enterprises; that is, business activities carried on with a view to earning revenue
- what proportion of its income the corporation earns from its commercial enterprises
- whether the commercial enterprises are substantial or peripheral, and
- whether the activities of the corporation advance the trading interests of its members.[62]

A **financial corporation** is one 'which borrows and lends or otherwise deals in finance as its principal or characteristic activity ...'[63]

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[56] *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50 (18 December 1978) at para. 8 (Bowen CJ), [(1978) 36 FLR 134 at p. 139].
[57] *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 (27 February 1979) at para. 53 (per Barwick CJ), [(1979) 143 CLR 190 at p. 208].
[58] ibid. at para. 10 (per Murphy J), [(1979) 143 CLR 190 at p. 239].
[59] ibid. at para. 31 (per Mason J), [(1979) 143 CLR 190 at p. 233].
[60] *Garvey v Institute of General Practice Education Incorporated* [2007] NSWIRComm 159 (28 June 2007) at para. 30, [(2007) 165 IR 62].
[61] *University of Western Australia v National Tertiary Education Industry Union* Print P1962 (AIRC, O'Connor C, 20 June 1997) at para. 11; citing *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 (27 February 1979) at para. 57 (Barwick CJ), [(1979) 143 CLR 190 at p. 209].
[62] *University of Western Australia v National Tertiary Education Industry Union* Print P1962 (AIRC, O'Connor C, 20 June 1997) at para. 12; citing *Re Australian Beauty Trade Suppliers Limited v Conference and Exhibition Organisers Pty Limited* [1991] FCA 154 (18 April 1991) at para. 11, [(1991) 29 FCR 68 at p. 72].
[63] *Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* [1978] FCA 50 (18 December 1978) at para. 4 (Bowen CJ), [(1978) 36 FLR 134 at p. 138].

The approach taken in deciding whether the activities of a corporation are such that the corporation should be considered to be a financial corporation is the same as the approach taken in deciding whether a corporation is a trading corporation.[64]

Summary of cases[65]

Trading or financial corporation	**NOT a trading or financial corporation**
Professional sporting organisation or club	Amateur sports club
Building society	Medical research institute
Community services organisations	Disability services organisation
Statutory public transport agency	

[64] *State Superannuation Board v Trade Practices Commission* (1982) HCA 72 (14 December 1982) at para. 19 (Mason, Murphy and Deane JJ), [(1982) 150 CLR 282 at p. 303].

[65] See also: *Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic)* [2002] FCA 860 (5 July 2002), [(2002) 120 FCR 191] (charitable organisation was a trading corporation); *State Superannuation Board v Trade Practices Commission* [1982] HCA 72 (14 December 1982), [(1982) 150 CLR 282] (statutory superannuation fund trustee was a financial corporation); *United Firefighters' Union of Australia & Ors v Metropolitan Fire and Emergency Services Board* [1998] FCA 551 (20 May 1988), [(1988) 83 FCR 346] (statutory fire services corporation was a trading corporation).

Case example: **Professional sporting organisation and club – Trading corporation**

R v Federal Court of Australia; Ex parte WA National Football League [1979] HCA 6 (27 February 1979), [(1979) 143 CLR 190].

Facts

The respondent was a registered football player with the West Perth Club. He moved his residence to South Australia having had an offer to play with the Norwood Club (the Club). Under the rules of the National League, adopted both by the State League and the West Perth Club, the respondent needed a clearance from the National League to play with another club other than the club he was registered with. If the respondent played without clearance, the Norwood Club would lose, or run the risk of losing competition points. The respondent was refused a clearance. He claimed that both the State League and the West Perth Club were trading corporations formed within Australia, bound by the provisions of the *Trade Practices Act 1974-1977* (Cth) (the TP Act) and, in relation to the requirement and refusal of a clearance, were in breach of the TP Act.

Outcome

The High Court, by majority, held that the West Perth Club and the league to which it belonged in Western Australia were trading corporations. Their central activity was the organisation and presentation of football matches in which players were paid to play and spectators charged for admission; and television, advertising and other rights were sold in connection with such matches. The Court found that this constituted trading activity.

Relevance

When determining if an organisation is a financial corporation or a trading corporation, it is necessary to examine any trading activity the organisation performs. When trading is a substantial activity of the corporation, the conclusion that the corporation is a trading corporation is open. The commercial nature of an activity is also an element in deciding whether the corporation is in trade or trading.

Case example: **Building Society – Financial corporation**

Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd [1978] FCA 50 (18 December 1978), [(1978) 36 FLR 134].

Facts

The income of the applicants in this matter, 2 co-operative incorporated building societies, was derived from interest paid by members upon loans made to them, management fees, fines and discharge fees paid by members, and allowances and commissions received from insurance companies. The revenue outgoings of the applicants consisted of interest on the principal of the bank loan, management fees and administrative expenses. The applicants did not conduct their activities for the purpose of making financial profits but, subject to charging a contribution to managerial and administrative expenses and a difference in the calculation of interest, lent to their members at the same rate as that at which they borrowed from the relevant bank.

Outcome

The Federal Court found that the fact that this activity was not for profit and involved the performance of an important social function was not determinative. The 2 co-operative incorporated building societies were found to be financial corporations on the basis that they lent money at interest and were therefore engaged in commercial dealing in finance.

Relevance

An organisation may be a financial corporation even if the organisation is not conducted for profit and involves an important social function.

Notwithstanding the restricted scope and limited duration of their activities, each applicant in this matter carried on a business. At the heart of that business was the commercial dealings in finance constituted by the relevant applicant's borrowing and lending of money, and the subsequent payments and receipt of money pursuant to obligations and rights resulting from those dealings. Each applicant was formed to carry on that business and their activities were confined to carrying it on. The business which each applicant carried on and which it was formed to carry on was a financial business.

Case example: **Community services organisation – Trading corporation**

Re Ms Marie Pasalskyj [2015] FWC 7309 (Hampton C, 13 November 2015).

Facts

The applicant alleged that she experienced bullying conduct in her workplace, Outcare. Outcare raised a jurisdictional objection that it was not a trading corporation within the meaning of the Fair Work Act due to its activities and nature. As a result, it contended the applicant was not at work in a constitutionally-covered business.

Outcome

The Commission held that a community services organisation that provides a range of services to offenders, former prisoners and their families is a trading corporation. Activities conducted for the purposes of fundraising were found to have the character of commercial transactions. The Commission determined that the trading activities of the organisation amounted to 11% of its income. This was found to be significant, and sufficient to impact upon the overall character of the organisation. Accordingly, the Commission found that the organisation was a trading corporation and that it could deal with the merits of the application.

Relevance

In this case, the altruistic intent of the organisation's activities did not prevent it being a trading corporation in circumstances where those activities were not insubstantial, trivial, insignificant, marginal, minor or incidental.

Case example: **Public transport agency – Trading corporation**

Roads and Maritime Services v Leeman [2018] FWCFB 5772 (Hatcher VP, Colman DP, Spencer C, 18 September 2018).

Facts

At first instance, the Commission found that Roads and Maritime Services (RMS) was a constitutionally-covered business because it was a trading corporation. The Commission took account of both the absolute amount of revenue RMS earned from trading activities ($232 million) and the proportion of RMS's revenue that was derived from trading activities, in concluding that RMS's trading activities were of significance to it rather than being peripheral.

RMS appealed on grounds including that the Commission failed to take into account RMS's public purposes and functions and relationships to the State of New South Wales (NSW) in determining whether RMS's trading activities were sufficient for it to be characterised as a trading corporation, and that RMS was established as a 'public transport agency' by the *Transport Administration Act 1988* (NSW) (TA Act) and its statutory functions were overwhelmingly public functions and were not of a commercial or profit-making nature.

Outcome

The Full Bench found that the functions conferred on RMS by ss.53(1)(a) and (b) of the TA Act were clearly concerned with the conduct of trading activities. These functions were not expressed as being subordinate or incidental to any of RMS's 'public' functions, and indeed the words 'whether or not related to its activities under this or any other Act' in s.53(1)(a) made it clear that the RMS was authorised to engage in trading activities in its own right (including outside of NSW). The Full Bench concluded that engaging in trading activity is a statutory function and purpose of RMS.

Relevance

The Full Bench held that '[t]he conclusion that RMS's trading activities are substantial and of significance permits it to be characterised … as a trading corporation ... RMS is not deprived of that character by reference to the purposes for which it was established, its closeness to the State of NSW, the fact that it may be subject to Ministerial direction, or the fact that its functions are predominantly for the public good and not commercially orientated.'

Case example: **Community services organisation – Trading corporation**

Thurling v Glossodia Community Information and Neighborhood Centre Inc. T/A Glossodia Community Centre [2019] FWCFB 3740 (Catanzariti VP, Hamilton DP, Hampton C, 5 July 2019).

Facts

At first instance the Commission found that Glossodia was not a trading corporation and therefore not a constitutionally-covered business and dismissed the employee's stop-bullying application. The employee appealed on grounds including that Glossodia's trading activities included providing before and after school child care for which it charged fees and levied administration fees, and rental fees for hiring its facilities, and that these activities comprised somewhere between 27.37-35.23% of its total income.

Outcome

The Full Bench granted permission to appeal and considered that the submissions made by Glossodia at first instance, as adopted in the Commission's decision, placed significant emphasis upon the purpose of the association and very little upon the nature of its purported trading activities.

The Full Bench found that the program services conducted by Glossodia were consistent with the purpose of the association but were made available at a cost to the individuals in the community who used those services. The services and the associated income represented the buying and selling of those services and a trading activity. The Full Bench concluded that these activities were trading in nature and were sufficient to mean that the Glossodia should have been held to be a trading corporation. The Full Bench upheld the appeal and quashed the decision at first instance. On rehearing, the Full Bench found that Glossodia was a trading corporation and as a result was conducting a constitutionally-covered business.

Relevance

While perhaps not charged at market rates, Glossodia's program services were subject to charges that were more than nominal and did not represent the gratuitous provision of a public welfare service in the manner described in *E v Red Cross*. Rather, its services were provided at a cost to users of the services and the income was not peripheral, insignificant or incidental when considered in the context of Glossodia's funding and operations. Indeed, the program services represented a significant part of the association's operations and almost a third of its total income.

Case example: **Amateur sporting organisation – NOT a trading or financial corporation**

Re Kimberley John Hughes v Western Australian Cricket Association (Inc) and Ors [1986] FCA 357 (27 October 1986), [(1986) 19 FCR 10].

Facts

The applicant was a professional cricketer who contended he was disqualified from district cricket because of his participation in a South African cricket tour. The applicant's disbarment from playing club cricket was said to result from the Cricket Council's resolution to amend the rules of the Cricket Council by including provision for the automatic disqualification of any player found in breach of the rule. Among other things, the applicant sought relief under the *Trade Practices Act 1974* (Cth), which required at least one of the parties to the relevant contract, arrangement or understanding to be a trading corporation.

Outcome

The Court found that the incorporated cricket clubs that were party to the relevant contract, arrangement or understanding were not trading corporations. (Although the Western Australian Cricket Association with which they were associated was found to be a trading corporation, it was not a party to the relevant agreement). The clubs were basically amateur bodies which did not charge for admission to matches and generally did not pay players. Although they engaged in some trading activities, this was not of sufficient significance to allow them to be characterised as trading corporations.

Relevance

None of the clubs carried on the game of cricket as a trade, though the extent of particular activities varied from club to club. Whilst the clubs had activities which were of a trading nature, in particular the provision of bar facilities, this was not found to be so significant as to impose on the clubs the character of a trading corporation. The principal activity of the clubs was the playing of cricket for pleasure rather than reward.

Case example: **Charitable organisation – Medical research institute - NOT a trading or financial corporation**

Hardeman v Children's Medical Research Institute[2007] NSWIRComm 189 (24 September 2007), [(2007) 166 IR 196].

Facts

The applicant sought interlocutory relief under the *Industrial Relations Act 1996* (NSW) from the NSW Industrial Relations Commission (NSWIRC), to restrain the Children's Medical Research Institute (the Institute) from terminating her contract of employment. The applicant also sought relief declaring her contract was unfair, harsh or unconscionable. The Institute contended the NSWIRC did not have jurisdiction to grant the relief as the Institute was a constitutional corporation and therefore the *Workplace Relations Act 1996* (Cth) applied.

Outcome

The Institute was found not to be a trading or financial corporation. The trading activities it did engage in were insubstantial and peripheral to the central activity of medical research, generating only approximately 2.5% of its revenue. A number of factors contributed to the NSWIRC's assessment that the Institute's financial activities were not a sufficiently significant proportion of its overall activities. In broad terms they were: the Institute's conscious passivity regarding its investments; the limited financial deliberation or interaction and acts related to finance; its minimal staffing arrangements and its extensive use of external financial advice and expertise.

Relevance

The Institute's trading and financial activities were not sufficiently substantial to render it a trading or financial corporation.

Case example: **Community based organisation – Disability services organisation – NOT a trading or financial corporation**

Re Ms McInnes [2014] FWC 1395 (Hampton C, 24 March 2014).

Facts

Ms McInnes made an application under s.789FC of the Fair Work Act for an order to stop bullying. The workplace concerned was conducted by Peninsula Support Services Inc. T/A Peninsula Support Services (PSS). PSS was a community-based organisation providing support to people with psychiatric disabilities and their carers living within the Southern metropolitan region in Victoria.

PSS objected to the application on the basis that it was not a trading corporation within the meaning of Fair Work Act due to its activities and nature and as a result, the worker was not at work in a constitutionally-covered business.

Outcome

The Commission found that the assessment of the nature of the corporation was one of fact and degree. When assessed in context, the organisation's income from trading activities, and those that might be considered to be trading activities, was not significant in either relative or absolute terms. Rather those activities, in PSS's overall circumstances, could be categorised as being insignificant, peripheral and incidental in the sense contemplated by the authorities.

The Commission was satisfied that PSS was not a trading corporation. Given the absence of any other circumstances that would make the workplace a constitutionally-covered business, there was no jurisdiction for the Commission to deal with the application further. The application was dismissed.

Relevance

Where trading or financial activities are insignificant, peripheral or incidental, the organisation will not be a trading or financial corporation.

What is the Commonwealth?

The ***Commonwealth of Australia*** – the official title of the Australian nation, established when the 6 states representing the 6 British colonies joined together at federation in 1901. In terms of the Fair Work Act, the WHS Act and the Sex Discrimination Act, the Commonwealth is represented by the various Government Departments and other Commonwealth entities, including a Commonwealth Authority or a body corporate incorporated in a Territory.

A ***Commonwealth employee*** is a person who holds an office or appointment in the Australian Public Service, or holds an administrative office, or is employed by a public authority of the Commonwealth.[66]

What is a Commonwealth authority?

Commonwealth authority means:

(a) a body corporate established for a public purpose by or under a law of the Commonwealth; or

(b) a body corporate:

(i) incorporated under a law of the Commonwealth or a State or a Territory; and

(ii) in which the Commonwealth has a controlling interest.[67]

Commonwealth authorities include 'corporate Commonwealth entities' and 'Commonwealth companies'. Examples include:

- the Australian Postal Corporation (Australia Post)
- the Commonwealth Scientific and Industrial Research Organisation (CSIRO)
- the Australian Broadcasting Commission (ABC)
- the National Library of Australia.

A 'Flipchart' and list of Commonwealth statutory authorities, including 'corporate Commonwealth entities' and 'Commonwealth companies' is available on the Department of Finance website (PGPA Flipchart and entity list): https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/pgpa-act-flipchart-and-list

[66] Butterworths Australian Legal Dictionary, 1997, at p. 224.
[67] Fair Work Act s.12.

What is a body corporate incorporated in a Territory?

The term ***body corporate*** refers to a person, association or group of persons legally incorporated in a corporation.[68] A body corporate has perpetual succession as well as the power to act, hold property, enter into legal contracts and sue and be sued in their own name, just as a natural person can.

The types of entities falling into these categories are broad, and include:

- trading and non-trading entities
- profit and non-profit making entities
- government-controlled entities
- other entities with less or no government control or involvement.

Included in the definition of body corporate are entities created by:

- common law (such as a corporation sole and corporation aggregate)
- statute (such as the Australian Securities & Investments Commission)
- registration pursuant to statute (such as a company, building society, credit union, trade union, and incorporated association).

If an entity is not established under an Act of Parliament, or under a statutory procedure of registration, such as the Corporations Law or an Incorporation Act, it is generally not a body corporate.

Each state and territory has legislation that allows various kinds of non-profit bodies to become bodies corporate. Bodies incorporated under these Acts are normally community, cultural, educational or charitable type organisations.

Perpetual succession is the feature of a company which means that it continues to have its own legal identity, regardless of changes in its membership.

[68] *Macquarie Dictionary* (online at 21 July 2021), Macmillan Publishers Australia 2021, 'body corporate' (def).

Part 5 – When is a worker sexually harassed at work?

- See Fair Work Act s.789FD

The following information only applies in relation to the alleged sexual harassment of a worker at work that occurred, or was part of a course of conduct that commenced, **before 6 March 2023**.

For information about sexual harassment in connection with work that is said to have occurred or commenced on or after 6 March 2023, see the Sexual Harassment Disputes Benchbook.

A worker is sexually harassed at work if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.

'Sexually harass' has the same meaning given by s.28A of the Sex Discrimination Act.[69] Section 28A provides that a person sexually harasses another person if:

- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The legal test for sexual harassment requires that the conduct must be:

1. either a sexual advance or a request for sexual favours to the person harassed or other conduct of a sexual nature in relation to the person harassed
2. unwelcome
3. such that a reasonable person, having regard to all the circumstances, would anticipate the possibility that the person who was harassed would be offended, humiliated and/or intimidated.

Each of these elements will be examined further below.

The person who engages in sexual harassment need not be a worker and could (for example) be a customer or client of the employer or principal, a supplier of the employer or business or a visitor to the place of work of the worker.

[69] Fair Work Act s.12.

A sexual advance, a request for sexual favours or conduct of a sexual nature

Whether there has been a sexual advance, a request for sexual favours directed to the person harassed or other conduct of a sexual nature in relation to the person harassed is a question of fact.[70]

'Conduct of a sexual nature' in s.28A of the Sex Discrimination Act has been interpreted broadly. It includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.[71]

It is clear that the concept 'other conduct of a sexual nature *in relation to the person harassed*' is wider than conduct specifically directed at the applicant, given it includes making a statement of a sexual nature *in the presence of* a person. However, this expression is not so broad as to encompass all unwelcome conduct of a sexual nature in relation to persons other than the applicant. The conduct must be shown to be, in some way, connected to the applicant. The question of whether particular conduct of a sexual nature is in relation to an applicant will depend on the circumstances, which may include whether a hostile or demeaning atmosphere has become a feature of the workplace environment.[72] In other contexts, conduct has been held to be 'in relation to' a person if there is a real connection to the person, rather than one that is insignificant, or remote and merely incidental.[73]

Examples of conduct of which may constitute a sexual advance, a request for sexual favours or other conduct of a sexual nature include:

- sexually suggestive comments or jokes;
- intrusive questions about private life or physical appearance;
- unwanted invitations to go on dates, or requests or pressure for sex;
- unwanted written declarations of love;
- sending sexually explicit or suggestive pictures or gifts to a worker, or displaying sexually explicit or suggestive pictures, posters, screensavers or objects in the work environment;
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, or following, watching or loitering;

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[70] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 22.
[71] Sex Discrimination Act s.28A(2).
[72] See, for example, *G v R & Dept of Health, Housing & Community Services* [1993] HREOCA 20 (17 September 1993); *Noble v Baldwin & Anor* [2011] FMCA 283 28 April 2011; *Carter v Linuki Pty Ltd t/as Aussie Hire & Anor* [2004] NSWADT 287; *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald (EOD)* [2005] NSWADTAP 40; *Treglown v Eliam Pty Limited and anor* [2010] NSWADT 196; *Zanella -v- Carroll's Auto Repairs Pty Ltd & anor* [2001] NSWADT 220; *Green v State of Queensland, Brooker and Keating* [2017] QCAT 8.
[73] *O'Grady v Northern Queensland Co Ltd* [1990] HCA 16; (1990) 169 CLR 356; *Maritime Union of Australia, The v Maersk Crewing Australia Pty Ltd* [2016] FWCFB 1894.

- inappropriate physical contact, such as deliberately brushing up against a person, or unwelcome touching, hugging, cornering or kissing;
- behaviours that may be offences under criminal laws, such as actual or attempted rape or sexual assault, indecent exposure or stalking;
- sexually explicit or suggestive emails, SMS or social media (including the use of emojis with sexual connotations), indecent phone calls, circulating pornography or other sexually graphic imagery, unwelcome sexual advances online, or sharing or threatening to share intimate images or film without consent.[74]

The intention of the alleged harasser is not relevant.[75] An advance, request or other conduct may be sexual in nature even if the person engaging in the conduct has no sexual interest in the person towards whom it is directed,[76] or is not aware that they are acting in a sexual way.[77] Sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties.[78]

Some conduct, which may not amount to sexual harassment on its own, may fall within the definition if it forms part of a broader pattern of inappropriate sexual conduct. For example, the flicking of elastic bands at a person has been found to be conduct of a sexual nature in the context of a broader pattern of sexual conduct.[79]

Unwelcome conduct

The advance, request or other conduct must be both of a sexual nature and unwelcome to be sexual harassment.

The question of whether an identified form of conduct is unwelcome is a subjective one. It turns only on the attitude of the recipient of that conduct.[80] The intention of the person responsible for the conduct is not relevant.

Unwelcome conduct has been described as being:

- conduct that is not solicited or invited, which the recipient regards as undesirable or offensive;[81]

[74] See, eg Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* Report 2020, pp 17-18. Note also, in respect of unwelcomed sexual intercourse, *Aldridge v Booth* [1988] FCA 170 at paras. 63, 72 and 73; *Ewin v Vergara (No 3)* [2013] FCA 1311 at paras. 25, 444 and 465 (not disturbed on appeal: *Vergara v Ewin* [2014] FCAFC 100).
[75] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at paras. 30 and 31.
[76] *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 at para. 708.
[77] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 at para. 24.
[78] *Ford v Inghams Enterprises Pty Ltd (No 3)* [2020] FCA 1784 at para. 708.
[79] *Shiels v James* [2000] FMCA 2 at para. 72.
[80] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 23.
[81] *Aldridge v Booth* [1988] FCA 170 (30 May 1988) at para. 4.

- conduct that is disagreeable to the person to whom it is directed.[82]

To find that conduct is unwelcome, it is not necessary for the person experiencing sexual harassment to have explicitly addressed the behaviour or informed their harasser that their conduct is unwelcome.[83] There are many reasons why a person who has been sexually harassed may not tell their harasser that the conduct is unwelcome. These reasons include a power imbalance, youth and inexperience and fear of reprisals.

Reasonable person test

The final element of the test for sexual harassment is that a reasonable person in the circumstances, having regard to those circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

The 'reasonable person' is assumed to have some knowledge of the personal qualities of the person harassed.[84] Section 28A(1A) of the Sex Discrimination Act requires that the circumstances to be taken into account include:

- the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- any disability of the person harassed;
- any other relevant circumstance.

The reasonable person test is an objective test.[85] It is not concerned with the motives or reasons of the person who engaged in the sexual harassment, or what they actually anticipated. Excuses such as 'it was joke', 'I didn't mean anything by it', 'it was harmless fun', or 'it was done while under the influence of alcohol', are misplaced.[86]

Single incidents

A single incident can constitute sexual harassment.[87] This is different to the Commission's jurisdiction to deal with bullying, which can only be accessed where the bullying behaviour is

[82] *Ewin v Vergara (No 3)* [2013] FCA 1311 at para. 27 (not disturbed on appeal: *Vergara v Ewin* [2014] FCAFC 100).
[83] *San v Dirluck Pty Ltd* [2005] FMCA 750 at para. 23.
[84] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 26.
[85] *Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126 (24 July 2020) at para. 25.
[86] Kate Eastman, Sophie Callan and Aditi Rao, 'Crossing the Line: Behaviour that Gets Barristers into Trouble' [2017] (Summer) *Bar News: Journal of the New South Wales Bar Association* 38, 39; Prue Bindon, '*The Weinstein Factor: Where does the legal profession stand?*' (2018) 247 *Ethos: Law Society of the ACT Journal* 26, 26.
[87] *Hall v A & A Sheiban* (1989) 20 FCR 217 at pp. 231, 247 and 279.

repeated.[88] Whether a single incident will constitute sexual harassment depends on the 'nature or quality of the action or statement.'[89]

Sexual harassment – Case examples

Note: Sexual harassment can take many forms, including allegations against a number of parties; serious criminal offences; and complaints of both sexual harassment and other bullying behaviours.

The following examples include cases about sexual harassment in other legal contexts; primarily under state and federal discrimination laws. **Unlike these cases, an award of damages is not available in the Commission where the sexual harassment occurred or commenced before 6 March 2023, as Part 6-4B of the Fair Work Act does not allow the Commission to order the payment of money if it makes a finding of sexual harassment.**

WHS regulators can also assess and investigate complaints of workplace sexual harassment in accordance with their individual compliance and prosecution policies, which may take into account issues such as the immediate risk to health and safety, possible breaches of WHS legislation, evidence, likelihood of success and whether prosecution would be in the public interest. Jurisdictions that use alternative dispute resolution practices may not keep or publish records of the outcomes in these matters.

It is not necessary for a worker to establish a risk to health and safety when seeking an order to stop sexual harassment, as sexual harassment is a known and accepted WHS risk.[90] Sexual harassment at work can cause various physical illnesses and psychological harm, such as stress, depression, anxiety and post-traumatic stress disorder.[91]

[88] Fair Work Act s. 789FD(1).

[89] *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 at para. 25.

[90] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at para. 38.

[91] Safe Work Australia, 'Workplace Sexual Harassment': https://www.safeworkaustralia.gov.au/safety-topic/hazards/workplace-sexual-harassment

Case example: **Sexual harassment ¬ conduct of a sexual nature – unwelcome conduct – reasonable person**

Hill v Hughes trading as Beesley and Hughes Lawyers [2019] FCCA 1267 (24 May 2019); ***Hughes trading as Beesley and Hughes Lawyers v Hill*** [2020] FCAFC 126 (24 July 2020).

Facts

Ms Beesley worked as a paralegal in a small law firm run by Mr Hughes, a solicitor. Shortly after Ms Beesley commenced work at the law firm, Mr Hughes began a course of conduct including:

- sending Ms Beesley persistent, amorous emails;
- during a trip for work, attending Ms Beesley's bedroom uninvited and inappropriately clothed, refusing to leave until she gave him a hug; and
- on a number of occasions, preventing Ms Beesley from leaving her office until she gave Mr Hughes a hug.

Ms Beesley rejected each of these advances and asked Mr Hughes to stop. When the conduct continued, Ms Beesley resigned.

At trial, Mr Hughes argued that his conduct was not sexual harassment because he was attempting to pursue a romantic relationship. The trial judge found that such a distinction 'reflects a social myopia' that is not reflected in the Sex Discrimination Act. The trial judge found that Mr Hughes' conduct was 'outrageous' and constituted sexual harassment.

Outcome

An appeal from Mr Hughes was dismissed.

The Full Court of the Federal Court (the Full Court) held that the question of whether there has been any of the 3 identified forms of conduct – a sexual advance, a request for sexual favours or other conduct of a sexual nature – is a question for the Court, and it is a question of fact.

It held that the test of whether conduct is 'unwelcome' is subjective and turns solely on the attitude of the person alleging the harassment.

By contrast, the reasonable person test is an objective one, to be assessed against the broadly defined circumstances in s.28A(1A) of the Sex Discrimination Act. In this case, the profound power imbalance between Mr Hughes and Ms Beesley was important, as was Mr Hughes' awareness of Ms Beesley's anxiety disorder.

Relevance

Whether an advance, request or conduct is sexual in nature is a question of fact.

Whether an advance, request or conduct is 'unwelcome' is assessed subjectively, and turns on the attitude of the person experiencing the conduct only.

Whether a reasonable person would anticipate the possibility that the recipient of the advance, request or conduct would be offended, humiliated or intimidated is assessed objectively.

Case example: **Sexual harassment ¬ conduct of a sexual nature – reasonable person**

Vitality Works Australia Pty Ltd v Yelda (No 2) [2021] NSWCA 147 (19 July 2021)

Facts

The New South Wales Civil and Administrative Tribunal (the Tribunal) determined that both Sydney Water Corporation (Sydney Water) and Vitality Works Australia Pty Ltd (Vitality Works) had engaged in sexual harassment by displaying a poster at the Sydney Water Ryde depot.[92]

Sydney Water is a male-dominated workplace and the poster was placed just outside the men's toilet and the lunchroom. The poster showed a photograph of a female Sydney Water employee under the caption 'Feel great – lubricate!' The employee had agreed to have her photograph taken for a WHS campaign but had not been informed that those words would be used above her image.

The Tribunal found that the poster conveyed the sexual connotation that the employee 'with her smiling face, feels great because she applies lubricant to her body, including her sexual organs which gives her sexual pleasure' and that she 'advocates that others should do the same'.

Outcome

On appeal, the NSW Court of Appeal (the Court) held that whether conduct is 'conduct of a sexual nature' is a question of fact. The phrase 'conduct of a sexual nature' has a broad meaning and includes sexually suggestive 'jokes' and comments as well as innuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod - all of these are capable of being deployed to sexualise conduct. The subjective intention of the alleged perpetrator to engage (or not engage) in 'conduct of a sexual nature' is not an element of sexual harassment.

The Court held that conduct of a sexual nature is not confined to conduct that is sexually explicit. This would overlook the statutory language and the infinite subtlety of human interaction and the historical forces that have shaped the subordinate place of women in the workplace for centuries. The scope of the phrase 'conduct of a sexual nature' is properly construed with an understanding of those matters.

The Court found that design, publication, display and distribution of the poster was plainly conduct of a sexual nature, which held up the employee to sexual ridicule in her workplace. The fact that other clients of Vitality Works had not made adverse comments about the slogan 'Feel great – lubricate' in the past was not relevant to its determination that a reasonable person would have anticipated that the employee would be offended, humiliated or intimidated by the conduct, which is an objective test.

[92] In contravention of s.22B of the *Anti-Discrimination Act 1977* (NSW). Section 22A of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated ...'

Relevance

The phrase 'conduct of a sexual nature' is of broad import, and should not be narrowly construed. It is clear that a single act or single incident may constitute sexual harassment.

Conduct which is not intended to be sexual harassment may amount to sexual harassment – there is no legal requirement that the perpetrator of sexual harassment intend to sexually harass the victim.

Case example: **Sexual harassment ¬ conduct of a sexual nature**

Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102 (20 February 2013);
Richardson v Oracle Corporation Australia Pty Ltd and Another [2014] FCAFC 82 (15 July 2014)

Facts

Ms Richardson was employed in the Sydney office of Oracle Corporation Australia Pty Ltd (Oracle). Mr Tucker was employed at Oracle's Melbourne office. Ms Richardson and Mr Tucker were part of a team putting together a bid for work.

Ms Richardson alleged that she was sexually harassed by Mr Tucker in the period from late April 2008 until 12 November 2008 during their work together as part of the bid team. The conduct included inappropriate sexual advances and subjecting Ms Richardson to a humiliating series of comments such as: 'Gosh, Rebecca, you and I fight so much, I think we must have been married in our last life', and 'So, Rebecca, how do you think our marriage was? I bet the sex was hot'.

Ms Richardson complained to her manager, who referred the matter to HR. An investigation was conducted. In the meantime, Ms Richardson was required to continue working with Mr Tucker and had regular contact with him via conference calls and emails. The HR investigation supported much of Ms Richardson's complaint. Mr Tucker was given a first and final warning and retained his role. Ms Richardson resigned in March 2009.

Mr Tucker denied some of the alleged conduct and explained the rest as trying to diffuse a tense situation with jokes, making innocuous or commonplace comments or engaging in 'blue banter' that fell short of sexual harassment when seen in context.

Outcome

The Federal Court rejected 'Mr Tucker's denials and attempts to defend his conduct as unintended, misunderstood or innocuous.' The Court found that Mr Tucker had embarked on a systematic course of conduct that was fairly described as sexual harassment within its statutory meaning. Some of the individual remarks and suggestions constituted sexual harassment in their own right. Overall, the whole course of conduct constituted sexual harassment.

Oracle was found vicariously liable for Mr Tucker's conduct. In its decision, the Federal Court noted that Ms Richardson was very distressed by Mr Tucker's conduct, which manifested in her suffering forms of physical and mental impairment, including an adjustment disorder.

Relevance

Jokes or 'banter' may constitute conduct of a sexual nature.

A perpetrator's intentions are irrelevant to the assessment of whether conduct is of a sexual nature.

The finder of fact may look to a course of conduct as a whole, which may include instances of sexual conduct as well as other conduct, in order to determine whether the conduct complained of constituted sexual harassment.

Case example: **Sexual harassment ¬ conduct of a sexual nature – unwelcome conduct**

Collins v Smith (Human Rights) [2015] VCAT 1029 (10 July 2015)

Facts

Ms Collins commenced working at a local post office in May 2011. Mr Smith was the owner and manager of the post office, in partnership with his wife. Up until 5 January 2013, Ms Collins said she enjoyed her job and got along well with Mr Smith, whom she regarded as 'like a father figure'.

However, after that time, Ms Collins detailed persistent and unwelcome conduct of a sexual nature by Mr Smith in the course of her employment, from January to April 2013. Mr Smith either denied that the conduct occurred or, where it was admitted, denied that it was unwelcome.

Outcome

The Victorian Civil and Administrative Tribunal (the Tribunal) upheld Ms Collins' complaints of sexual harassment.[93] As there were no other witnesses to the events and only limited corroborative evidence, the Tribunal's assessment of the credibility of each party's account was crucial to its findings.

The Tribunal accepted Ms Collins' evidence of the numerous incidents of sexual harassment, which included physical contact (such as attempting to kiss Ms Collins and touching her on her bottom and breasts); verbal comments, including propositioning for sex and threatening comments, and written communications including a St Valentine card, notes and text messages.

The Tribunal rejected Mr Smith's evidence depicting Ms Collins as the principal protagonist who welcomed his continuing flattery and jocular behaviour. It preferred Ms Collins' evidence that she consistently rejected Mr Smiths' advances and reiterated to him her desire to maintain a friendly but professional relationship. The Tribunal accepted that Ms Collins was attempting to effectively 'manage' Mr Smith in view of her desire to maintain her employment, and Mr Smith's behaviour created an intolerable situation for her in which to perform her work. The medical evidence showed a clear nexus between the sexual harassment and Ms Collins' consequent psychological trauma, comprising chronic post-traumatic stress disorder and a depressive disorder.

Relevance

A finding of sexual harassment may be based on the fact finder's assessment of the relative credibility of each party's accounts, particularly in circumstances where there is limited corroborating evidence.

A worker does not welcome conduct simply by enduring it and taking steps to placate the harasser in order to maintain employment.

[93] Within the meaning of s.92 of the *Equal Opportunity Act 2010* (Vic). Section 92 of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated ...'

Case example: **Sexual harassment ¬ conduct of a sexual nature – unwelcome conduct - reasonable person**

Kordas v Ruba & Jo Pty Ltd t/a Aztec Hair & Beauty [2017] NSWCATAD 156 (25 May 2017)

Facts

Mr Kordas was employed as an apprentice hairdresser by Aztec Hair and Beauty for about 3 months. He alleged that he was sexually harassed during his employment by his manager, Mr Rony, and his colleague and trainer, Mr Eaton. The alleged sexual harassment included Mr Rony stroking Mr Kordas' palm when he gave him money to make a purchase, and the following conduct by Mr Eaton:

- unwelcome touching (such as requiring Mr Kordas to hold his hand unnecessarily when he was showing him how to blow dry hair; putting his hands around Mr Kordas' waist; unnecessarily brushing against Mr Kordas, and slapping Mr Kordas' bottom with a ruler), and
- unwelcome verbal comments (such as referring to Mr Kordas' as 'his bitch' and saying that he and Mr Kordas were like a gay married couple).

Outcome

The New South Wales Civil and Administrative Tribunal (the Tribunal) determined that both Mr Rony and Mr Eaton had engaged in sexual harassment,[94] and Aztec Hair and Beauty was vicariously liable.

The Tribunal noted that whether conduct is of a sexual nature may depend on the context. The Tribunal accepted that the conduct was of a sexual nature in the context of a workplace in which Mr Kordas was the most junior employee, who had no prior relationship with his manager or trainer.

The Tribunal was also satisfied that the conduct had been unwelcome. It was not necessary for Mr Kordas to establish that the perpetrators knew that their conduct was unwelcome.

The Tribunal considered the circumstances of the conduct, including that Mr Kordas' position as an apprentice meant that he had little, if any, power in relation to his manager and trainer. The Tribunal concluded that a reasonable person, having regard to these circumstances, would have anticipated that the conduct would be likely to humiliate or intimidate Mr Kordas.

Relevance

Sexual harassment is unlawful regardless of the sex or sexual orientation of the parties. A perpetrator need not know that their conduct is unwelcomed.

The circumstances of the conduct may impact the assessment of whether the conduct is of a sexual nature, as well as whether a reasonable person would consider it offensive, humiliating or intimidating.

[94] In contravention of s.22B of the *Anti-Discrimination Act 1977* (NSW). Section 22A of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated ...'

Case example: **Sexual harassment ¬ conduct of a sexual nature**

Kerkofs v Abdallah (Human Rights) [2019] VCAT 259 (25 February 2019)

Facts

Ms Kerkofs worked at Parker Manufactured Products Pty Ltd (PMP) from 4 to 16 May 2016. Ms Kerkofs claimed that during that time she was sexually harassed by Mr Abdallah, a colleague.

Ms Kerkofs alleged that at her workplace, an office within the PMP factory, she was subjected to various instances of unwelcome conduct of a sexual nature by Mr Abdallah including him: using nicknames such as 'sexy' and 'honey'; commenting on her body and making sexual comments; physically touching her, and discussing and rating her appearance and that of other women.

Ms Kerkofs also alleged that she was sexually assaulted by Mr Abdallah at home after he drove her home from work (at the direction of his supervisor) because she was unwell. Ms Kerkofs did not willingly participate in or solicit the behaviour, which happened while she was resting on her bed. She succumbed to it because she was too ill to resist.

Ms Kerkofs reported the sexual assault to her manager 3 days after the incident. She subsequently developed a post-traumatic stress disorder.

Outcome

The Victorian Civil and Administrative Tribunal (the Tribunal) found that Mr Abdallah had engaged in sexual harassment,[95] and that PMP was vicariously liable for his actions. Mr Abdallah did not dispute that the alleged conduct was properly characterised as sexual harassment but denied he had engaged in any of the conduct alleged.

The Tribunal preferred the evidence of Ms Kerkofs. While Mr Abdallah was evasive in answering questions and sought to interfere with other evidence given to the Tribunal, Ms Kerkofs was a credible witness and her account was largely consistent with accounts she had given to other people. The Tribunal rejected the suggestion that the fact that Ms Kerkofs did not pursue a complaint to the police reflected on her credibility, observing that many people who are victims of sexual assault are not prepared to go through the trauma of giving evidence in a criminal trial.

The Tribunal also did not consider that inconsistencies in Ms Kerkofs' evidence reflected adversely, to any great extent, on her credibility, observing that inconsistencies in an account of sexual activity are to be expected, and one should not expect an identical account on each occasion a traumatic sexual experience is recounted.

The Tribunal found that it was more probable than not that Mr Abdallah had engaged in each of the alleged acts of sexual harassment, and they were unwelcome. The Tribunal accepted that a

[95] Within the meaning of s.92 of the *Equal Opportunity Act 2010* (Vic). Section 92 of that Act defines 'sexual harassment' in similar terms to s.28A the Sex Discrimination Act. The key difference is the additional underlined words in s.28A '… in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated …'

reasonable person, having regard to all the circumstances, would have anticipated that Ms Kerkofs would be offended, humiliated or intimidated by that conduct.

Relevance

Inconsistencies in accounts of sexual harassment are to be expected and do not necessarily impact adversely on a complainant's credibility, particularly given the fact that a complainant may be recalling traumatic events. Similarly, the credibility of a complaint of sexual harassment that constitutes sexual assault is not undermined simply by reason of the fact that a complainant chooses not to report the conduct to the police. Many people who are victims of sexual assault do not report the conduct, including to the police.

Case example: **Sexual harassment ¬ unwelcome conduct**

Aldridge v Booth [1988] FCA 170 (30 May 1988)

Facts

Miss Aldridge, aged 19, was employed in a cake shop through a government employment scheme, after having been unemployed for a year. This was her first full-time job. She alleged that, during the year of her employment, Mr Booth, who was a proprietor of the business, made repeated unwelcome sexual advances towards and contact with Miss Aldridge. Mr Booth and Miss Aldridge were often the only 2 people working in the shop. The alleged advances included physically touching Miss Aldridge, kissing her, pulling her hair, requesting sexual intercourse, threatening to terminate her employment when she resisted and engaging in unwanted acts of sexual intercourse with her at the cake shop. Miss Aldridge ultimately resigned.

Mr Booth accepted that there was one act of intercourse, which he described as 'reasonably spontaneous'. He otherwise claimed there was only accidental or unintended touching because of the confines of the shop, and horseplay from time to time.

Outcome

The Federal Court preferred the account of Miss Aldridge and was satisfied that there was a course of conduct engaged in by Mr. Booth that constituted sexual harassment which was, in the main, unwelcome. The Court accepted Miss Aldridge's evidence that she believed that if she rejected the advances, she would lose her job. The Court held that the sexual harassment 'continued for as long as it did, and went as far as it did, because of the fear of Miss Aldridge of losing her job.'

Relevance

The Court characterised Miss Aldridge as being both young and vulnerable when compared to Mr Booth, who was the proprietor of the shop in which she worked. The power imbalance between them, and Miss Aldridge's fear that she would lose her job, were relevant to the Court's conclusion the conduct was unwelcome.

Case example: **Sexual harassment ¬ unwelcome conduct – reasonable person**

Horman v Distribution Group Ltd [2001] FMCA 52 (19 December 2001)

Facts

Ms Horman worked as a spare parts interpreter for Distribution Group Ltd (Distribution Group), at a branch of its Repco Auto Parts business. Ms Horman alleged that during the course of her employment she was sexually harassed by her co-workers, which included inappropriate suggestions and comments; texta writing on her body; her bra straps being pulled, and her buttocks being touched. Distribution Group argued that, far from being offended by any incident of 'tomfoolery' in the workplace, Ms Horman was an enthusiastic participant and instigator.

Outcome

The Federal Magistrates Court (the Court) found some, but not all, of the alleged conduct took place, and then moved to the question of whether or not that conduct was unwelcome. Ms Horman's evidence included a letter that she had written towards the end of her employment outlining the harassing behaviour, which concluded: 'Please, do something, it's not fair for people to get away with such behaviour.' The Court accepted that the sexual conduct towards Ms Horman was unwelcome by reference to this letter, which was written contemporaneously and was found to represent Ms Horman's state of mind at the time.

Next the Court considered whether a reasonable person would anticipate the possibility that Ms Horman would be offended, humiliated or intimidated by the conduct. The Court accepted that Ms Horman used crude and vulgar language in the workplace; engaged in physical contact with other employees; exhibited explicit sexual photographs of herself; made disclosures about personal matters such as the shaving of her pubic hair and participated in tomfoolery and arguments. The Court did not accept that it followed that a person in the position of Ms Horman would still not be offended, humiliated or intimidated by some of the actions and remarks directed at her. The Court found that 'everyone is entitled to draw a line somewhere, and those activities crossed that line'. The Court held:

> '"Giving as good as you get" is often the only way in which a person feels he or she can resist unpleasant language and would not to my mind indicate to a reasonable person the type of acceptance of the language which would relieve a respondent of liability under section 28A of the Sex Discrimination Act.'

Relevance

While the behaviour of a complainant, including inappropriate behaviour, may be relevant in assessing whether or not the conduct was 'unwelcome', or whether a reasonable person in the circumstances would have anticipated the possibility that the complainant would be offended, humiliated or intimidated, it will not disqualify a complainant from claiming sexual harassment in relation to other conduct.

Case example: **Sexual harassment ¬ reasonable person**

Smith v Hehir and Financial Advisors Aust Pty Ltd **[2001] QADT 11** (26 June 2001)

Facts

Ms Smith was employed by Hehir and Financial Advisors Aust Pty Ltd as a telemarketer. She alleged that Mr Hehir sexually harassed her on a number of occasions, including by unnecessarily and inappropriately touching her (such as massaging her shoulders and hugging her when she was distressed about a personal matter), and making suggestions with sexual connotations to her.

Outcome

The Queensland Anti-Discrimination Tribunal (the Tribunal) found that each of the incidents constituted sexual harassment.[96] In considering whether a reasonable person would have anticipated the possibility of offence in relation to the hugging incident, the Tribunal considered that it did not matter what Mr Hehir thought, as men's and women's perceptions of behaviour which can be characterised as sexual harassment may differ. Nor did the Tribunal consider it necessarily mattered what Ms Smith thought or felt. The Tribunal held:

> 'I do not consider that Mr Hehir intended to sexually harass Ms Smith on this occasion. However, the issue becomes whether a reasonable person taking all the circumstances into account (including the unwelcome rubbing on or after 8 February) would have anticipated the possibility that Ms Smith would be offended, humiliated or intimidated by this action … Using another person's distress as an excuse to touch them for purposes which are less than altruistic should never be encouraged or condoned. As reasonable members of society, however, we must equally be on our guard not to discourage genuine and compassionate actions of comfort from one person to another, particularly if there is obvious distress. Whether an action is compassionate or reprehensible will depend on the overall context in every case. The context here is that the action was not one between friends of long standing: it was an action by a middle-aged male employer to a young female employee who had only worked in the office for 2 weeks. It occurred not long after another incident when distress due to a phone call had been used as an excuse to massage the complainant. The action was more than just a touch, such as placing a comforting hand on the distressed person's arm or shoulder: it was more in the form of a cuddle. In my opinion, in this instance in the overall context, a reasonable person should have anticipated that there was the possibility that Ms Smith would have found this action offensive, humiliating or intimidating …'

Relevance

The 'reasonable person' test does not turn on the intentions of the perpetrator, or the reaction of the person experiencing sexual harassment. It is an objective test, determined by the specific context of the conduct.

A reasonable person may anticipate the possibility certain conduct would offend, humiliate or intimidate a person in one context, but not in another.

[96] Contravening s.118 of the *Anti-Discrimination Act 1991* (Qld). Section 119 of that Act defines 'sexual harassment' in comparable (but more extensive) terms to s.28A the Sex Discrimination Act.

What does 'at work' mean?

For a worker to be covered by the Commission's jurisdiction to stop workplace sexual harassment in Part 6-4B of the Fair Work Act, the alleged sexual harassment must have occurred while the worker is 'at work'.[97]

The phrase 'at work' is not defined in the legislation.

When considering whether a person is 'at work', the focal point of the inquiry is the worker (the applicant).

The individuals engaging in the sexual harassment do not need to be workers – for example, they could be customers of a business. There is no requirement that these individuals must also be 'at work' at the time they engage in the alleged sexual harassment.

The term 'at work' can encompass a range of circumstances. Whether a worker is 'at work' will usually be straightforward, but not always. It will depend on the context, including custom and practice and the nature of the worker's contract.[98]

The Commission has considered the meaning of 'at work' in several decisions concerning applications to stop bullying at work. In these cases, the Commission has found that being 'at work' is not limited to a physical workplace or the times at which a worker is performing work. It may include the performance of work at any time or location,[99] as well as when the worker is engaged in some other activity which is authorised or permitted by their employer.[100] The Commission has found that a worker can be at work even though they are not working (for example, because they are on an authorised meal break[101] or at a work event or on a coffee break).[102]

The expression 'at work' has also been held to extend to where the employer had authorised the worker taking special paid leave and thereafter suspended their employment. The worker was considered to be 'at work', notwithstanding his absence from the work location and non-performance of the usual daily responsibilities associated with his role, as the periods of absence were authorised and directed by his employer and the applicant 'acted' accordingly by complying with the same.[103]

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[97] Fair Work Act s.789FD(1).

[98] *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227 (Ross J, Hatcher VP, Gostencnik DP, Hampton C, Johns C, 19 December 2014) at para. 51.

[99] *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227 (Ross J, Hatcher VP, Gostencnik DP, Hampton C, Johns C, 19 December 2014) at para. 48.

[100] ibid at para. 51.

[101] ibid at para. 49. It was not necessary for the Commission there to decide whether the provisions apply in circumstances where a meal break is taken outside the workplace.

[102] *Nasir Sheikh v Civil Aviation Safety Authority and Ors* [2016] FWC 7039 (Wilson C, 8 November 2016) and see also Explanatory Memorandum to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para. 41.

[103] *Cain v Downing and Ors* [2020] FWC 1914 (Beaumont DP, 8 May 2020) at paras. 145-146.

Orders to stop sexual harassment can be based on conduct outside the workplace if the conduct 'relates to work'[104] or where the applicant was performing activities that were 'closely connected to work'.[105] Whether the necessary connection is present depends on the particular facts and circumstances of the case.

Related information

- Definition of 'Worker'

Use of social media

Sexual harassment can involve the use of technology, including sexually explicit emails, SMS or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.[106]

In *Bowker and Others v DP World Melbourne Limited T/A DP World and Others*,[107] the Full Bench of the Commission gave preliminary consideration to the complex issue of the circumstances in which a person who is the target of repeated unreasonable use of social media may be said to have been bullied 'at work' as follows:

> [54] The use of social media to engage in bullying behaviour creates particular challenges. Conceptually there is little doubt that using social media to repeatedly behave unreasonably towards a worker constitutes bullying behaviour. But how does the definition of 'bullied at work' apply to such behaviour? For example, say the bullying behaviour consisted of a series of facebook posts. There is no requirement for the person who made the posts (the alleged bully) to be 'at work' at the time the posts were made, but what about the worker to whom they are directed?
>
> [55] During the course of oral argument counsel for the MUA submitted that the worker would have to be 'at work' at the time the facebook posts were made. We reject this submission. The relevant behaviour is not limited to the point in time when the comments are first posted on facebook. The behaviour continues for as long as the comments remain on facebook. It follows that the worker need not be 'at work' at the time the comments are posted, it would suffice if they accessed the comments later while 'at work', subject to the comment we make at paragraph 51 above.

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[104] Revised Explanatory Memorandum to the Fair Work Amendment Bill 2013, para. 119.

[105] Explanatory Memorandum to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para. 41; and see *Bowker and Ors v DP World Melbourne Limited t/a DP World and Ors* [2014] FWCFB 9227 (Ross J, Hatcher VP, Gostencnik DP, Hampton C, Johns C, 19 December 2014); *Nasir Sheikh v Civil Aviation Safety Authority and Ors* [2016] FWC 7039 (Wilson C, 8 November 2016).

[106] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) at p 17.

[107] *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227 (Ross J, Hatcher VP, Gostencnik DP, Hampton C, Johns C, 19 December 2014).

> [56] We acknowledge that the meaning we have ascribed to s.789FD may give rise to some arbitrary results. A worker may only access comments on social media which constitute unreasonable behaviour (with the meaning of s.789FD(1)(a)) at a time when they are not 'at work' and the behaviour will not fall within the scope of Part 6-4B. But it seems to us that such a consequence necessarily follows from the fact that the legislature has adopted a definition which is intended to confine the operation of the substantive provisions.

Reasonable belief of sexual harassment at work

 See Fair Work Act s.789FC(1)

For a worker to be able to apply to the Commission for orders to stop sexual harassment under Part 6-4B of the Fair Work Act, the worker must ***reasonably believe*** that they have been sexually harassed at work.

The expression 'reasonable belief' and similar expressions are used in a wide variety of contexts by the statutory and common law. It is clear from cases decided in those differing contexts that not only must the requisite belief actually and genuinely be held by the relevant person[108], but in addition the belief must be reasonable in the sense that, objectively speaking, there must be something to support it or some other rational basis for the holding of the belief. It will not be a reasonable belief if it is irrational or absurd.[109]

[108] *Burbeck v Alice Springs Town Council & Ors* [2017] FWC 4988 (Wilson C, 6 October 2017); *Re Watts* [2018] FWC 1455 (Williams C, 20 March 2018) at para. 10.

[109] See *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 79.

Case example: **Application for orders to stop bullying – insufficient evidence to support reasonable belief of bullying – no future prospect of bullying identified - Application dismissed**

Darryl Vine v Central Bayside Community Health Services and Ors [2020] FWC 5910 (Yilmaz C, 5 November 2020)

Facts

The applicant made a range of allegations of bullying conduct against his employer and the 3 named individuals described as 'victimising, humiliating, intimidating and threatening'. The applicant sought a stop bullying order and an order to suspend the named persons, a written apology and assurances from the CEO that he would not suffer any further bullying.

The application was made after the employer had raised a number of concerns about Mr Vine's conduct including some inappropriate posts on social media.

Outcome

The application was dismissed on the grounds that there no credible evidence to reach a finding that the applicant was bullied at work. The Commission found the disciplinary actions taken by the respondent were reasonable management action carried out in a reasonable manner. Based on the submissions filed, the Commission also found that the applicant was unlikely to return to the workplace meaning that even if there was bullying, an order would be of no practical effect. As a result, an order to stop bullying could not be made.

Relevance

The Commission assessed all of the evidence and was not satisfied that there was any evidence of bullying. Whilst the applicant believed he had been bullied, the conduct must not only be perceived as bullying but that belief must be reasonable in the sense that it is able to be supported or justified on an objective basis.

Case example: **Application for orders to stop bullying – not a worker or at work – no reasonable belief of bullying at work - Application dismissed**

Mr K [2021] FWC 5943 (McKinnon C, 17 September 2021)

Facts

The applicant made several applications to the Commission including an application under s.789FC of the Fair Work Act for orders to stop bullying at work in the Commission.

The applicant was a former employee of a large employer in South Australia. He had never carried out any work or engaged in any other authorised or permitted work-related activity for the Commission.

Outcome

The bullying application was dismissed on grounds including that Mr K could not reasonably believe that he had been bullied at work in the Commission because Mr K was not a 'worker' or 'at work' in the Commission. Accordingly, Mr K was not entitled to apply under s.789FC(1) of the Fair Work Act for orders to stop bullying at work in the Commission.

Relevance

The Commission found that the applicant could not have held the requisite 'reasonable belief' that he had been bullied at work in the Commission, as he was not a worker of the Commission.

Part 6 – Risk of continued sexual harassment

See Fair Work Act s.789FF(1)(b)(ii)

Under preserved Part 6-4B of the Fair Work Act, for the Commission to be able to make an order to stop sexual harassment, it must be satisfied that a worker has been sexually harassed at work by an individual or individuals (the persons named in the application) **and** that there is a risk that the worker will continue to be sexually harassed at work by that individual or those individuals.

It is not sufficient to satisfy the second condition in s.789FF(1)(b)(ii) to demonstrate that there is a risk of the applicant being sexually harassed at work by individuals other than those who have been found to have engaged in sexual harassment.[110]

Applying a dictionary definition, 'risk' means exposure to the hazard or chance of continued sexual harassment. Relevant considerations may include whether the worker is still in contact with the individual or individuals at work, and any action that may have been taken to deal with the behaviour.

Absence of future risk of sexual harassment

If a worker will no longer be at work with the relevant individual or individuals, and there is no reasonable prospect of that occurring in some capacity in the future, then it will usually not be possible for an applicant to demonstrate that they are at future risk of being sexually harassed at work by the individual(s).

The circumstances in which this might arise have been considered in the context of applications to stop bullying at work. They include the person who harassed the worker no longer working at the workplace,[111] the worker making an application after having ceased working in a workplace,[112] or the worker being dismissed or ceasing work in a workplace after making an application but before the matter is dealt with by the Commission.[113]

If there is no risk that the applicant will continue to be sexually harassed at work by the individual or individuals named in the application, the Commission has no power to make an order to stop sexual harassment under Part 6-4B. In these circumstances, the Commission is likely to find that the

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[110] See *Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others* [2019] FWCFB 2771 (Hatcher VP, Sams DP, Hampton C, 26 April 2019) at para. 29, in the context of a stop bullying application.
[111] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at para. 47 states: 'Orders would not be available in cases where there is no risk of harassment occurring again, for example when the person who harassed the worker is no longer employed at the workplace.'
[112] *Shaw v Australia and New Zealand Banking Group Limited t/a ANZ Bank* [2014] FWC 3408 (Gostencnik DP, 26 May 2014) at para. 16, in the context of a stop bullying application.
[113] *Re Mr M T* [2014] FWC 3852 (Johns C, 23 June 2014) at paras 20 and 22–23 and *Re Ms Brenton* [2014] FWC 4166 (Cloghan C, 24 June 2014) at paras 9–10, in the context of stop bullying applications.

application has no reasonable prospect of success and may exercise its discretion to dismiss the application.[114]

The Commission has held that it will not always be appropriate to dismiss an application where a worker has been terminated from their employment. The decision to dismiss an application on this basis requires a consideration of the particular circumstances of the parties, including whether or not an individual may return to a workplace in some capacity as a worker. The Commission may decide to consider the application or adjourn it until any related dismissal proceeding - where there is a prospect of reinstatement- is determined. This is a matter of judgement in the particular circumstances of each case.[115]

If an application is dismissed because the employee has left the workplace and they are later re-employed by the same employer, the employee can make a new application for orders to stop sexual harassment at work if they remain concerned about the risk of sexual harassment.

If their concerns relate to alleged sexual harassment at work that was part of a course of conduct that commenced before 6 March 2023, an application could be made under s.789FC of Part 6-4B of the Fair Work Act, provided the jurisdictional facts could be established in relation to the application.[116] Allegations of the past sexual harassment could be relied upon in support of any such application.[117] In this scenario, the employee may not be able to apply to the Commission to deal with a sexual harassment dispute under new Part 3-5A of the Fair Work Act.

However, if the alleged sexual harassment only starts on or after 6 March 2023, an application could be made under new Part 3-5A of the Fair Work Act – see the Sexual Harassment Disputes Benchbook. Applicants who are unsure about the rules that apply to them may need to seek advice about the matter before applying to the Commission.

Workplace Advice Service

The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections or workplace bullying or sexual harassment.

The Commission's role is to connect eligible persons with lawyers who may be able to help them. These lawyers work at law firms and other legal organisations that are

[114] Fair Work Act s.587. See also Part 10 of this Benchbook.
[115] *Atkinson v Killarney Properties Pty Ltd T/A Perm-A-Pleat Schoolwear and Adrian Palm* [2015] FWCFB 6503 (Acton SDP, Gooley DP, Roe C, 14 October 2015) at para. 35 and *Dr Ng* [2019] FWC 3055 (Hampton C, 11 June 2019) at paras 32–33, in the context of stop bullying applications.
[116] *Obatoki v Mallee Track Health & Community Services and Others* [2014] FWC 8828 (Kovacic DP, 5 December 2014) at para. 21, in the context of a stop bullying application; re-affirmed on appeal [2015] FWCFB 1661 (Catanzariti VP, Smith DP, Blair C, 27 March 2015) at para. 17.
[117] *Dr Ravi v Baker IDI Heart and Diabetes Institute Holdings Limited T/A Baker IDI Heart and Diabetes Institute and Another* [2014] FWC 7507 (Gostencnik DP, 28 October 2014) at para. 14, in the context of a stop bullying application.

completely independent of the Commission. The eligibility quiz on the Commission's website helps employers and employees to find out if they are eligible for the service.

Other legal help

You can find a community legal centre in your area by searching the Community Legal Centres website. The 'Where to get legal help' page of Commission's website includes contact details for some of the main community legal centres in each state and territory who may be able to assist with free legal advice or other advisory services.

The law institutes or law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance.

The following case examples are drawn from Commission decisions dealing with applications to stop bullying at work:

Case example: Application for orders to stop bullying – no longer employed – Application dismissed

Application by Vanessa Stewart [2020] FWC 4562 (Simpson C, 28 August 2020)

Facts

The application for orders to stop bullying was lodged on 17 June 2020. On 3 August 2020, the applicant wrote to the Commission and confirmed that she had resigned from her employment. The respondent requested that the Commission dismiss the matter under s.587 of the Fair Work Act.

Outcome

As there was no evidence to suggest there was a risk that the applicant would continue to be bullied at work, the application was dismissed on the grounds it had no reasonable prospects of success.

Relevance

It was clear from the circumstances of the matter that there was presently no risk the applicant would be bullied at work by the group of individuals against whom she made her application, given she was no longer employed by the employer and no longer attended the workplace. In those circumstances, the Commission exercised its discretion to dismiss the application.

Case example: **Application for orders to stop bullying – no risk of future bullying – Application dismissed**

Ms Aferdita (Rita) Shehu [2020] FWC 4544 (Lee C, 10 September 2020)

Facts

The applicant alleged bullying by 2 named individuals in the workplace. The alleged conduct included being placed under an unsustainable level of work, receiving no support from a named person and being subject to disparaging remarks.

At the time of the hearing, the applicant had not been at work for over 18 months and remained totally incapacitated for work. The persons named either no longer worked at the workplace or had not worked at the workplace for a number of months and did not wish to return to the workplace.

The applicant maintained that she continued to be at risk of bullying and sought that the Commission determine that the bullying occurred and make orders to stop the bullying. The employer asked the Commission to dismiss the application on the basis that there was no risk of bullying occurring as a consequence of the persons named no longer being in the workplace.

Outcome

The application was dismissed pursuant to s.587 of the Fair Work Act as it had no reasonable prospects of success.

Even assuming that the applicant had been bullied at work, the Commission was satisfied on the evidence that there was no risk of the applicant continuing to be bullied at work by those individuals, in circumstances where they were not working at that store and were extremely unlikely to work there again. Further, the employer was willing to facilitate the applicant's transfer to another store if the applicant wished.

Relevance

In order for the Commission to make an order to stop bullying both ss.789FF(1)(b)(i) and (ii) must be satisfied. Because there was no risk that the applicant would continue to be bullied, s.789FF(b)(ii) could not be satisfied and the Commission did not need to make a finding under s.789FF(b)(i) as to whether or not there was bullying behaviour.

Change in circumstances

Changes that are made in the workplace to specifically address the issues around alleged sexual harassment may reduce or eliminate the risk that a worker will continue to be sexually harassed at work. The Commission may take this into consideration when deciding whether or not to make an order.[118]

Changes that might be made include:

- the relocation or dismissal of the individual or individuals alleged to have sexually harassed the applicant;
- the introduction of a workplace sexual harassment policy;
- the delivery of sexual harassment or other appropriate training;
- changes to rosters; or
- changes to reporting requirements.

Other options for workers who are no longer working for the employer/principal

A person who is no longer at work where the alleged sexual harassment occurred may be able to make another type of application to the Commission or bring a claim in other federal or state jurisdictions:

If a person has been dismissed they may be eligible to make an unfair dismissal application or a general protections application to the Commission. They may also be eligible to make a claim in other federal or state jurisdictions.

See Part 6 – Risk of continued sexual harassment for further information.

See also – Other avenues for dealing with sexual harassment

Other Commission Benchbooks

You can access the **Unfair Dismissals** Benchbook through the following link: www.fwc.gov.au/resources/benchbooks/unfair-dismissals-benchbook

[118] *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para. 32, in the context of a stop bullying application.

You can access the **General Protections** Benchbook through the following link: www.fwc.gov.au/resources/benchbooks/general-protections-benchbook

WHS regulators, as well as the AHRC and anti-discrimination bodies in the states and territories can also deal with complaints about sexual harassment (depending on matters including where the conduct occurred).

Information about each of those bodies is available on their websites.

Workplace Advice Service

The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections or workplace bullying or sexual harassment.

The Commission's role is to connect eligible persons with lawyers who may be able to help them. These lawyers work at law firms and other legal organisations that are completely independent of the Commission. The eligibility quiz on the Commission's website helps employers and employees to find out if they are eligible for the service.

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The law institutes or law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance.

Part 7 – Making an application

See Fair Work Act s.789FC

The following information only applies in relation to the alleged sexual harassment of a worker at work that occurred, or was part of a course of conduct that commenced, **before 6 March 2023**.

For information about sexual harassment in connection with work that is said to have occurred or commenced on or after 6 March 2023, see the Sexual Harassment Disputes Benchbook.

A worker who reasonably believes that he or she has been sexually harassed at work may apply to the Fair Work Commission (the Commission) for an order to stop the sexual harassment.

A person must apply to the Commission for an order to stop sexual harassment using a completed and signed application form [Form F72A].

There is no timeframe for a worker lodging an application for an order to stop sexual harassment. However, if the worker no longer has a connection to the workplace, an application for these orders is unlikely to succeed because there is no future risk of the relevant behaviour.[119]

Making an application to the Commission for an order to stop workplace sexual harassment is a workplace right protected under the general protections provisions of the Fair Work Act. Further information about the general protections provisions is available in the General protections Benchbook.

If a person has been dismissed they may be eligible to make an unfair dismissal application or a general protections application to the Commission. They may also be eligible to make a claim in other Federal or State jurisdictions.

See Part 6 – Risk of continued sexual harassment for further information.

Application fee

An application to stop sexual harassment at work must be accompanied by payment of the prescribed fee (or an application to waive the prescribed fee).[120] Failure to pay the filing fee or apply

[119] *Appeal by Ms Anne Pilbrow* [2020] FWCFB 4373 (Hatcher VP, Asbury DP, Hunt C, 19 August 2020) at para 16.
[120] Fair Work Act s.789FC(4).

for a waiver at the time of making the application, may result in the Commission finding that the application has not been validly made.[121]

Link to form

- Form F72A – Application for an order to stop sexual harassment that occurred prior to 6 March 2023

All forms are available on the Forms page of the Commission's website.

Link to waiver form

- Form F80 – Waiver of application fee

All forms are available on the Forms page of the Commission's website.

Amending an application

Section 586 of the Fair Work Act allows the Commission to correct or amend an application or waive an irregularity in the form or manner in which an application is made.[122]

An applicant can apply to the Commission to amend an application if they have made a mistake on the form such as misspelling the name or not providing the full name of the employer. In certain circumstances, this power may also be used to substitute the name of the employer.[123] The power cannot be used to fundamentally change the nature of a claim (for example, from one type of claim to another).[124]

[121] See *Druett v State Rail Authority of NSW & Ors* [2007] AIRC 805 (Lawler VP, 19 September 2007) and *Atanaskovic Hartnell Corporate Services Pty Ltd t/a Atanaskovic Hartnell v Kelly* [2017] FWCFB 763 (Hatcher VP, Sams DP, Hunt C, 15 February 2017), in the context of an application for relief in respect of termination of employment and a general protections dismissal application, respectively.

[122] Fair Work Act s.586; see *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 (Ross J, Sams DP, Bull C, 29 April 2013) at para. 6, [(2013) 231 IR 89].

[123] See for e.g. *Djula v Centurion Transport Co. Pty Ltd* [2015] FWCFB 2371 (Catanzariti VP, Harrison SDP, Bull C, 12 May 2015) at para. 28, where the Full Bench observed that had the amendment sought by the applicant been granted, it would not have had the effect of creating a new application – while it would have substituted the name of the respondent, the application would have remained the same.

[124] *Ioannou v Northern Belting Services Pty Ltd* [2014] FWCFB 6660 (Boulton J, Gostencnik DP, Johns C, 2 October 2014) at para. 17.

Case example: **Application to amend stop bullying application refused – New application can be made**

Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others [2019] FWCFB 2771 (Hatcher VP, Sams DP, Hampton C, 26 April 2019).

Decision at first instance [2018] FWC 6486 (Lee C, 20 November 2018).

Facts

The proceedings in this matter went forward entirely on the basis of bullying allegations against a clearly identified group of individuals, and Mecca responded to the case on this basis. On the day of the hearing, Ms Mekuria raised a series of new allegations against other individuals. One of the letters sent to the Commission on the morning of the hearing sought some new orders against her 'supervisor and manager'.

Outcome

The Full Bench refused to allow the application to be amended to name new individuals because it would not have been procedurally fair to Mecca.

Relevance

The Full Bench held that Mecca was in no position to respond to new allegations. The Full Bench confirmed that Ms Mekuria's new allegations could be addressed via a fresh and separate application to stop bullying if she wished to pursue them.

Responding to an application

Employer or principal

The person named as an employer or principal in an application to stop sexual harassment at work **must** lodge with the Commission a response to the application within **7 calendar days** after the day on which the person was served with the application.[125]

Link to response form

Form F73A – Response from an employer or principal to an application for an order to stop sexual harassment that occurred prior to 6 March 2023. All forms are available on the Forms page of the Commission's website.

Related information

- For calculating 7 calendar days - References to provisions in Part 6-4B of the Fair Work Act

Unless the context indicates otherwise, references in this Benchbook to Part 6-4B of the Fair Work Act are to the Act as it was just before 6 March 2023. These provisions are extracted in full at **Appendix A**.

On 6 March 2023, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) amended the sexual harassment provisions in the Fair Work Act. However, the transitional arrangements in the Secure Jobs Better Pay Act mean that Part 6-4B of the Fair Work Act, as it was just before 6 March 2023, continues to apply in relation to the sexual harassment of a worker at work that occurred (or commenced) before 6 March 2023.

- What is a day?

Persons named as having engaged in sexual harassment

A person who is named in an application for an order to stop sexual harassment as having engaged in sexual harassment can lodge a response to the application if they wish. Lodging a response is

[125] *Fair Work Commission Rules 2013* r.23A(1).

optional for the person. Their response must be lodged with the Commission within **7 calendar days** after the day on which the person was served with the application.[126]

Link to response form

Form F74A – Response from a person named in an application for an order to stop sexual harassment that occurred prior to 6 March 2023 All forms are available on the Forms page of the Commission's website.

Service

The Commission must serve an application for an order to stop sexual harassment on each person named in the application as an employer or principal and each individual named as allegedly engaging in the sexual harassment. Where the person named as having engaged in sexual harassment has a different employer or principal to the applicant, the Commission will also serve that person's employer or principal if their details are included in the application.

The Commission can decide to vary or dispense with the service rules in appropriate cases.[127]

A response to an application for an order to stop sexual harassment must be served on the other parties to the matter and their legal or other representatives.

The other parties are:

- the worker who has made the application (the applicant), and
- each person named in the application as an employer or principal, and
- each person named in the application as having engaged in sexual harassment.

The response must be served within **7 calendar days** after receiving the application for an order to stop sexual harassment at work. The Commission may issue a direction that requires the employer or principal, or a person named to serve a copy of the response on some but not all of the parties specified above.

Related information

- Confidentiality – sending documents to the other parties

[126] *Fair Work Commission Rules 2013* r.23A(3).
[127] *Fair Work Commission Rules 2013* rr.6(1) and (2).

Part 8 – Commission process – Hearings and conferences

Commission to deal with applications promptly

Under preserved Part 6-4B of the Fair Work Act, the Commission must start to deal with an application for an order to stop sexual harassment within 14 days after the application is made.[128]

This early intervention is intended to help resolve matters quickly and inexpensively, with the ultimate aim of restoring safe working relationships.[129]

Making an application does not of itself stop any actions taking place at a workplace. This includes investigations to deal with alleged sexual harassment as well as the implementation of any investigation outcome.

Powers of the Commission

The Fair Work Act provides the Commission with flexibility to inform itself as it considers appropriate in relation to an application for an order to stop the sexual harassment. This may include contacting the employer or other parties to the application, conducting a conference or holding a determinative conference or formal hearing.[130]

The President may refer a matter to a work health and safety (WHS) regulator where it considers this is necessary and appropriate.[131] If such a referral is made, it does not necessarily mean that the Commission will defer dealing with an application before it. The Fair Work Act specifically provides that an applicant may have an action under a WHS law as well as an application to stop sexual harassment before the Commission.[132]

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[128] Fair Work Act s.789FE(1).

[129] Statement of Compatibility with Human Rights, Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at paras. 31 and 38.

[130] Fair Work Act s.590.

[131] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 117. See also *Obatoki v Mallee Track Health and Community Services & Others* [2015] FWCFB 1661 (Catanzariti VP, Smith DP, Blair C, 27 March 2015); *Re Bassanese* [2015] FWC 3515 (Hampton C, 5 June 2015) at para. 40.

[132] Fair Work Act s.789FH.

Role of the Commission

The Commission is required to consider the evidence and objectively assess whether it is satisfied that sexual harassment has occurred at work in relation to the worker.[133]

The Commission is not required by the relevant provisions of the Fair Work Act to set out a point-by-point merits review of each aspect of the applicant's claim.[134]

The Commission does not have an investigatory role in relation to allegations of sexual harassment at work and it is not necessary for the Commission to undertake a complete investigation of the background to the concerns raised. It is for the parties to present their own case and for the Commission to determine whether it is satisfied that a worker has been sexually harassed at work and whether there is a risk that the sexual harassment will continue.

In order to be satisfied that a worker has been sexually harassed at work, the Commission first needs to make factual findings about what had occurred and assess whether the behaviour of relevant persons may be characterised as falling within the definition of 'sexually harassed at work' – this requires the Commission to reach a conclusion as to the relevant elements of the conduct complained of.[135]

Before making a decision, a Member is likely to hold a conference to see if the matter can be resolved. A matter may then be listed for a determinative conference or a hearing to determine whether or not to make an order to stop sexual harassment.

Hearings and conferences

 See Fair Work Act ss.592–593

Conferences

A conference conducted by the Commission must be held in private unless the Commission specifically directs otherwise.[136]

In private means that members of the public are excluded. Persons who are necessary for the Commission to perform its functions are permitted to be present.[137] Usually, parties can bring a support person with them to a conference, such as a partner, parent or close friend. While support persons are not representatives, they can provide emotional support and act as a 'sounding board' during private sessions.

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[133] See *Appellant v Respondent* [2015] FWCFB 1972 (Harrison SDP, Lawrence DP, Cambridge C, 22 April 2015) at para. 30.
[134] ibid.
[135] *Mayson v Mylan Health P/L and Ors* [2020] FWC 1404 (Colman DP, 17 March 2020) at para. 19 (in the context of a stop bullying application).
[136] Fair Work Act s.592(3).
[137] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49 (5 October 2006) at para. 25, [(2006) 230 CLR 486].

In the course of dealing with a matter, the Commission may hold a conference where the Member will try to resolve the dispute with the people involved, including by conducting mediation or conciliation, making a recommendation to the parties or expressing an opinion.[138]

Where a matter is not resolved, the Commission may determine the matter on the papers or by holding a hearing or determinative conference. Determinative conferences are less formal than hearings and are held in private but are recorded. Transcript may be available on request to the parties.

After a determinative conference or hearing, the Commission will usually issue a binding decision and will publish its reasons for decision (including the names of the parties, details of the allegations made against individuals and relevant witness evidence) on its website, unless the Commission has decided otherwise.

Hearings

A **hearing** is a proceeding which is generally conducted in public, resulting in a decision.[139] Hearings are more formal than conferences.

The Commission may inform itself in relation to a matter before it as it sees fit. The Commission will only conduct a hearing if it considers it appropriate to do so.[140]

For further information about Commission conferences and hearings refer to the Fair Hearings Practice Note.

Procedural issues

Confidentiality – sending documents to the other parties

The service rules in relation to applications under Part 6-4B for orders to stop workplace sexual harassment, and responses to such applications, are discussed above. As noted there, the Commission can decide to vary or dispense with the service rules in appropriate cases.[141]

Generally, a party to a matter must also send a copy of any correspondence or documents sent to the Commission to the other parties (or their representatives). If they do not do so, the Commission may forward a copy to the other parties (or their representatives).

If a party has any concerns about correspondence or a document being forwarded by the Commission to the other parties or their representatives (for example, because the document

[138] Fair Work Act s.592(4).
[139] See the section below entitled 'Confidentiality orders – De-identification of parties' for information about the Commission's power to make orders to keep information confidential.
[140] Fair Work Act ss.590 and 593.
[141] *Fair Work Commission Rules 2013* rr.6(1) and (2).

contains personal medical details or other sensitive information) they should contact the Commission to discuss their options before sending the document to the Commission.

The Commission's powers and practice in relation to making confidentiality orders is discussed below.

Confidentiality orders – De-identification of parties

See Fair Work Act ss.593–594

The Commission is generally required to perform its functions and exercise its powers in a manner that is open and transparent,[142] and is required to publish written decisions and orders in relation to applications for orders to stop sexual harassment.[143] However, some matters may involve disclosure of sensitive personal information (including medical information) in a way that is not appropriate for publication in a written decision.

The Commission has the power to make orders to keep information confidential. This might include orders:

- that all or part of a hearing be held in private,
- restricting the persons who may be present at a hearing,
- prohibiting or restricting the publication of the names and addresses of persons appearing at, or involved in, the hearing, and
- prohibiting or restricting the publication or disclosure of evidence, documents, or some or all of the Commission's decision or reasons in relation to a matter.[144]

Considerations of open justice and the administration of justice are clearly relevant to the exercise of discretion to make a confidentiality order under s.594(1) of the Fair Work Act. However, these considerations are not to be applied in a vacuum and need to be considered in the context of the express power to prohibit or restrict publication of certain material having regard to its confidential nature or for any other reason and the circumstances of a particular case.[145]

The purpose of the workplace sexual harassment jurisdiction in Part 6-4B of the Fair Work Act (as it was before 6 March 2023) is to ensure that workers can continue to work free from the risk to health and safety caused by workplace sexual harassment. This may be defeated if the public disclosure of sensitive information during the course of such proceedings would be likely to make the worker's continuing engagement at the workplace unviable. However, in accordance with the open justice principle, the Commission has held in relation to an application to stop bullying that a

[142] Fair Work Act s.577(c).
[143] Fair Work Act s.601(4).
[144] Fair Work Act ss.593–594.
[145] *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2015] FWC 4542 (Gostencnik DP, 6 July 2015) at para. 15.

non-disclosure order cannot be made merely because allegations have been made that are embarrassing, distressing or potentially damaging to reputations.[146] Something more is required.

If a party applies for confidentiality orders on the basis that disclosure of sensitive information is likely to endanger the viability of a continuing working engagement, the party will need to positively satisfy the Commission that this is the case. A mere assertion is not enough.[147]

[146] *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 9.
[147] ibid. at para. 10.

Case example: **Application for de-identification of parties approved**[148]

Application by Worker A, Worker B, Worker C, Worker D and Worker E *(interim orders dealing with behaviour at workplace)* PR584404 (Gostencnik DP, 18 August 2016).

Application by Worker A, Worker B, Worker C, Worker D and Worker E *(interim orders dealing with confidentiality)* PR584235 (Gostencnik DP, 15 August 2016).

Application by Worker A, Worker B, Worker C, Worker D and Worker E *(reasons for confidentiality order)* [2016] FWC 6524 (Gostencnik DP, 7 October 2016).

Facts

An application for an interim confidentiality order was made in the context of protected industrial action by a group of workers at the Carlton and United Breweries (CUB) site in Abbotsford, Victoria. The workers alleged that they were experiencing unreasonable behaviour as a result of the industrial action.

The applicants submitted that the publication of their names in connection with the applications would likely result in an escalation of the behaviour they were experiencing at the workplace.

The applicants had previously sought, and been granted, an interim order which prohibited the persons named from engaging in certain behaviour towards them, including filming the applicants attending work and calling them various inappropriate names.

Outcome

The Deputy President issued the orders sought on the basis that the concerns were genuinely held and the risk that the behaviour would escalate was not merely theoretical. Further, the interests of open justice were found to 'give way to the desirability to mitigate the risk of escalating inappropriate conduct directed towards the applicants'.

Relevance

The capacity of a person to effectively participate in a proceeding before the Commission may be affected, for example, by a well-founded or reasonable concern that the disclosure and publication of their name or address might result in some form of retribution, harassment or intimidation.

[148] See also *H v Centre and Others* [2014] FWC 6128 (Wilson C, 4 September 2014) and *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014).

Case example: **Application for de-identification of parties NOT approved**[149]

Amie Mac v Bank of Queensland Limited and Others [2015] FWC 774 (Hatcher VP, 13 February 2015).

Facts

Amie Mac filed an application for orders to stop bullying at work. The application alleged that bullying occurred in the course of Ms Mac's employment as a lawyer with the Bank of Queensland Limited (BOQ), and identified 5 persons employed by BOQ as the perpetrators of that bullying (jointly, the respondents).

The respondents applied for an order prohibiting the publication of their names and the name of the applicant. The respondents submitted that de-identification was appropriate because it would:

- minimise the negative impact that any open proceedings may have on Ms Mac, particularly in relation to her ability to return to work
- minimise the negative impact that any open proceedings may have on the health of Ms Mac
- minimise the adverse impact on the individual respondents of untested allegations, including allegations to the effect that they (being lawyers) have breached the Australian Solicitors' Conduct Rules, and
- minimise unnecessary knowledge of the proceedings amongst BOQ employees, thereby minimising the potential to adversely affect any return to work by Ms Mac.

Outcome

The Commission found nothing in the evidence, including the medical evidence, which could form a proper basis for the conclusion that the identification of the names of the relevant individuals would be likely to prevent Ms Mac from returning to work at an appropriate time. Ms Mac herself, who had access to competent legal and medical advice, expressed no concerns on this score and was opposed to the making of de-identification orders. There was also no issue of 'untested' allegations, because the allegations had been tested at the hearing and were the subject of findings in the decision.

The Commission did not consider there to be any proper basis for the making of the de-identification orders sought by the respondents and rejected their application.

Relevance

The principle of open justice will usually be the paramount consideration in determining whether a confidentiality order should be made. It is not sufficient to justify the making of a non-disclosure order merely on the basis that allegations have been made which are embarrassing, distressing or potentially damaging to reputations.

[149] See also *Re Justin Corfield* [2014] FWC 4887 (Bissett C, 21 July 2014) and *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWC 7381 (Gostencnik DP, 21 October 2014).

Interim Orders

See Fair Work Act ss.589 and 789FF

Sometimes, parties to an application under Part 6-4B to stop sexual harassment may seek to have certain preliminary issues dealt with prior to the application being determined. The Commission does not have power to make interim orders in relation to an application to stop sexual harassment unless it is satisfied that the worker has been sexually harassed at work and there is continuing risk of sexual harassment.

Case example: **Application for an interim order – Interim order refused**

Ms Virginia Wills v Grant, Marley & The Government of New South Wales, Sydney Trains and Another [2020] FWCFB 4514 (Ross J, Hatcher VP and Gostencnik DP, 28 August 2020)

Facts

The applicant filed an application for interim orders to restrain the respondents from taking any further step in relation to its investigation of the applicant, imposing any disciplinary sanction on the applicant and/or terminating the applicant's employment. The application for interlocutory relief was dismissed and that decision was appealed.

Outcome

The appeal was dismissed as the Full Bench was not satisfied that the worker had been bullied at work or that there was a risk that the bullying would continue.

Relevance

The Commission has power to make an interim order dealing with an application made under s.789FC. However, an interim stop bullying order cannot be issued based only on a prima facie case, or serious question to be determined, and the balance of convenience favouring the interim relief sought.

Section 789FF allows the Commission to make stop bullying order, including an interim order, only if it is satisfied that a worker has been bullied at work and that there is a risk that the bullying will continue. For example, the Commission might be satisfied that a worker has been bullied at work and that there is a risk of continued bullying but require further submissions from the parties as to the final orders; an interim order might be made 'in the interim' on the material before the Commission at that time.

The Full Bench noted that it should not usually be necessary for applicants for stop bullying orders to seek interim orders given the Commission triages stop bullying applications in order to ensure that applications that are brought in circumstances of urgency are dealt with on an expedited basis.

Case example: **Application for interim orders – Interim orders refused**

Mayson v Mylan Health P/L and Ors [2020] FWC 1404 (Colman DP, 17 March 2020)

Facts

The applicant sought interim orders to stop her employer and 4 named individuals from taking further disciplinary action against her or terminating her employment until the final hearing and determination of her workplace bullying application.

Outcome

The application for interim orders was dismissed.

The Commission rejected the applicant's argument that s.589(2) of the Fair Work Act is a discrete source of power for the Commission to make interim orders in workplace bullying cases.

An application under s.789FC alleging that a worker has been bullied at work seeks an order under s.789FF to prevent the worker from being bullied by those individuals. Any order made in relation to a s.789FC application is an order under s.789FF and needs to meet its requirements.

It was not enough for the Commission to be persuaded that the applicant had a prima facie case and that the balance of convenience was in her favour in order to make the interim orders. As the Commission was not yet satisfied that the worker had been bullied at work or that there was a risk that the bullying would continue, the Commission did not have power to make orders to stop the behaviour and dismissed the application for interim orders.

Relevance

An interim order to stop bullying cannot be issued based only on a prima facie case, or serious question to be determined, and the balance of convenience favouring the grant of the interim order. The Commission can only make an order to stop bullying, including an interim order, if it is satisfied that a worker has been bullied at work and there is a risk that the bullying will continue.

The Commission rejected the applicant's argument that an interim order should be granted because it was necessary for her employment to continue so that the Commission could determine her workplace bullying application. The purpose of making orders to stop workplace bullying is to prevent a worker from being bullied at work, not to prevent the termination of their employment.

Consent Orders

Some parties, during the process of dealing with an application under Part 6-4B to stop sexual harassment, may come to an agreement about how they will work together in a workplace. Providing the parties also agree that the circumstances required by the Fair Work Act for making such an order have been met, an order giving effect to this agreement may be made by the Commission, called a consent order. The Commission would still need to be satisfied that the conditions for making an order were met.

Representation by lawyers and paid agents

See Fair Work Act ss.12 and 596, *Fair Work Commission Rules 2013* rr.11–12A

Related information

- Notification of 'acting for' a person
- What is representation?
- Exception – Conciliation conference by staff conciliator
- Representation – Not in a conference or hearing
- When will permission be granted?

Definitions

A ***lawyer*** is a person who is admitted to the legal profession by a Supreme Court of a state or territory.[150]

A ***paid agent*** is an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter before the Commission.[151]

Seeking permission

A person must seek the Commission's permission to be represented by a lawyer or paid agent participating in a conference or hearing in relation to an application to stop sexual harassment (subject to the exception below). Permission is not usually required for a lawyer or paid agent to make an application or submissions on a person's behalf.[152]

[150] Fair Work Act s.12.

[151] Fair Work Act s.12.

[152] Fair Work Act s.596(1) and *Fair Work Commission Rules 2013* rr.12(1)(b) and 12(3). See also s.596(4) as to when a person is taken not to be represented by a lawyer or paid agent.

Only a Commission Member can give or refuse permission for a lawyer or paid agent to represent a party, unless a Commission employee (such as a staff conciliator) has been delegated this power or function.[153]

Notification of 'acting for' a person

If a person wants to advise the Commission that a lawyer or paid agent acts for them in relation to a matter before the Commission, they must lodge a notice with the Commission.[154] The notice must be served on all parties to the matter.[155]

There are 2 ways in which a person (or a lawyer or paid agent acting for the person) can give notice that a lawyer or paid agent acts for them in relation to a matter before the Commission:

- they can give notice by identifying the lawyer or paid agent as the person's representative in an application or other approved Commission form that they lodge in the matter, or
- they can give notice by lodging a Form F53.[156]

The notice may serve to inform the Commission and other parties that the lawyer or paid agent needs to be copied into correspondence and documents lodged in the matter. It also puts the other parties on notice that costs are being incurred for which the other parties (or their lawyers or paid agents) could become liable if a costs order is made by the Commission.[157]

Meaning of 'act for' a person

In broad terms, a lawyer or paid agent **acts for** a person in relation to a matter before the Commission if they provide their professional services to the person in relation to the matter – for example:

- appearing as an advocate in a conference or hearing conducted by a Member of the Commission (or in a conciliation conference before a member of the staff of the Commission)
- preparing to appear as an advocate
- negotiating a settlement or compromise of the matter
- giving legal or other advice
- preparing or advising on documents (including applications, forms, affidavits, statutory declarations, witness statements, written submissions and appeal books) for use at a conference or hearing

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[153] *Department of Education and Early Childhood Development v A Whole New Approach Pty Ltd* [2011] FWA 8040 (Gooley C, 29 November 2011) at para. 67.
[154] *Fair Work Commission Rules 2013* r.11(1).
[155] *Fair Work Commission Rules 2013* Schedule 1.
[156] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 19.
[157] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 16.

- lodging documents with the Commission
- sending letters or emails to the Commission, another party or another lawyer or paid agent, or
- carrying out work incidental to any of the above.[158]

Link to form

- Form F53 – Notice that a person: (a) has a lawyer or paid agent; or (b) will seek permission for lawyer or paid agent to participate in a conference or hearing.

All forms are available on the Forms page of the Commission's website.

Ceasing to 'act for' a person

If a person has previously lodged a notice informing the Commission that a lawyer or paid agent is acting for them in relation to a matter before the Commission and the lawyer or paid agent ceases to act for them, the person must give the Commission notice of this.[159] The notice must also be served on all of the other parties to the matter.[160]

Link to form

- Form F54 – Notice that lawyer or paid agent has ceased to act for a person.

All forms are available on the Forms page of the Commission's website.

In-house counsel, union representatives and employer association representatives

A person **does not need to seek permission** to be represented by a lawyer or paid agent if the lawyer or paid agent is:

- an employee (or officer) of the person, or
- an employee (or officer) of any of the following, which is representing the person:
  - a union or employer association that is registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
  - an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
  - a peak council, or

[158] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 13.
[159] *Fair Work Commission Rules 2013* r.11(2).
[160] *Fair Work Commission Rules 2013* Schedule 1.

- a bargaining representative, or

- a bargaining representative.[161]

In these circumstances, the person is **taken not to be represented** by a lawyer or paid agent.[162]

Other support persons

Where a person wants to be represented by a person or organisation that is **not** a lawyer or paid agent as defined in the Fair Work Act, the Commission's permission is not required.[163]

What is representation?

The term '**representation**' is concerned with more than just advocacy at a hearing. A lawyer can be said to **represent** their client when they engage in a wide range of activities connected with litigation, not just advocacy.[164]

Barristers' conduct rules describe the work of a barrister in the following way: [165]

'Barristers' work consists of:

(a) appearing as an advocate;

(b) preparing to appear as an advocate;

(c) negotiating for a client with an opponent to compromise a case;

(d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;

(e) giving legal advice;

(f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;

(g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and

(h) such other work as is from time to time commonly carried out by barristers.'

This work is no different with respect to a solicitor.

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[161] Fair Work Act s.596(4).
[162] Fair Work Act s.596(4).
[163] *Cooper v Brisbane Bus Lines Pty Ltd* [2011] FWA 1400 (Simpson C, 3 March 2011) at para. 13.
[164] *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.
[165] Australian Bar Association's Barristers' Conduct Rules cited in *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34. See also r.11 of the *Legal Profession Uniform Conduct (Barristers) Rules* 2015, which is in the same terms.

Outside of the context of legal representation, a paid agent involved in proceedings before the Commission will typically engage in non-legal equivalents of most of the above categories of work and would be regarded as 'representing' their client in doing so.[166]

Meaning of 'representing' a person and 'participating' in a conference or hearing

Sections 596(1) and (2) of the Fair Work Act refer to a person being represented 'in a matter' before the Commission. The word 'matter' describes more than just a hearing; in a legal context it usually describes the whole situation that is brought before a court or tribunal.[167]

Section 596(1) also expressly provides that representation in a matter includes 'making an application or submission to the FWC on behalf of the person'.[168]

The meaning of **represent** in s.596 of the Fair Work Act and the *Fair Work Commission Rules 2013* is narrower than the meaning of **act for** a person. **Representing** a person generally means that the activity will involve some interaction with the Commission itself – for example:

- appearing as an advocate in a conference or hearing conducted by a Member of the Commission (or in a conciliation conference before a member of the staff of the Commission)
- participating in a conference or hearing other than as an advocate
- negotiating a settlement or compromise of the matter in a conciliation conference
- lodging written applications, responses, submissions and other documents with the Commission, or
- sending letters or emails to both the Commission and another party or lawyer or paid agent.[169]

Participating in a conference or hearing **includes:**

- appearing as an advocate of a person in the conference or hearing (or otherwise speaking on behalf of a person in the conference or hearing), and

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[166] *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.
[167] ibid. at para. 36.
[168] ibid. at para. 37.
[169] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 23. For Commission decisions that consider the nature of representation, see for example *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at paras. 34-35 and 52-53; *Kolobius v Uniting Church in Australia Property Trust (Q)* [2018] FWCFB 1057 (Hatcher VP, Spencer C, Hunt C, 16 February 2018) at para. 36; *Rodl v Qantas Airways Limited* [2018] FWCFB 6693 (Gostencnik DP, Bull DP, Bissett C, 30 October 2018) at para. 65.

- attending the conference or hearing and assisting a person to present their case without speaking on behalf of the person (such as by taking notes, providing documents or cataloguing exhibits for an advocate, or making suggestions to an advocate as how best to conduct the case).[170]

Representation – In a conference or hearing

A person must not be represented by a lawyer or paid agent participating in a conference or hearing relating to an application to stop sexual harassment without the permission of the Commission.[171]

This requirement for permission does not apply to lawyers and paid agents who are covered by s.596(4) of the Fair Work Act[172] or to the exception below, unless the Commission directs otherwise.

If a person proposes to be represented by a lawyer or paid agent participating in a conference or hearing in relation to an application to stop sexual harassment before the Commission and requires permission to be represented, the person must lodge a notice with the Commission informing the Commission that the person will seek the Commission's permission for a lawyer or paid agent to participate in the conference or hearing. [173]

Link to form

- Form F53 – Notice that a person: (a) has a lawyer or paid agent; or (b) will seek permission for lawyer or paid agent to participate in a conference or hearing.

All forms are available on the Forms page of the Commission's website.

Exception – Conciliation conference by staff conciliator

A person may, without the permission of the Commission, be represented in a matter by a lawyer or paid agent participating in a conciliation **conference conducted by a member of the staff of the Commission**, whether or not under delegation, in relation to an application for an order to stop sexual harassment.[174]

The exception does not permit a person to be represented by a lawyer or paid agent participating in a **conference before a Commission Member** in relation to an application under s.789FC of the Fair Work Act for an order to stop sexual harassment. A person **cannot be represented** by a lawyer or

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[170] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 24. See *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) and *Kolobius v Uniting Church in Australia Property Trust (Q)* [2018] FWCFB 1057 (Hatcher VP, Spencer C, Hunt C, 16 February 2018).

[171] *Fair Work Commission Rules 2013* r.12(1).

[172] *Fair Work Commission Rules 2013*, Note to r.12(1).

[173] *Fair Work Commission Rules 2013* r.12A(1). Rule 12A(2) provides that the Commission may permit a person to be represented by a lawyer or paid agent in a matter before the Commission even if the person fails to comply with r.12A(1).

[174] *Fair Work Commission Rules 2013* r.12(2)(b)(ii). Note, applications for orders to stop sexual harassment are currently only assigned to Members of the Commission.

paid agent in a conference before a Commission Member in relation to a s.789FC application without the permission of the Commission.[175]

Despite this exception (in relation to staff conciliation conferences), the Commission may direct that a person is not to be represented in a matter by a lawyer or paid agent except with the permission of the Commission.[176]

Representation – Not in a conference or hearing

A person may be represented by a lawyer or paid agent **other than** by them participating in a conference or hearing **without** the permission of the Commission.[177]

Under rule 12(1)(b) and s.596 of the Fair Work Act, apart from participating in a conference or hearing, a person's lawyer or paid agent can act for and represent the person without permission, unless the Commission directs otherwise.

For example, unless the Commission directs otherwise, the lawyer or paid agent can:

- prepare and lodge written applications, responses, submissions and other documents with the Commission, and
- correspond with the Commission and other parties.[178]

When will permission be granted?

The Commission can only give permission for a person to be represented by a lawyer or paid agent in a matter before the Commission if:

- it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter (complexity)[179]
- it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively (effectiveness),[180] or
- it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter (fairness).[181]

Each of these are separate reasons why the Commission might be satisfied that permission should be granted for a person to be represented. If the Commission is satisfied that permission should be

[175] *Fair Work Commission Rules 2013* r.12(4).
[176] *Fair Work Commission Rules 2013* r.12(3).
[178] Fair Work Commission Rules 2013 r.12(1)(b) and Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 27.
[179] Fair Work Act s.596(2)(a).
[180] Fair Work Act s.596(2)(b).
[181] Fair Work Act s.596(2)(c).

granted for one of these reasons, it is not necessary to also consider the other reasons given for seeking permission. Granting permission is discretionary and even if one of the reasons applies, permission may not be granted.[182]

Assessing whether permission should be granted under s.596 involves a 2-step process:

1. Assess whether one or more of the criteria in s.596(2) is satisfied. This involves making of an evaluative judgment akin to the exercise of a discretion.
2. If the first step is satisfied, consider whether in all of the circumstances, the discretion should be exercised in favour of the party seeking permission.[183]

In granting permission, the Commission will have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.[184]

The discretion afforded to the Commission will be exercised on the facts and circumstances of the particular case.[185]

The Commission is obliged to perform its functions and exercise its powers in a manner that is 'fair and just'.[186] In some cases it may not be fair and just for one party to be represented by a lawyer or paid agent when the other is not.[187]

A party might be required to represent themselves if the Commission is not satisfied permission should be granted for a lawyer or paid agent to appear for them.[188]

Where permission is required, the Commission must decide whether to grant permission before a party can be represented by a lawyer or paid agent, even if the other party has not objected to representation.[189]

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[182] *Kaur v Hartley Lifecare Incorporated* [2020] FWCFB 6434 (Hatcher VP, Mansini DP, McKinnon C, 1 December 2020) at para. 21.

[183] *Warrell v Fair Work Australia* [2013] FCA 291, 233 IR 335 (4 April 2013) at para. 24; *Asciano Services Pty Ltd v Hadfield* [2015] FWCFB 2618 (Hatcher VP, Sams DO, Lawrence DP, 21 April 2015) at para. 19; *Calleri v Swinburne University of Technology* [2017] FWCFB 4187 (Ross J, Colman DP, Cirkovic C, 28 August 2017) at para. 36, *Kaur v Hartley Lifecare Incorporated* [2020] FWCFB 6434 (Hatcher VP, Mansini DP, McKinnon C, 1 December 2020) at para. 21.

[184] Explanatory Memorandum to Fair Work Bill 2008 at para. 2296. Also see *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (Lewin C, 18 March 2011) at para. 41.

[185] *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (Harrison C, 9 October 2009) at para. 12.

[186] Fair Work Act s.577(a).

[187] *Warrell v Fair Work Australia* [2013] FCA 291 (4 April 2013) at para. 27.

[188] *Azzopardi v Serco Sodexo Defence Services Pty Limited* [2013] FWC 3405 (Cambridge C, 29 May 2013).

[189] *Viavattene v Health Care Australia* [2012] FWA 7407 (Booth C, 9 October 2012) at para. 4.

Partial representation may be permitted during examination-in-chief and cross-examination of the party seeking representation[190] or during argument about jurisdictional issues.[191]

Complexity

The complexity of a matter is relevant to whether a matter could be dealt with more efficiently if permission is granted for a person to be represented, but it is not determinative. While s.596(2)(a) of the Fair Work Act requires the complexity of the matter to be taken into account in deciding whether or not to grant permission to be represented, the issue to decide is whether the grant of permission would enable the matter to be dealt with more efficiently. [192]

A significant number of documents and wide-ranging issues does not necessarily mean a matter is complex.[193]

Jurisdictional issues are often complex and may require expertise in case law. However, even if there is a jurisdictional issue which needs to be determined, permission may be refused or limited to specific parts of a hearing.[194]

Effectiveness

Where a person would be unable to effectively represent themselves, permission for representation may be granted.[195] The test is not whether a person would be more effectively represented if permission was granted. The criterion to be satisfied is that 'it would be unfair not to allow the person to be represented because the person is unable to represent … itself effectively.' In considering whether the criterion is satisfied context is important, and the Commission will adhere to the language of s.596 rather than placing any unnecessary and unhelpful gloss on the words used.[196]

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[190] *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at para. 6.

[191] *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (Leary DP, 17 February 2010) at para. 31.

[192] See *Singh v Metro Trains Melbourne* [2015] FWCFB 3502 (Hatcher VP, Kovacic DP, Johns C, 5 June 2015) at para. 16 (point 2); *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 19.

[193] *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 (Catanzariti VP, Drake SDP, Riordan C, 4 May 2015) at para. 17.

[194] See for e.g. *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at paras 5–6.

[195] Fair Work Act s.596(2)(b).

[196] *Wellparks Holdings Pty Ltd t/as ERGT Australia v Govender* [2021] FWCFB 268 (Ross J, Masson DP, Wilson C, 20 January 2021) at paras. 66 and 67; *Grabovsky v United Protestant Association of NSW Ltd T/A UPA* [2018] FWCFB 4362 (Ross J, Asbury DP, Hampton C, 31 July 2018) at para. 54.

Examples

A circumstance where a person may be given permission to be represented is where the person is from a non-English speaking background or has difficulty reading or writing.[197]

Other circumstances where a person may be given permission to be represented are where the person:

- *is a minor*
- *has a disability which affects their capacity to effectively represent themselves*
- *is in a vulnerable setting, or*
- *is located overseas.*

Whether or not permission is granted will depend on the context of the matter before the Commission.

Fairness

Permission may be granted if it would be unfair to refuse permission taking into account the fairness between the parties to the matter.[198]

Example

A person may be given permission to be represented where one party to the matter is a small business with no human resources staff and the other is represented by a union.[199]

[197] Fair Work Act, Note (a) to s.596(2).
[198] Fair Work Act s.596(2)(c).
[199] Fair Work Act, Note (b) to s.596(2).

Case example: **Permission granted for representation – Complexity**[200]

Aly v Commonwealth Bank of Australia; Michelle Gentile; Russell Hayman [2015] FWC 3604 (Bissett C, 27 May 2015).

Facts

The employer submitted that it should be granted permission to be represented in part on the basis that it had a jurisdictional objection to the application. Specifically, the employer objected to the stop bullying application on the basis that it had engaged in reasonable management action carried out in a reasonable manner.

Outcome

The Commission was satisfied that there was a level of complexity given the range of issues raised by the applicant would 'require a level of unpacking of a number of incidents and assimilation of asserted facts and supporting evidence'. The Commission granted the employer permission to be represented (but noted that this was not a jurisdictional objection in the strict sense).

Relevance

The Commission was satisfied that the matter had a level of complexity, and that the matter would be dealt with more efficiently given this complexity if the employer had representation.

[200] See also *Pedler v The Commonwealth of Australia, represented by Centrelink* [2011] FWAFB 4909 (Watson VP, Ives DP, Bissett C, 1 August 2011) and *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (Leary DP, 17 February 2010).

Case example: **Permission granted for representation – Complexity – Fairness**[201]

Rollason v Austar Coal Mine Pty Limited [2010] FWA 4863 (Stanton C, 1 July 2010)

Facts

The employee was dismissed for alleged sexual harassment. The employee contended his dismissal was, in part, related to an application made to the Commission concerning a workplace right. The employee, who was represented by a union, objected to the employer being legally represented.

The employer submitted that it did not have specialist human resources or other staff equipped with legal, industrial relations or advocacy skills to effectively represent itself in the proceedings, and its Human Resources Coordinator was on maternity leave and in any event had no advocacy training or experience before courts or tribunals.

Outcome

The Commission held that the relevant factual matrix was sufficiently complex that legal representation would assist in its effective and efficient resolution. The union's advocate, although not legally qualified, was highly experienced. Permission for the employer to be legally represented was granted.

Relevance

The union advocate had over 20 years' experience across a wide range of industrial issues, including unfair dismissal proceedings within the coal industry. The Commission found it would not have been fair for the employer to be unrepresented given the complexity of the matter and the experience of the employee's representative.

[201] See also *Wesslink v Walker Australia Pty Ltd T/as Tenneco* [2011] FWA 2267 (Hampton C, 21 April 2011) (complexity and fairness) and *Rahman v Storm International Pty Ltd T/A Storm International Property Maintenance* [2011] FWA 7583 (Cambridge C, 4 November 2011) (fairness).

Case example: **Permission granted for representation – Complexity - Fairness**

Singh v Metro Trains Melbourne [2015] FWCFB 3502 (Hatcher VP, Kovacic DP, Johns C, 5 June 2015)

Facts

Ms Singh's unfair dismissal application was listed for determinative conference and the respondent was granted permission to be legally represented at the conference. Ms Singh appealed this decision.

Outcome

The Full Bench refused permission to appeal. The Full Bench held that the appellant's argument that the case was not complex did not address whether the granting of permission would enable matter to be dealt with more efficiently.

The Bench also held that no manifest injustice or unfairness arose from the decision to grant the respondent permission to be legally represented. Having seen and heard Ms Singh during the appeal hearing, the Full Bench was satisfied that she was a person capable of articulating her case, and the greater procedural informality of a determinative conference (compared to a Commission hearing) would significantly reduce any disadvantage perceived by Ms Singh. If Ms Singh had any difficulty in understanding any legal question which arose, the Commission could intervene as appropriate.

Relevance

While s.596(2)(a) of the Fair Work Act requires the complexity of the matter to be taken into account in deciding whether or not to grant permission to be represented, the real issue under s.596(2)(a) is whether the grant of permission would enable the matter to be dealt with more efficiently.

There will be circumstances where permission for legal representation may enable a matter to be dealt with more efficiently even though it is not particularly complex; for example, an appeal may be dealt with more efficiently by granting permission to allow the legal representatives who appeared in the matter at first instance to also appear in the appeal.

Case example: **Permission granted for representation – Complexity - Efficiency**

Vassallo v Easitag P/L [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021)

Facts

Mr Vassallo initially filed a claim with the Commission that he had been misclassified under the applicable modern award, which was rejected in November 2017. Mr Vassallo was refused permission to appeal that decision (First Appeal) and then filed an underpayment claim in the Federal Court which was dismissed. Subsequent applications to the Commission were dismissed, including an application under s.603 of the Fair Work Act to have the Commission's 2017 decision varied or revoked.

In March 2021, a Full Bench refused Mr Vassallo permission to appeal the dismissal of his s.603 application (Second Appeal). Easitag P/L (Easitag) made an application for an order that Mr Vassallo pay its costs in relation to the unsuccessful Second Appeal.

Outcome

In deciding to grant Easitag's application for indemnity costs in relation to the Second Appeal, the Full Bench noted that Easitag had successfully applied under s.596(2)(a) for permission to be represented in the Second Appeal, despite the fact that it was not legally complex.

The Full Bench held that there is no contradiction in this – s.596(2)(a) is engaged if granting permission for representation would enable the matter to be dealt with more efficiently, *taking into account* the complexity of the matter.

Relevance

The presence of complexity is not required in order for s.596(2)(a) of the Fair Work Act to be engaged. In a case with a long history involving serial applications, granting representation to a respondent to be represented by a lawyer or paid agent may offer the Commission various benefits tending to promote the efficient conduct of the proceeding, irrespective of the absence of complexity. These benefits, including perspective, brevity, and concision in the presentation of facts and argument, may be such as to warrant the grant of permission under s.596(2)(a). In some cases, it may also be patently unfair to deny representation to a party that is a respondent to serial unmeritorious claims (see s.596(2)(c)).

Case example: **Permission granted for representation – Efficiency**

Venn v The Salvation Army T/A Barrington Lodge [2010] FWA 912 (Leary DP, 9 February 2010).

Facts

The employee opposed permission for the employer to be legally represented because the employee was unrepresented and the employer could be represented by its Human Resources Officer. However, the employee had obtained a restraining order against the Human Resources Officer, who was going to be a witness in the matter. The employer had no-one else capable of presenting its case.

The employee was represented by a very experienced HR professional experienced in advocacy who had represented the employee in other matters.

Outcome

Permission for legal representation was granted to both parties. The Commission was satisfied that the employer did not have a person able to present its case, and even if the Human Resources Officer was capable, it would be difficult for her to be both advocate and witness.

Relevance

In this matter, the employee did not wish to participate in a conciliation conference and wished to proceed directly to hearing, accordingly the hearing would be the first time any issues related to the substantive claim would be addressed. Legal representation would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

Case example: **Permission NOT granted for representation – Employer of a considerable size with adequate HR support**[202]

Application by EK [2017] FWC 3448 (Simpson C, 4 July 2017).

Facts

This matter involved an application to stop bullying against 2 persons named who were alleged to have bullied the applicant at work. Both the applicant and the 2 persons named were employed by the same employer. The employer advised that it was representing itself and the 2 persons named in the matter.

After the Commission dismissed an application by the employer to dismiss the stop bullying application, the employer advised it was intending to seek leave to be legally represented.

The applicant submitted that she was relying on the support of her daughter, who, like herself, did not have any legal, human resources, industrial relations or university qualifications. She submitted she would be at a significant disadvantage if legal representation was granted for the employer and the 2 persons named.

Outcome

The employer appeared in the matter and relied on its internal human resources staff, using their expertise to support the 2 persons named in refuting the applicant's allegations. The Commission concluded that it would not be unfair to refuse the application by the employer and the 2 persons named to be represented, taking into account fairness between the parties. The application for legal representation was refused.

Relevance

The persons named in this matter received the support of the employer's human resources staff and as a result were at somewhat of an advantage over the applicant. To grant the employer and the persons named legal representation would lead to a further imbalance between the parties.

[202] See also *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 (Catanzariti VP, Drake SDP, Riordan C, 4 May 2015) (complexity), *Bowley v Trimatic Management Services Pty Ltd T/A TSA Telco Group* [2013] FWC 1320 (Steel C, 1 March 2013) (complexity), *Hamilton v Carter Holt Harvey Wood Products Australia Pty Ltd* [2012] FWA 5219 (Bartel DP, 19 June 2012) (complexity) and *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (Harrison C, 9 October 2009) (complexity); *Lekos v Zoological Parks and Gardens Board T/A Zoos Victoria* [2011] FWA 1520 (Lewin C, 18 March 2011) (complexity and fairness).

Rescheduling or adjourning matters

Parties to matters before the Commission may apply to have the matter adjourned.

Parties should not assume that an adjournment will be granted.[203] The principles in relation to adjourning (or staying) proceedings are as follows:

- a party to a matter before the Commission has a right to expect that the matter will be determined quickly
- serious consideration needs to be given before any action interferes with this right
- the party who applies for the adjournment must demonstrate that it is necessary to the satisfaction of the Commission
- a party is not automatically entitled to an adjournment because they are involved in a criminal hearing, and
- an application for an adjournment must be determined on its own merits.[204]

The Commission's task is a 'balancing of justice between the parties' taking all relevant factors into account.[205]

The consideration of an application for adjournment of a matter requires the exercise of a discretion. The overarching objective must always be the just resolution of the real issues in dispute with minimum delay and expense. Regard must be given to ensuring that the applicant for the adjournment is afforded a fair and reasonable opportunity to advance their case, and that any adjournment does not cause undue prejudice to the other party.[206]

However, the interests of the parties are not the only considerations. The Commission is an institution which is required to deal with a very large number of matters, and s.577 of the Fair Work Act provides that the Commission must perform its functions and exercise its powers fairly, justly and quickly.[207]

Specific provisions of the Fair Work Act require the Commission to start dealing with particular types of matters in defined timeframes (for example, in relation to applications for orders to stop sexual harassment, s.789FE(1)). Therefore the grant of adjournments and the associated loss of valuable

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[203] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 26.
[204] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 31; summarising the relevant principles from *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982), applied in *Mr Kevin Boyce v Scott Corporation Limited T/A Bulktrans* [2016] FWC 594 (Saunders C, 12 February 2016) at para. 10.
[205] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 28; citing *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982).
[206] *Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others* [2019] FWCFB 1093 (Hatcher VP, Sams DP, Hampton C, 19 February 2019) at para. 18.
[207] ibid.

hearing days may prejudice the Commission's capacity to promptly deal with matters. For this reason, when a matter has been programmed for hearing in a way which affords parties a proper opportunity to advance their cases within reasonable timeframes, an adjournment would not readily be granted.[208]

Examples of where a request for an adjournment may be granted include:

- where illness of the applicant or a significant person in the respondent's business or a witness would prevent them from attending a proceeding – a medical certificate or other relevant evidence may be required of the requesting party to substantiate the request
- unavailability of a representative for reasons beyond their control
- a significant life event affecting a conference or hearing participant, or
- where the applicant, a significant person in the respondent's business, a witness or a representative will be interstate or overseas and the travel was booked before the application was listed for hearing – the Commission may ask for proof that the booking was made prior to the matter being listed for hearing.

The other party (or parties) will usually be asked to comment on an adjournment request before a decision is made by the Commission. This may mean that documents providing in support of an adjournment request are shared with other people involved in the matter. Concerns about the disclosure of personal or private information should be brought to the attention of the Commission before this happens so that they can be dealt with before the information is shared.

Uncontested applications

The Commission attempts to make regular contact with parties to an application under Part 6-4B for an order to stop sexual harassment. If a party does not respond to the Commission's notices or directions the application may still be dealt with, including by holding a hearing and making a decision. Any orders made by the Commission in an uncontested application are legally binding and enforceable.[209]

[208] ibid. See generally *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009).
[209] See, for example, *Antonarakis v Logan City Electrical Service Division Pty Ltd* [2017] FWC 3801 (Simpson C, 21 July 2017) and *Amanpreet Kaur v The Trustee for Mehtaab Family Trust T/A Paint Splash* [2021] FWC 3343 (Lee C, 23 June 2021).

Bias

A Commission Member should not hear a case if there are reasonable grounds for apprehending that they are, or will be seen to be, biased.[210]

The test for reasonable apprehension of bias is that a fair-minded lay observer might reasonably apprehend that the Member might not bring an impartial and unprejudiced mind to resolution of the question they are required to decide

The question of a reasonable apprehension of bias is a difficult one involving matters 'of degree and particular circumstances [which] may strike different minds in different ways'.[211]

A reasonable apprehension of bias involves deciding whether a 'fair-minded lay observer' would reasonably apprehend that the decision-maker would not decide a case impartially and without prejudice.[212] Bias does not mean simply that a decision-maker considers one party's case not to be strong, or decides a case adversely to one party.[213]

Reasonable apprehension of bias may arise in the following 4 (sometimes overlapping) ways:

- if a Commission Member has some direct or indirect interest in the case, financial or otherwise
- if a Commission Member has published statements or acted in a way that gives rise to a reasonable apprehension of prejudice
- if the Commission Member has some direct or indirect relationship, experience or contact with anyone involved in the case, and
- if the Commission Member has some knowledge of extraneous information, which cannot be used in the case, however would be seen as detrimental.[214]

While it is important that justice must be seen to be done, it is of equal importance that Commission Members discharge their duty to hear and decide matters and do not, by agreeing too readily to suggestions of appearance of bias, encourage parties to believe that by seeking their disqualification

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[210] *R v Watson; Ex parte Armstrong* [1976] HCA 39 (3 August 1976), [(1976) 136 CLR 248; (1976) 9 ALR 551, 561–565]; cited in *Livesey v New South Wales Bar Association* [1983] HCA 17 (20 May 1983) at para. 7, [(1983) 151 CLR 288, 293–294].

[211] *Livesey v New South Wales Bar Association* [1983] HCA 17 (20 May 1983) at para. 8, [(1983) 151 CLR 288]; citing *R v Shaw; Ex parte Shaw* (1980) 55 ALJR 12 (14 November 1980) at p. 16 (Aickin J).

[212] *Dain v Bradley & Grant* [2012] FWA 9029 (Booth DP, 29 October 2012) at para. 14; citing *British American Tobacco Australia Services Limited v Laurie* [2011] HCA 2 (9 February 2011) at para. 104.

[213] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 352].

[214] *Webb v The Queen* [1994] HCA 30 (30 June 1994), [(1994) 181 CLR 41, 74]; see also *Construction, Forestry, Maritime, Mining and Energy Union v Watpac Construction Pty Ltd T/A Watpac Construction* [2019] FWCFB 3855 (Hamberger SDP, Gostencnik DP, Saunders DP, 4 June 2019).

they will have their case heard by someone thought to be more likely to decide the case in their favour.[215]

Expression of a view or prejudgment

In deciding whether a Commission Member should be disqualified for the appearance of bias, the Member (or a Full Bench on appeal) will consider whether a reasonable and fair-minded person might anticipate that the Commission member might approach the matter with a partial or prejudiced mind.[216]

The question is not whether the decision-maker's mind was blank, but whether their mind was open to persuasion.[217]

The expression of a provisional view on a particular issue, or warning parties of the outcome of a provisional view, is usually entirely consistent with procedural fairness.[218]

Prior relationship

Generally, a Commission Member will not be disqualified in circumstances where it is found that the Member, before being appointed as a Member, gave legal advice or represented a person who now appears before them as a party in their capacity as a Member.[219] However, the Member should not hear a matter if the Member:

- is determining the correctness of advice they gave to a party in their role as a legal representative
- recommended a course of conduct to a party in their role as a legal representative and the legality, reasonableness or wisdom of that conduct is to be determined, or
- is determining the quality of the advice they gave while they were the legal representative of one of the parties.[220]

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[215] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), per Mason J [(1986) 161 CLR 342, at p. 352].
[216] *Johnson v Johnson* [2000] HCA 48 (7 September 2000) at para. 11, [(2000) 201 CLR 488].
[217] *The Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 (29 March 2001) at para. 71, [(2001) 205 CLR 507].
[218] *Oram v Derby Gem Pty Ltd* PR946375 (AIRCFB, Lawler VP, Kaufman SDP, Blair C, 22 July 2004) at para. 110, [(2004) 134 IR 379]. See also *Bienstein v Bienstein* (2003) 195 ALR 225 at 232, where the High Court held: 'This court held in *Re Keely; Ex parte Ansett Transport Industries* [(1990) 94 ALR 1] that the expression by a judge of tentative views during the course of argument as to matters on which the parties are permitted to address full argument manifests no partiality or bias. This approach has been confirmed and applied in many cases.' (endnotes omitted)
[219] *Re Polites; Ex parte Hoyts Corporation Pty Ltd* [1991] HCA 25 (20 June 1991) at para. 10, [(1991) 173 CLR 78].
[220] ibid.

Extraneous information

Commission Members can draw upon the specialist expertise they bring to the Commission or their general knowledge as members of the community in dealing with Commission matters. However, a Commission Member should disclose any independent knowledge of factual matters that affect or may affect the decision to be made.[221]

A central element of the justice system is that a judge (or Commission Member) should determine the case based on the evidence and arguments presented.[222] A judge (or Commission Member) should not take into account, or indeed receive, secret or private representations from a party or from a stranger about the case they are to decide.[223]

[221] *Re Media, Entertainment and Arts Alliance and Theatre Managers' Association; Ex parte Hoyts Corporation Pty Ltd (No 2)* [1994] HCA 66 (9 February 1994) at para. 12, [(1994) 119 ALR 206].
[222] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 350].
[223] *Regional Express Holdings Ltd, Png Yeow Tat, Mark Burgess and Maree Penglis v Stephen Hanson* [2021] FWCFB 2755 (Hatcher VP, Gostencnik DP, Bissett C, 14 May 2021) at para. 51.

Case example: **Apprehension of bias – Expression of a view or prejudgment**

Gaynor King [2018] FWC 3300 (Bissett C, 8 June 2018).

Facts

Three applicants made applications to the Commission for an order to stop bullying, naming Ms King as the person who had engaged in the conduct. Following 2 conciliation conferences before the Commission, the applicants discontinued their applications. Ms King made an application for costs against the applicants. Commissioner Bissett made a decision in relation to that application, dismissing the application for costs.

At the same time as the costs application, Ms King also made an application to the Commission for orders to stop bullying. She named the 3 initial applicants as those who had engaged in bullying conduct directed towards her, which included making the initial applications for orders to stop bullying.

Ms King's application for orders to stop bullying was subject to conciliation before Commissioner Bissett, where it did not settle. Directions were then issued for filing submissions and evidence in the matter. United Voice, representing the initial applicants (now respondents) requested that Commissioner Bissett recuse herself from further dealing with the application because of comments made by the Commissioner in the costs decision.

Outcome

Commissioner Bissett considered the passages from the costs decision issued by her in relation to the applications of the initial applicants. In that decision, the Commissioner made findings with respect to the motivations of the 3 in making their applications for orders to stop bullying. The Commissioner found that the applications harassed and embarrassed Ms King, were made vexatiously, sought to intimidate and had far-reaching consequences.

The Commissioner was satisfied that she expressed views in that decision that may lead a lay observer to apprehend that she may not bring an impartial mind to the determination of the application by Ms King. Accordingly, Commissioner Bissett recused herself from hearing Ms King's application for orders to stop bullying.

Relevance

Any person making application to the Commission is entitled to a fair hearing and to have their case determined on its merits. The application by Ms King was inextricably tied up with the earlier applications for orders to stop bullying and the costs application. In order to ensure that everyone, including Ms King, was fairly heard, the Commissioner was satisfied that she should recuse herself.

Part 9 – Evidence

See Fair Work Act ss.590 and 591

Section 590 of the Fair Work Act outlines the ways in which the Commission may inform itself including by:

- requiring a person to attend the Commission
- requiring written and oral submissions
- requiring a person to provide copies of documents
- taking evidence under oath or affirmation
- conducting inquiries or undertaking research, or
- holding a conference or a hearing.

Section 591 of the Fair Work Act states that the Commission is not bound by the rules of evidence and procedure (whether or not the Commission holds a hearing).

Instead, the rules of evidence 'provide general guidance as to the manner in which the Commission chooses to inform itself'.[224]

Commission Members are expected to act judicially and in accordance with 'notions of procedural fairness and impartiality'.[225]

Commission Members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.[226]

[224] *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847 (Lawler VP, Hamberger SDP, Gay C, 17 June 2011) at para. 28, [(2011) 209 IR 1]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* PR948938 (AIRCFB, Ross VP, Duncan SDP, Bacon C, 12 July 2004) at paras 47–50, [(2004) 143 IR 354].
[225] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 25, [(2011) 192 FCR 78]; Fair Work Commission, 'Member Code of Conduct' (2 July 2021), at pp. 4 and 8.
[226] ibid.

Case example: **Following rules of evidence – Employer used illegally obtained evidence for allegation of theft**

Walker v Mittagong Sands Pty Ltd T/A Cowra Quartz [2010] FWA 9440 (Thatcher C, 8 December 2010).

Facts

The employee was accused of stealing oil from the employer. After becoming suspicious that the theft had occurred, the employer searched for and took samples of oil from the employee's vehicle, without the employee's authority, in order to have it tested. Mr Walker made an unfair dismissal claim, in which he submitted that he had not stolen the oil, and that the evidence of the oil sample should not be admitted.

Outcome

While s.591 of the Fair Work Act provides that the Commission is not bound by the rules of evidence it does not mean that such rules are irrelevant.

The Commission was guided by s.138 of the *Evidence Act 1995* (Cth) in deciding whether to exclude the evidence. Having found that the evidence was unlawfully obtained or in consequence of evidence that was unlawfully obtained, the Commission considered whether the desirability of admitting the evidence outweighed the undesirability of admitting such evidence.

The Commission exercised its discretion to exclude the evidence.

Relevance

After taking all of the circumstances into consideration, including giving appropriate weight to the factors in s.138(3), the Commission held that the undesirability of admitting the evidence outweighed the desirability of admitting the evidence.

While the power to admit or exclude challenged evidence is discretionary, that discretion must be exercised judicially in the interests of justice. The interests of justice are not confined to the interests of the parties but extend to include the broader public interest in the proper administration of justice.

Privilege against self-incrimination

Witnesses have a right not to produce documents, or answer questions they are asked during a Commission proceeding, on the grounds of self-incrimination. The test is whether there is a real and appreciable danger of the person being convicted of an offence if they answer the question. If the test is met, the person can choose not to answer the question.

This is important because a person can be required by the Commission to attend before the Commission and answer a question or produce specific documents. Ordinarily, if a person refuses or fails to answer the question or produce the documents, they commit an offence with a penalty of imprisonment.[227]However, if a person has a reasonable excuse not to answer the question or provide the document, they are not required to do so.[228]

The privilege against self-incrimination could provide a reasonable excuse for not answering a question or producing a document. If the privilege applies, because the person believes on reasonable grounds that their evidence will tend to prove that they have committed an offence, they are not required to answer that question where there is a 'real and appreciable danger of conviction'.[229]

The privilege against self-incrimination is a substantive common law right and is available in both judicial and non-judicial proceedings, including in proceedings before the Commission.[230]

The *Evidence Act 1995* (Cth) specifies how a federal court must deal with potential self-incrimination. Under s.128 of that Act, a witness in court proceedings may object to giving evidence on the grounds that the evidence may tend to prove that the witness has either committed an offence under an Australian or foreign law or is liable to a civil penalty. If the court determines that there are reasonable grounds for the objection, the court must inform the witness that:

a) the witness need not give evidence unless required; and
b) the court will give the witness a certificate if the witness willingly gives the evidence, or if the witness gives the evidence after being required to do so by the court.

The certificate prevents the evidence, and any evidence obtained as a direct or indirect consequence, from being used against the witness in any proceedings in an Australian court.

The protection extends only to evidence given under compulsion. The Federal Court has held that when a witness who is a party to the proceedings is being asked questions by their own legal

[227] Fair Work Act s.677(3).
[228] Fair Work Act s.677(4).
[229] *Sorby v Commonwealth* [1983] HCA 10 (18 March 1983) at para. 11, [(1983) 152 CLR 281].
[230] ibid at 309; *Reid v Howard* [1995] HCA 40 (6 December 1995), [(1995) 184 CLR 1] See also *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 (9 May 2007), para.77.

representative (whether in evidence in chief or re-examination) the witness is not under any compulsion to give the evidence and therefore cannot 'object' under s.128.[231]

The Commission is not bound by the rules of evidence or the *Evidence Act 1995*, but these provide general guidance as to the manner in which the Commission informs itself.

Where a person relies on the privilege against self-incrimination, the Commission cannot draw an adverse inference from failure to give the particular evidence. This means the Commission cannot assume the witness did not provide the evidence or the document only because it would have harmed their case before the Commission.

The Commission still needs to determine the application based upon the evidence that is before it. The decision will be made without the evidence the witness might otherwise have given if they had not relied on the privilege against self-incrimination.

Whether a matter before the Commission will be adjourned or otherwise delayed because one or more witnesses may assert a privilege against self-incrimination was considered by a Full Bench of the Commission in *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar*.[232] The Full Bench confirmed that *McMahon v Gould*[233] sets down non-exhaustive guidelines and that it is necessary for the Commission to determine what justice requires in the circumstances.[234]

A corporate entity does not have a privilege against self-incrimination.[235]

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[231] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] FCAFC 4 (30 January 2018).

[232] *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar* [2018] FWCFB 1255 (Ross J, Binet DP, Platt C, 5 March 2018).

[233] *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982).

[234] *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar* [2018] FWCFB 1255 (Ross J, Binet DP, Platt C, 5 March 2018) at para. 49.

[235] *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74 (24 December 1993), [(1993). 178 CLR 477]. While companies are not entitled to claim the privilege against self-incrimination, company directors can claim the privilege where a disclosure would tend to make them personally liable.

Part 10 – What are the outcomes?

Conciliated outcomes

Most matters in the Commission are resolved through conciliation by the parties voluntarily agreeing to an outcome to settle the matter.

Outcomes negotiated at the conciliation of applications for orders to stop sexual harassment depend on the interests of the parties and can include things like:

- changes in work arrangements, including in lines of reporting
- an apology
- a reference or statement of service (if the employment relationship has ended)
- commitments by the employer or principal to:
  - investigate a complaint or engage an external investigator
  - provide training for staff on sexual harassment, discrimination and other relevant matters
  - review and update its policies and procedures
  - be more transparent in reporting complaints about sexual harassment
  - conduct a safety risk assessment for the workplace
- sharing information
- the applicant withdrawing the complaint.

Orders to stop sexual harassment at work

See Fair Work Act s.789FF

If a worker has made an application under s.789FC of the Fair Work Act and the Commission is satisfied that the worker has been sexually harassed at work by one or more individuals and there is a risk that this will continue, then the Commission may make an order to prevent the worker from being sexually harassed at work.[236]

The Commission can make any order it considers appropriate (**other than** an order requiring payment of money) to prevent the worker from being sexually harassed at work by the individual or individuals.[237]

Where a finding of sexual harassment is made and there is some future risk, orders to stop the sexual harassment would usually follow. Such orders would, in appropriate cases, aim to establish a suitable basis for a future mutually safe and constructive working relationship.[238]

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[236] Fair Work Act s.789FF(1).

[237] Fair Work Act ss.789FF(1)(c), (d) and (e).

[238] See *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para. 50.

The laws to stop sexual harassment are directed at preventing workers being sexually harassed at work. They are not directed at punishing bad behaviour (although they may have a deterrent effect) or compensating the victims of such behaviour. Their primary aim is to protect workers from future harm, and the focus is on resolving the matter and enabling normal working relationships to resume.[239]

Orders are not available in cases where the Commission finds that there is no risk of sexual harassment occurring again, which may be the case, for example, when the person who harassed the worker is no longer connected to the workplace.[240]

Related information

- Part 6 – Risk of continued sexual harassment

Who can an order be made against?

Section 789FF of the Fair Work Act does not limit the persons against whom orders can be made. The Commission may make orders directed to the behaviour of individuals found to have engaged in sexual harassment as well as their respective employer(s)/principal(s). As noted in the Explanatory Statement to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021:

> The existing jurisprudence, which will continue to be relevant in relation to the modified jurisdiction, provides that orders can apply to a broad range of persons, most obviously co-workers but also employers and visitors to the workplace where appropriate.[241]

Where the parties agree that orders should be made and the Commission is satisfied that sexual harassment has taken place, and there is a risk of further sexual harassment, consent orders may be issued by the Commission.

What can be ordered

Under preserved Part 6-4B, the Commission has wide powers to make orders to stop sexual harassment, but it cannot order the payment of money. The Commission can include any terms in an order that it considers appropriate to prevent the worker from being sexually harassed at work.[242]

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[239] See Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 120 regarding proposed clause 789FF – FWC may make orders to stop bullying; Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 50, and see *Re Ms McInnes* [2014] FWCFB 1440 (Ross J, Hatcher VP, Hampton C, 6 March 2014) at para. 9.

[240] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 47.

[241] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para. 48.

[242] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 48.

The Commission's powers must be informed by, but are not necessarily limited to, the sexual harassment found to have occurred. Orders must be directed towards the prevention of the worker being sexually harassed at work in the future by the individual or individuals concerned, be based upon appropriate findings, and have regard to the considerations established by s.789FF(2) of the Fair Work Act.[243]

The range of orders that the Commission may make includes orders requiring:

- changes in working arrangements
- one or more individuals to stop specified behaviour
- regular monitoring of behaviours by an employer
- compliance with an employer's policy
- the provision of information and additional support and training to workers
- conduct a safety risk assessment for the workplace, and
- a review of the employer's workplace policies.[244]

The orders that are made depend on the facts and circumstances of the case. The Commission may also make orders that go to the broader conduct within, and culture of, a workplace. These could include the establishment and implementation of appropriate policies, procedures and training.[245]

Examples of orders the Commission has made in response to applications for orders to stop bullying (which provide insight into the type of orders that the Commission might make to stop sexual harassment) include:

1. orders that individual parties:

- not make contact with each other
- only make contact via email during specific times
- not attend certain premises
- not denigrate or humiliate one another,
- behave in a way that is reasonable and professional
- not deliberately or unreasonably delay the performance of work

[243] *Churches and Others v Jackson and Woods* [2016] FWCFB 2367 (O'Callaghan SDP, Clancy DP, Hampton C, 14 April 2016) at para 32.
[244] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 121.
[245] *Re Ms LP* [2015] FWC 6602 (Hampton C, 4 November 2015) at para. 194; see also *CF and NW* [2015] FWC 5272 (Hampton C, 5 August 2015) at paras 31–34.

- refrain from making written and/or oral statements to each other or others that are abusive, offensive, or disparaging;

2. orders for companies:

- to provide all staff with additional training on appropriate workplace behaviour
- to ensure they have in place updated 'anti-bullying' policies and complaints handling procedures
- to commission specific training for management personnel who will be investigating complaints about workplace bullying
- to implement, and actively monitor, the effectiveness of control measures identified in risk assessments, or
- to arrange for a Work Safe inspector to attend meetings with parties.[246]

The Commission has also observed, in the context of an application to stop bullying, that physical and/or functional separation in the workplace of a person who has alleged that they have been bullied, and those said to have engaged in bullying conduct is one way of preventing future bullying, although it may be a last resort where other practical measures will not be effective.[247]

If an applicant is suffering from a medical condition that prevents their return to the workplace without some appropriate modifications, the Commission may consider such measures in an order.[248]

What cannot be ordered – reinstatement and the payment of money

The Commission cannot order reinstatement or the payment of compensation or another amount of money.[249]

Section 789FF(1) of the Fair Work Act does not prevent the Commission from making an order that would require some financial expenditure on the part of the employer to give effect to the order.[250]

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[246] For examples see *Applicant v Company A Pty Ltd; Company B Pty Ltd; and Third Respondent* PR555521 (Williams C, 15 September 2014); *CF and NW* PR569997 (Hampton C, 30 July 2015); *Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston and Others* PR573139 (Wells DP, 23 October 2015); *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* PR574247 (Gostencnik DP, 26 November 2015).

[247] *South Eastern Sydney Local Health District v Lal* [2019] FWCFB 1475 (Hatcher VP, Sams DP, Hampton C, 7 March 2019) at para. 24.

[248] *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 168.

[249] Fair Work Act s.789FF(1) and Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 120, in relation to the Commission's workplace bullying jurisdiction. See also *Application by Chopra* [2020] FWC 3491 (Clancy DP, 2 July 2020) at para. 69(i).

[250] See *South Eastern Sydney Local Health District v Lal* [2019] FWCFB 1475 (Hatcher VP, Sams DP, Hampton C, 7 March 2019) at para. 27.

An order which has the effect of requiring the continuation of the payment of normal wages for work performed in the context of a continuing employment relationship does not fall within the exclusion in s.789FF(1) of the Fair Work Act.[251]

A person who has been sexually harassed at work and seeks compensation may be eligible to make a claim in another jurisdiction, such as to the AHRC or an anti-discrimination body in their state or territory. Information about those jurisdictions; how to make a complaint and what remedies are available can be found on their respective websites. [252]

Where the sexual harassment at work occurred or formed part of a course of conduct that commenced before 6 March 2023, a person cannot seek compensation under the Commission's sexual harassment disputes jurisdiction in new Part 3-5A of the Fair Work Act.

Workplace Advice Service

The Workplace Advice Service is a free legal assistance program facilitated by the Commission for eligible employees and employers who have a concern or enquiry regarding dismissal, general protections or workplace bullying or sexual harassment.

The Commission's role is to connect eligible persons with lawyers who may be able to help them. These lawyers work at law firms and other legal organisations that are completely independent of the Commission. The eligibility quiz on the Commission's website helps employers and employees to find out if they are eligible for the service.

Other legal help

You can find a community legal centre in your area by searching the Community Legal Centres website. The 'Where to get legal help' page of Commission's website includes contact details for some of the main community legal centres in each state and territory who may be able to assist with free legal advice or other advisory services.

The law institutes or law societies in each state or territory may be able to refer a party to a private solicitor who specialises in workplace law.

Unions and employer organisations may also be able to provide advice and assistance.

[251] ibid.

[252] Australian Human Rights Commission (humanrights.gov.au); ACT Human Rights Commission (hrc.act.gov.au); Anti-Discrimination Board of NSW (antidiscrimination.justice.nsw.gov.au); Equal Opportunity Commission South Australia (eoc.sa.gov.au); Equal Opportunity Tasmania (equalopportunity.tas.gov.au); Equal Opportunity Commission Western Australia (eoc.wa.gov.au), Northern Territory Anti-Discrimination Commission (https://adc.nt.gov.au/); Queensland Human Rights Commission (qhrc.qld.gov.au) and Victorian Equal Opportunity and Human Rights Commission (www.humanrights.vic.gov.au).

Considerations

When considering the terms of an order to prevent further sexual harassment at work, the Commission must, to the extent that it is aware, take into account:

- any final or interim outcomes arising out of an investigation into the matter that is being undertaken by another person or body
- any procedures available to the worker to resolve grievances or disputes
- any final or interim outcomes arising out of any procedures available to the worker for resolving grievances or disputes, and
- any matters that the Commission considers relevant.[253]

By taking into account these factors, the Commission can frame the order in a way that has regard to compliance action being taken by the employer or a health and safety regulator or another body, to ensure consistency with those actions.[254]

Outcomes arising from investigations by another person or body

A worker who has made an application to the Commission for an order to stop sexual harassment can also seek intervention by a WHS regulator under the WHS Act or the corresponding state or territory WHS laws.[255] WHS regulators may respond to complaints in a number of ways consistent with their own internal policies. Regulators may send inspectors to workplaces to investigate incidents, issuing prohibition or improvement notices, seeking enforceable undertakings or prosecuting alleged offences against WHS laws.

Workplace sexual harassment which involves criminal behaviour may also be the subject of a complaint to, and investigation by the police.

Any outcomes arising from an investigation by such a person or body, that the Commission is aware of, must be taken into account by the Commission when making orders.[256]

The AHRC and anti-discrimination bodies in the states and territories can also deal with complaints about sexual harassment (depending on matters including where the conduct occurred). Information about each of those bodies is available on their websites.[257]

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[253] Fair Work Act s.789FF(2).
[254] See revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 123.
[255] Fair Work Act s.789FH.
[256] Fair Work Act s.789FF(2)(a).
[257] Australian Human Rights Commission (humanrights.gov.au); ACT Human Rights Commission (hrc.act.gov.au); Anti-Discrimination Board of NSW (antidiscrimination.justice.nsw.gov.au); Equal Opportunity Commission South Australia (eoc.sa.gov.au); Equal Opportunity Tasmania (equalopportunity.tas.gov.au); Equal Opportunity Commission Western Australia (eoc.wa.gov.au), Northern Territory Anti-Discrimination

Case example: **Outcome arising from an investigation by another person or body considered**

Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014).

Facts

The applicant managed a team of employees. It was alleged that 2 employees who reported to the applicant started behaving unreasonably towards the applicant by harassing her on a daily basis and spreading rumours about her in the workplace.

One of those employees made bullying allegations against the applicant immediately prior to the applicant lodging this application. The employer arranged for an investigation to be conducted by a legal firm, which found that the allegations against the applicant were justified in part, whereas the complaints by the applicant were not substantiated.

The applicant did not rely upon the legal firm's investigation as evidence of bullying conduct in its own right (by the employer), but as support for her proposition that there was a risk of ongoing bullying conduct against her, principally because no action was being proposed in relation to the other employee.

Outcome

The Commission noted that, although the results of the investigation were provided to the applicant and the Commission, the full report and evidence about how the investigation was conducted were not. As a result, the Commission placed no weight upon the outcomes of the investigation so far as it might have cast light on the applicant's and other employee's conduct and relied upon its findings from the direct evidence provided. Accordingly, it was not necessary for the Commission to consider the employer's claim of legal professional privilege in relation to the investigation and/or whether this had been waived.

The Commission found that some of the behaviour towards the applicant was bordering upon unreasonable but not such as to fall within the scope of bullying behaviour as defined by the Fair Work Act. As a result the Commission was not satisfied that the applicant had been bullied at work.

Relevance

The Commission found that the engagement of an external person to investigate both competing allegations was not unreasonable. There was also nothing unreasonable about the apparent general approach to the investigation adopted by the legal firm.

Commission (https://adc.nt.gov.au/); Queensland Human Rights Commission (qhrc.qld.gov.au) and Victorian Equal Opportunity and Human Rights Commission (www.humanrights.vic.gov.au).

Procedures available to resolve grievances or disputes

This refers to any internal complaint mechanisms that may be available to a worker to resolve their grievance at the workplace level without the Commission's involvement, such as pursuant to a WHS law or an enterprise agreement or award.

Some workplaces will have policies which contain specific provisions on workplace sexual harassment, such as how it is to be prevented and what action should be taken if it occurs. These may be contained within an enterprise agreement, code of conduct or policy manual.

The availability of alternative procedures does not mean that an application for orders to stop sexual harassment cannot proceed. An individual may still apply to the Commission to help resolve the matter quickly and inexpensively if they have been sexually harassed at work.[258]

Any matters the Commission considers relevant

In considering the terms of an order, the Commission must also take into account any other matters that the Commission considers to be relevant to an application for an order to stop sexual harassment.

Without limiting the matters that might be considered in this context, the circumstances of the parties, the history and nature of the work and work relationships) and the utility of any orders that might be made would be relevant considerations.[259] This might include:

- the applicant being on leave from the workplace
- that the individual(s) involved in the behaviour are no longer in the workplace
- changes in the work environment
- initiatives put in place by the employer such as policies and procedures to reduce the risk of sexual harassment
- any other developments in the workplace.[260]

[258] See revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 88 and Statement of Compatibility with Human Rights, Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para.31.
[259] *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para.39.
[260] Ibid. at para. 4; citing *Re Ms LP* [2015] FWC 6602 (Hampton C, 4 November 2015) at para. 195.

Case example: **Orders NOT made – Positive steps by employer**

Re Ms LP [2015] FWC 6602 (Hampton C, 4 November 2015);
Re Ms LP [2016] FWC 763 (Hampton C, 12 February 2016).

Facts

The applicant was a Food and Beverage Attendant at a family-owned restaurant. She sought orders to stop certain alleged conduct by a group of individuals, including orders for the employer to conduct management courses to be completed by the supervisors at the restaurant, and for all staff to attend training on bullying conduct.

The employer contended that the alleged conduct was not bullying but rather was reasonable management action carried out in a reasonable manner. The employer further contended that the Commission had no jurisdiction to consider the conduct of the former Head Chef and former Supervisor as they had ceased working for the employer and there was no risk that the applicant would continue to be bullied by those individuals at work.

The employer submitted that, since some of the incidents had occurred, it had worked to develop a comprehensive set of policies about workplace bullying and appropriate workplace behaviour and provided training in relation to those matters.

Outcome

The Commission was satisfied, on fine balance, that there was sufficient relevant unreasonable behaviour towards the applicant and/or the group of workers to which she belonged whilst at work to constitute bullying. However, much of that behaviour occurred in a particular context that had since changed, and this had an impact upon the appropriateness of any orders that might be considered.

The Commission was not persuaded that it could, or should, make orders in this matter, and sought further submissions on this issue. In a subsequent decision, the Commission determined that given the history of the matter, the extent of positive measures that the employer subsequently put into place as a result of the applications, and an understanding of the workplace and the relationships that had developed from hearing the matter, the Commission did not consider that the making of orders at that time would be conducive to the constructive resumption of working relationships. No orders were made.

Relevance

Where a finding of bullying conduct is made and there is some future risk, preventative orders would be expected to follow. Such orders would establish the appropriate basis for future mutually safe and constructive relationships.

Here, the Commission decided that making orders would not be conducive to the parties resuming constructive working relationships given the history of the matter and the extent of positive measures the employer had put in place as a result of the applications.

Case example: **Orders NOT made – bullying finding an adequate deterrent**

Lacey and Kandelaars v Murrays Australia Pty Limited; Cullen [2017] FWC 3136 (Roe C, 8 June 2017).

Facts

The 2 applicants were employed as bus drivers. They alleged bullying by their manager Mr Cullen and their employer. Mr Cullen and Murrays Australia provided a joint defence to the applications and accepted that whilst Mr Cullen engaged in some inappropriate behaviour, they denied that the behaviour amounted to bullying.

Mr Cullen's duties were altered so that he was no longer responsible for supervision of drivers, investigating incidents, assessing drivers or disciplining drivers and therefore there was no longer any risk that the applicants would be bullied at work. He remained responsible for training drivers and recording breathalyser results from time to time.

The Commission was satisfied that Mr Cullen's behaviour was unreasonable and that it was not reasonable management action carried out in a reasonable manner. The Commission was satisfied that Mr Cullen bullied both applicants.

Outcome

The Commission accepted that the change in Mr Cullen's role in itself was not sufficient and considered that an essential further step was to recognise that bullying had occurred because:

- it sent a strong message to Mr Cullen and should reduce the likelihood for further unreasonable action
- it should assist the drivers affected to regain some confidence and dignity, and
- it should assist management in taking the necessary steps to be more supportive of the drivers and to regain their confidence.

The Commission also accepted that there was a serious risk that bullying conduct would continue. Ultimately, the Commission held that bullying had occurred but an order was not necessary or appropriate in this case.

Relevance

The Commission accepted that the risk of bullying conduct continuing was substantially reduced by the change in Mr Cullen's role, and that it was not possible to avoid contact between the applicants and Mr Cullen. The Commission did not consider that an order requiring complete separation between Mr Cullen and other drivers, and the applicants in particular, or requiring another person to always be present, would be a practical or balanced response.

When can the Commission dismiss an application?

General power to dismiss

The Commission can dismiss an application under s.587(1) on its own motion or on application.[261]

Without limiting when the Commission can dismiss a matter, an application can be dismissed on the following grounds:

- the application is not made in accordance with the Act, or
- the application is frivolous or vexatious, or
- the application has no reasonable prospects of success.[262]

Frivolous or vexatious

An application will be considered frivolous or vexatious where the application:

- is so obviously untenable that it cannot possibly succeed
- is manifestly groundless
- is so manifestly faulty that it does not admit of argument
- discloses a case which the Commission is satisfied cannot succeed, or
- does not disclose a cause of action.[263]

No reasonable prospect of success

Generally, for an application to have no reasonable prospect of success, it must be manifestly untenable and groundless.[264]

The party raising the objection does not need to prove that the other party's case is hopeless or unarguable.

The Commission must critically assess whether the evidence of the party responding to the objection is of sufficient quality or weight to have reasonable prospects of success.

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[261] Fair Work Act s.587(3).

[262] Fair Work Act s.587(1).

[263] *Micheletto v Korowa Anglican Girls' School* PR940392 (AIRCFB, Giudice J, Hamilton DP, Deegan C, 11 November 2003) at para. 17, [(2003) 128 IR 269]; citing *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 (9 November 1964) at paras 8–10, [(1964) 112 CLR 125 at pp. 128–130].

[264] *Wright v Australian Customs Services* PR926115 (AIRCFB, Giudice J, Williams SDP, Foggo C, 23 December 2002) at para. 23.

The party responding to the objection does not need to present their entire case but must present a sufficient outline to enable the Commission to reach a preliminary view on the merits of their case.

The real question is not whether there is any issue that could arguably be heard, but whether there is any issue that should be *permitted* to be heard.[265]

An application can be dismissed on the basis that it has no reasonable prospects of success, including after the Commission has heard the applicant's case but before the respondent has started to present its case. However, if a respondent applies at that point for the applicant's case to be dismissed, it may be required to elect not to call any evidence.[266]

Note: The following case examples relating to the dismissal of applications on the basis that they were frivolous, vexatious and/or had no reasonable prospects of success are drawn from unfair dismissal, stop bullying and other cases.

Related information

- Part 6 – Risk of continued sexual harassment

[265] *Applicant v Respondent* [2010] FWA 1765 (McCarthy SDP, 4 March 2010) at para. 15; citing *Wang v Anying Group Pty Ltd* [2009] FCA 1500 at para. 43; and *Davis v Insolvency and Trustee Service Australia (No 3)* [2010] FCA 69 (12 February 2010) at para. 15.

[266] *Townsley v State of Victoria (Department of Education & Early Childhood Development)* [2013] FWCFB 5834 (Hatcher VP, Hamilton DP, Wilson C, 20 September 2013) at paras 17–24.

Case example: **Application dismissed – No reasonable prospects of success**[267]

Shaw v Australia and New Zealand Banking Group Limited t/A ANZ Bank [2014] FWC 3408 (Gostencnik DP, 26 May 2014).

Facts

An application was made by Mr Shaw under s.789FC of the Fair Work Act for an order to stop bullying. Before the matter could be heard, Mr Shaw was dismissed from his employment with ANZ.

ANZ applied pursuant to s.587(3) of the Fair Work Act for an order under s.587(1) dismissing Mr Shaw's application because, since Mr Shaw's dismissal, there ceased to be a risk that Mr Shaw would continue to be bullied at work by any individual or group.

Outcome

The Commission found that, as the employment relationship had ended, there was no power to make an order to stop bullying and, as a consequence, was satisfied that Mr Shaw's application had no reasonable prospect of success. The application was dismissed.

Relevance

A key consideration for the making of an order to stop bullying and/or sexual harassment is that there is a risk that the worker will continue to be bullied and/or sexually harassed at work. Once the employee has been dismissed then there would not usually be a risk that the employee will continue to be bullied and/or sexually harassed at work.

[267] See also *Re P.K.* [2015] FWC 562 (Hampton C, 11 February 2015), *Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern* [2010] FWA 3389 (Harrison DP, 28 April 2010) and *Applicant v Respondent* [2010] FWA 1765 (McCarthy SDP, 4 March 2010).

Case example: **Application NOT dismissed – Frivolous, vexatious or lacking in substance – Facts in dispute**

Perrella v ITW Australia Pty Ltd T/A Hobart Food Equipment Service and Sales [2009] AIRC 107 (Williams C, 3 February 2009).

Facts

The employee was dismissed for poor performance. There were fundamental disagreements between the parties on the facts of the matter.

Outcome

The employer sought to dismiss the application and had to prove to the Commission that the employee's case was so untenable that it could not possibly succeed. The Commission was not able to decide which of the 2 conflicting versions was correct based on the parties' written submissions alone. To resolve the conflicting views, the Commission would need to have all relevant witnesses called to give evidence under oath and be subject to cross-examination and to then hear argument from both parties regarding that evidence.

The Commission was not satisfied that the application was frivolous, vexatious or lacking in substance such that it should be dismissed without any further hearing.

Relevance

The respondent could not satisfy the Commission that the application was frivolous or vexatious or lacking in substance. As a result, the matter was listed for hearing so that the evidence in the matter could be heard.

Case example: **Application dismissed – Frivolous or vexatious**[268]

Application by Mr Jeffrey Vassallo [2021] FWC 132 (Cirkovic C, 12 January 2021), confirmed on appeal: ***Jeffery Vassallo v Easitag Pty. Ltd.*** [2021] FWCFB 1554 (Dean DP, Colman DP, Platt C, 23 March 2021)

Facts

Mr Vassallo initially filed a claim with the Commission that he had been misclassified under the applicable modern award. The claim was rejected in November 2017. Mr Vassallo was refused permission to appeal that decision (First Appeal) and subsequently applied under s.603 of the Fair Work Act to have the Commission's 2017 decision varied or revoked. Easitag P/L (Easitag) asked the Commission to dismiss Mr Vassallo's revocation application under s.587(1)(b).

Outcome

The Commission dismissed Mr Vassallo's revocation application under s.587(1)(b) of the Fair Work Act. The Commission concluded that the majority of Mr Vassallo's submissions sought to reagitate matters that were the subject of its 2017 decision, and that the application was an abuse of process, groundless and vexatious.

Relevance

In finding that Mr Vassallo's revocation application was an abuse of process, the Commission considered the decision of *Rogers v The Queen* (1994) 181 CLR 251 at 286 where it was held: 'Although the categories of abuse of procedure remain open, abuses of procedure usually fall into one of three categories: (1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute.'

The Full Bench on appeal held that the approach taken by the Commissioner to Easitag's s.587 application was entirely orthodox. While such applications generally face a high hurdle, in the present case it was clearly open to the Commissioner to reach the conclusion that the proceedings were groundless and vexatious and plainly open to her to dismiss the application under s.587.

[268] See also *West v Hi-Trans Express t/as NSW Logistics Pty Ltd* PR974807 (AIRC, Hamberger SDP, 4 December 2006) and *Taminiau and Thomson v Austin Group Limited* PR974223 (AIRC, Harrison C, 5 October 2006).

Defence, Security and Australian Federal Police (AFP) Operations

The Commission may dismiss an application for an order to stop sexual harassment if the Commission considers that the application involved matters that relate to:

- Australia's defence
- Australia's national security, or
- An existing or future covert operation, or international operation; of the Australian Federal Police (AFP).[269]

A ***covert operation*** is a 'function' or 'service' of the AFP[270] where knowledge of the operation by an unauthorised person may:

reduce the effectiveness of the performance of the function or service, or

expose a person to the danger of physical harm or death arising from the actions of another person'.[271]

A covert operation might, for example, include an undercover operation to identify those involved in drug trafficking, but would not include general duties policing.[272]

An ***international operation*** is an 'operation to maintain order in a foreign country' where:

it would not be reasonably practicable to eliminate risks to the health and safety of the AFP appointee involved in the operation because of the environment in which the operation is undertaken, and

the Commissioner of the AFP has taken all steps reasonably practicable to minimise any risks to the health and safety of the AFP appointee.[273]

[269] Fair Work Act s.789FE(2).
[270] *Australian Federal Police Act 1979* (Cth) s.8.
[271] WHS Act s.12E(2).
[272] Note to WHS Act s.8.
[273] WHS Act s.12E(2).

Contravening an order of the Commission

A person to whom an order to stop sexual harassment applies must comply with a term of the order.[274]

The requirement to comply with an order to stop sexual harassment is a civil remedy provision.[275]

A ***civil remedy provision*** is a provision of the Fair Work Act that if breached, allows a person affected to apply to a Court for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate (such as an injunction).

An application for a breach of a civil remedy provision is made to the Federal Court, the Federal Circuit and Family Court of Australia or an eligible State or Territory court. The application may be made by the person affected by the contravention, an industrial association or a Fair Work Inspector.[276] To seek the assistance of a Fair Work Inspector in relation to the enforcement of an order, a party should contact the Fair Work Ombudsman.

An application regarding a breach of a civil remedy provision must be made within 6 years of the alleged contravention.[277]

Related information

- Role of the Court

[274] Fair Work Act s.789FG.
[275] Fair Work Act, s.539(1) (see item 38 of the table at s.539(2)).
[276] Fair Work Act s.539(2).
[277] Fair Work Act s.544.

Part 11 – Associated applications

Costs

 See Fair Work Act s.611

People who incur costs in a matter before the Commission (such as legal costs) must generally pay their own costs.[278]

The Commission has the discretion to order one party to pay the other party's costs in limited circumstances.[279]

This is called a 'costs order'.

What are costs?

Costs are the amounts a party has paid to a lawyer or paid agent for advice and representation in a matter before a court or tribunal, including their fees and disbursements (out-of-pocket expenses).

Legal costs may be ordered to be paid on either a party-party basis or an indemnity basis:

Party–party costs

Party–party costs are the legal costs that are deemed necessary and reasonable. The Commission will look at whether the legal work done was necessary and will decide what a fair and reasonable amount is for that work.[280] These are also known as ordinary costs.

Indemnity costs

Indemnity costs are also known as solicitor–client costs.

Indemnity costs are all costs including fees, charges, disbursements, expenses and remuneration, as long as they have not been unreasonably incurred.[281]

Indemnity costs cover a larger proportion of the legal costs than party-party costs.

[278] Fair Work Act s.611(1).
[279] Fair Work Act s.611(2).
[280] LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (online at 21 July 2021) 'party and party costs'.
[281] Ibid. (online at 21 July 2021) 'indemnity costs'.

Indemnity costs may be ordered when there has been an element of misconduct or delinquency on the part of the party being ordered to pay costs.[282]

What costs may be recovered?

The Fair Work Regulations include a 'schedule of costs' which sets out appropriate rates for common legal services. The schedule provides the Commission with guidance when exercising its jurisdiction to make an order for costs.[283]

The Commission is not limited to the items in the schedule of costs but cannot exceed the rates or amounts in the schedule if an item is relevant to the matter.[284]

Applying for costs

An application for costs **must be made within 14 days** after the Commission finishes dealing with a matter.[285]

Related information

- For calculating 14 days - References to provisions in Part 6-4B of the Fair Work Act

  Unless the context indicates otherwise, references in this Benchbook to Part 6-4B of the Fair Work Act are to the Act as it was just before 6 March 2023. These provisions are extracted in full at **Appendix A**.

  On 6 March 2023, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) amended the sexual harassment provisions in the Fair Work Act. However, the transitional arrangements in the Secure Jobs Better Pay Act mean that Part 6-4B of the Fair Work Act, as it was just before 6 March 2023, continues to apply in relation to the sexual harassment of a worker at work that occurred (or commenced) before 6 March 2023.

- What is a day?

[282] *Oshlack v Richmond River Council* [1998] HCA 11 (25 February 1998) at para. 44, [(1998) 193 CLR 72]; cited in *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 5.
[283] Fair Work Regulations reg 3.04; sch 3.1.
[284] Fair Work Regulations reg 3.04; sch 3.1. See *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at paras. 16 to 21.
[285] Fair Work Act s.377.

When are costs ordered?

See Fair Work Act s.611

Section 611 of the Fair Work Act sets out the general provision for when the Commission may order costs. The Commission may order a person to pay the other party's costs if it is satisfied:

- that the person's application or response to an application was made vexatiously or without reasonable cause, or
- it should have been reasonably apparent that the person's application or response to an application had no reasonable prospect of success.

The power to award costs is discretionary. Awarding costs is a 2-stage process:

- First, a Commission Member will decide whether there is power to award costs, and
- if there is power, the Commission Member will consider whether an order for costs is appropriate in all the circumstances.[286]

Vexatiously

An application is made vexatiously if:

- the main purpose of the application (or response) is to harass, annoy or embarrass the other party,[287] or
- there is another purpose for the action other than resolving the issues arising from the application (or response).[288]

Without reasonable cause

The test for 'without reasonable cause' is that the application (or response):

- is 'so obviously untenable that it cannot possibly succeed'
- is 'manifestly groundless'
- is 'so manifestly faulty that it does not admit of argument'

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[286] *McKenzie v Meran Rise Pty Ltd t/as Nu Force Security Services* Print S4692 (AIRCFB, Giudice J, Watson SDP, Whelan C, 7 April 2000) at para. 7.
[287] *Nilsen v Loyal Orange Trust* [1997] IRCA 267 (11 September 1997), [(1997) 76 IR 180 at p. 181]; citing *Attorney-General v Wentworth* (1988) 14 NSWLR 481, at p. 491; cited in *Holland v Nude Pty Ltd T/A Nude Delicafe)* [2012] FWAFB 6508 (Harrison SDP, Richards SDP, Blair C, 3 August 2012) at para. 7, [(2012) 224 IR 16].
[288] ibid.

- 'discloses a case which the Court is satisfied cannot succeed', or
- 'under no possibility can there be a good cause of action'.[289]

The Commission may also consider whether, at the time the application (or response) was made, there was a 'substantial prospect of success.'[290] It is inappropriate to find that an application (or response) was without reasonable cause if success depends on the resolution of an arguable point of law.[291]

An application (or response) is not without reasonable cause just because the court rejects a person's arguments.[292]

In simple terms, ***without reasonable cause*** means that an application (or response) is made without there being any real reason, basis or purpose.

'Reasonably apparent' and 'no reasonable prospect of success'

Whether it *should have been reasonably apparent* that an application (or response) had no reasonable prospect of success is an **objective test** that is directed to a belief formed on an objective basis, rather than a subjective test.[293]

A finding that an application (or response) has no reasonable prospect of success 'should only be reached with extreme caution in circumstances where the application [or response] is manifestly untenable or groundless or so lacking in merit or substance as to be not reasonably arguable.'[294]

An ***objective test*** considers the view of a reasonable person. It looks at whether it would have been apparent to a *reasonable person* that an application or response had no reasonable prospect of success. This is the appropriate test.

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[289] *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 (9 November 1964) at para. 8, [(1964) 112 CLR 125 at p. 129]; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [2011] FWA 2225 (Thatcher C, 14 April 2011) at para. 17, [(2011) 210 IR 370].

[290] *Re Joseph Michael Kanan v Australian Postal and Telecommunications Union* [1992] FCA 366 (31 July 1992) at para. 29, [(1992) 43 IR 257]; cited in *Dryden v The Bethanie Group Inc* [2013] FWC 224 (Williams C, 11 January 2013) at para. 20.

[291] ibid.

[292] *R v Moore; Ex Parte Federated Miscellaneous Workers' Union of Australia* [1978] HCA 51 (14 December 1978) at para. 3 (Gibbs J), [(1978) 140 CLR 470 at p. 473]; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* [2011] FWA 2225 (Thatcher C, 14 April 2011) at para. 20, [(2011) 210 IR 370].

[293] *Baker v Salver Resources Pty Ltd* [2011] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing *Wodonga Rural City Council v Lewis* PR956243 (AIRCFB, Watson SDP, Lloyd SDP, Gay C, 4 March 2005) at para. 6, [(2005) 142 IR 188].

[294] *Baker v Salver Resources Pty Ltd* [2011] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing *Deane v Paper Australia Pty Ltd* PR932454 (AIRCFB, Giudice J, Williams SDP, Simmonds C, 6 June 2003) at para. 7 and *A Smith v Barwon Region Water Authority* [2009] AIRCFB 769, at para 48.

A ***subjective test*** considers the view of the person themselves. It would look at whether it would be reasonably apparent to the person that their application or response had no reasonable prospect of success. This is not the test.

Case example: **Costs ordered – Vindictive and frivolous**

Hill v L E Stewart Investments Pty Ltd T/A Southern Highlands Taxis and Coaches and Others [2014] FWC 5588 (Hatcher VP, 21 August 2014).
Decision on the substantive application [2014] FWC 4666 (Hatcher VP, 25 July 2014).

Facts

An application was made by Mr Paul Hill under s.789FC(1) of the Fair Work Act for an order to stop bullying. At the hearing of Mr Hill's application, which he did not attend, the respondents (the employer and persons named) foreshadowed an intention to apply for costs.

The respondents claimed the costs on the grounds of inconvenience and disruption, evidenced by the time they spent preparing for and participating in the listed telephone conferences and attending the hearing. The respondents supported the claim for costs on the ground that Mr Hill's application was 'vindictive and frivolous'. Mr Hill did not file any submission on the question of costs.

Outcome

The Commission was satisfied that it should have been reasonably apparent to Mr Hill that his application had no reasonable prospect of success. Mr Hill's working relationship with the respondents came to an end on 11 March 2014, 6 days before Mr Hill filed his application. As there was no reasonable prospect of the working relationship re-commencing at some future time, there was no further risk of Mr Hill continuing to be bullied by the respondents at work. The legislative scheme is directed to preventing potential future conduct, not punishing or compensating for past conduct. Costs were ordered with respect to the hearing in Wollongong on 10 July 2014.

Relevance

Mr Hill's unreasonable behaviour in not attending the hearing of his application, not advising that he would not attend, not responding to the Commission's prior inquiries as to whether he would attend, and his failure to provide any reasonable explanation for this conduct, justified the awarding of costs. As the respondents were self-represented, the Commission awarded costs in the nature of witness fees for their attendance at the court hearing.

Case example: **Costs NOT ordered – Not reasonably apparent there was no reasonable prospects of success**[295]

Luke Tamu v World Vision Australia [2020] FWCFB 5342 (Hatcher VP, Sam DP, Spencer C, 6 November 2020)

Facts

The Full Bench refused Mr Tamu permission to appeal a decision to issue a certificate in respect of his general protections dismissal application. The Full Bench concluded that Mr Tamu's appeal was 'entirely lacking in merit'. World Vision Australia (World Vision) subsequently applied for costs under s.611 of the Fair Work Act.

Outcome

The Full Bench was satisfied that Mr Tamu's appeal was lodged without reasonable cause and had no reasonable prospects of success. However, it was not prepared to find that the appeal was lodged vexatiously in order to harass World Vision or to seek some collateral advantage.

As s.611(2)(b) was satisfied, the Bench considered whether it should exercise its discretion to award costs to World Vision. The Bench rejected World Vision's submission that costs should be awarded to deter Mr Tamu from making or continuing other legal proceedings against World Vision, as the Bench had no basis to assess the merits of Mr Tamu's claim that his dismissal was unlawful.

The following matters were relevant to the Full Bench's decision to decline to award costs:

- World Vision did not file a Form F53 notice and so did not place Mr Tamu on notice that it was incurring costs for which he could be liable
- although World Vision applied for permission to be represented in the appeal, this was never actually granted
- the application for representation was made on the basis that it would enable the matter to be dealt with more efficiently, taking into account its complexity. As the Bench did not need to hear from World Vision in the appeal, this could not be said to be the case. Further, as World Vision did not seek to rely on s.596(2)(b) of the Fair Work Act, an inference was available that World Vision was capable of representing itself, and
- the directions made in respect of the appeal did not require World Vision to file any written submissions or take any other step in relation to the appeal.

Relevance

The decision to award costs is a discretionary decision. Simply because an appeal is without merit does not mean that it is made vexatiously, or that the appellant will necessarily be made responsible for the respondent's costs.

[295] See also *Re Ms S.W.* [2014] FWC 4476 (Hampton C, 2 June 2014) (costs not ordered as not reasonably apparent that there was no reasonable prospects of success).

Appeals

See Fair Work Act s.604

The following information is limited to providing general guidance for **appeals against an order to stop sexual harassment or a decision to refuse to grant such an order**.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal Proceedings Practice Note.

Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.[296]

A ***person who is aggrieved*** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as, in some circumstances, a union or an employer association.[297]

In determining whether a person is a 'person aggrieved' for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context.[298]

Intervention

There is no provision of the Fair Work Act expressly dealing with the ability of a person to intervene in a case if they are not a party. The Commission may use the broad procedural power in s.589(1) to permit a person to participate in appropriate cases. There are also limited rights for government ministers to make submissions in certain cases in the public interest.[299]

[296] Fair Work Act s.604(1).

[297] See for e.g. *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2015] FWCFB 7090 (Watson VP, Kovacic DP, Roe C, 27 October 2015).

[298] *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).

[299] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 (Lawler VP, O'Callaghan SDP, Bissett C, 23 December 2010) at para. 9. Note: ss.597 and 597A of the Fair Work Act provide for workplace relations Ministers to make a submission in a Full Bench Commission matter if it is in the public interest, and for the Commonwealth Minister to also make a submission if the matter involves public sector employment.

Time limit for appeal – 21 days

A Notice of Appeal must be lodged with the Commission **within 21 days** after the date of the decision being appealed.[300] If an appeal is lodged late, application also needs to be made for an extension of time to lodge the appeal.[301] An extension of time is not a right. The person seeking an extension of time will need to persuade the Commission that additional time is warranted in the circumstances.

Related information

- For calculating 21 days - References to provisions in Part 6-4B of the Fair Work Act

Unless the context indicates otherwise, references in this Benchbook to Part 6-4B of the Fair Work Act are to the Act as it was just before 6 March 2023. These provisions are extracted in full at **Appendix A**.

On 6 March 2023, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act) amended the sexual harassment provisions in the Fair Work Act. However, the transitional arrangements in the Secure Jobs Better Pay Act mean that Part 6-4B of the Fair Work Act, as it was just before 6 March 2023, continues to apply in relation to the sexual harassment of a worker at work that occurred (or commenced) before 6 March 2023.

- What is a day?

Considerations

An appeal under s.604 of the Fair Work Act is an appeal by way of rehearing [302] and the Commission's powers on appeal are only exercisable if there is error on the part of the primary decision-maker.

There is no right to appeal a Commission decision relating to an application to stop sexual harassment at work. An appeal may only be made with the permission of the Commission.[303]

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[300] *Fair Work Commission Rules* rr.56(2)(a)–(b).

[301] *Fair Work Commission Rules* r.56(2)(c). To do so the appellant needs to indicate this in the Notice of Appeal (Form F7).

[302] This is so because on appeal, the Commission has the power to receive further evidence, pursuant to s.607(2); see *Coal and Allied v AIRC* [2000] HCA 47 (31 August 2000) at para. 17, (per Gleeson CJ, Gaudron and Hayne JJ) [(2000) 203 CLR 194].

[303] See *Krcho v University of New South Wales (UNSW); Lucian Hiss; Phil Allen; Karen Scott* [2019] FWCFB 8269 (Gostencnik DP, Millhouse DP, Spencer C, 10 December 2019) at para. 35.

In such appeals, a Full Bench of the Commission needs to determine 2 key issues:

- whether permission to appeal should be granted, and
- whether there has been an appealable error in the original decision.

Permission to appeal

Permission granted in the public interest

The Fair Work Act provides that the Commission **must** grant permission to appeal if it is satisfied that it is in the public interest.[304] The 'public interest' is not defined in the Fair Work Act, but it is generally understood to refer to a benefit or advantage to the whole community, as opposed to an individual.

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[305]

Some considerations that may attract the public interest include where:

- a matter raises issues of importance and general application
- there is a diversity of decisions so that guidance from an appellate court is required
- the original decision manifests an injustice or the result is counter intuitive, or
- the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[306]

Permission to appeal will usually only be granted if there is an arguable case of appealable error, because an appeal cannot succeed without it. Even if a relevant error is found, or a decision-maker might prefer a different result to the original decision-maker, it might not be in the public interest to grant permission to appeal and the appeal might not succeed.[307] An appealable error is one that is material to the outcome of the case. Hearing and determining an appeal must also have a practical purpose – this is known as 'utility'.[308]

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[304] Fair Work Act s.604(2).

[305] *Coal and Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].

[306] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at paras. 24-27, [(2010) 197 IR 266].

[307] See *Krcho v University of New South Wales T/A UNSW Sydney* [2021] FWCFB 350 (Asbury DP, Clancy DP, Masson DP, 29 January 2021) at para. 49; *Lawrence v Coal & Allied Mining Services Pty Ltd t/as Mt Thorley Operations/Warkworth* [2010] FWAFB 10089 at para. 28, affirmed on judicial review and *NSW Bar Association v Brett McAuliffe*; *Commonwealth of Australia represented by the Australian Taxation Office* [2014] FWCFB 1663 (Ross J, Hatcher VP, Cargill C, 13 March 2014) at para. 28.

[308] See *Galloway v Molina and Zhai* [2021] FWCFB 5419 (Catanzariti VP, Easton DP, O'Neill C, 1 September 2021) at para. 26; *Bechtal Construction (Australia) Pty Ltd v Maritime Union of Australia* [2013] FWCFB 4250

It is generally considered to be in the public interest to discourage appeals from preliminary or procedural rulings.[309]

(Hatcher VP, Harrison SDP, Simpson C, 5 July 2013) at paras. 9-12; *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025 (Ross J, Booth DP, McKenna C, 17 December 2013) at para. 48.

[309] See *Krcho v University of New South Wales T/A UNSW Sydney* [2021] FWCFB 350 (Asbury DP, Clancy DP, Masson DP, 29 January 2021) at paras. 51-52, although '[t]here may be cases where an interim or provisional decision does affect substantive rights in a manner which cannot be redressed in an appeal against a final decision … [which] may warrant a departure from the well-established position', at para. 58).

Permission granted on other discretionary grounds

The Commission can grant permission to appeal 'on conventional grounds' (not limited to those that are in the public interest) if it is considered appropriate in the circumstances of a particular case. [310]

The grounds for granting permission to appeal other than in the public interest are not specified. Considerations that have traditionally been seen as justifying the grant of permission to appeal include where a decision is attended with sufficient doubt to warrant its reconsideration or where substantial injustice may result if permission to appeal is refused.[311]

Grounds for appeal

Appeals under s.604 of the Fair Work Act exist for the correction of appealable error. Their purpose is not to allow an unsuccessful party a further opportunity to argue their case in the absence of error.[312]

A Full Bench of the Commission must identify some error of law or fact in the decision at first instance before it can intervene.[313] An error of law may be jurisdictional (when the Commission makes a decision or order that it does not have power to make) or relate to any question of law that arises for decision in a matter. An error of fact must be material to the outcome of the case. Not all errors of fact will warrant correction on appeal.

The approach of a Full Bench to appeals depends on the nature of the decision under appeal:[314]

Correctness standard

The **correctness standard** applies where the 'legal criterion applied or purportedly applied by the primary [decision-maker] to reach the conclusion demands a unique outcome'.[315] The correctness standard applies to errors of law or fact in circumstances where, by the nature of the fact or conclusion, only one view is legally possible.

For example, a Full Court of the Federal Court has said that the question of whether or not a worker is an 'employee' within the meaning of the Fair Work Act involves the application of a legal standard to a given set of facts. The question of whether particular facts satisfy that legal standard is generally a question of fact, and therefore any appeal of that conclusion is an appeal on a question of fact.

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[310] Fair Work Act s.604(2).

[311] *Construction, Forestry, Mining and Energy Union v AIRC* [1998] FCA 1404, (1998) 89 FCR 200, (1998) 84 IR 314 (6 November 1998) at 220; *Wan v AIRC* [2001] FCA 1803 (17 December 2001) at para. 26 [(2001) 116 FCR 481]; *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 3 (and see also para. 24) [(2010) 197 IR 266].

[312] *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 13.

[313] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 (13 December 2013) at para. 40.

[314] *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd* [2021] FWCFB 5030 (Clancy DP, Colman DP, McKinnon C, 13 August 2021) at para. 11.

[315] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30,264 CLR 541 at para. 49 per Gageler J.

However, as there is only one legally correct answer – either the worker is in an employment relationship or they are not – the correctness standard applies.[316]

Where the correctness standard applies, the Commission is concerned with the correctness of the conclusion reached in the decision at first instance, not whether that conclusion was reasonably open.[317] The task of the appellant is to demonstrate that the conclusion in the decision was wrong, not that there was some error in the decision-maker's reasoning process.[318] In determining the appeal, the Full Bench will substitute its own conclusion for that of the original decision-maker if it finds that their conclusion was not correct.[319]

Discretion standard

In contrast, where the decision under appeal is discretionary in nature, a successful appeal will usually require the appellant to demonstrate that the original decision-maker's discretion was not exercised correctly. The **discretion standard** applies to the review of evaluative conclusions, such as where the Commission must "be satisfied" of something before it can make a decision. These are matters where the Commission has some latitude about the decision to be made because the decision under appeal is one that 'tolerates a range of outcomes', on which 'reasonable minds may differ'.[320]

The correctness of a discretionary decision can only be challenged by showing error in the decision-making process.[321] If permission to appeal is granted, the Full Bench will consider whether the conclusion reached by the original decision-maker was reasonably open to them on the facts.[322] If the conclusion was reasonably open on the facts, the Full Bench cannot change or interfere with the original decision, for example, by substituting its own views for the views of the original decision-maker.[323] It is not enough that a Full Bench would have arrived at a different conclusion to that of

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[316] *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 at paras. 4-5, 171-173 and 252, [[2020] 297 IR 210].

[317] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338]; *Moszko v Simplot Australia Pty Ltd* [2021] FWCFB 6046 (Catanzariti VP, Saunders DP and Wilson C, 10 November 2021)

[318] *Hempel v Northern Territory Air Services Pty Ltd* [2021] FWCFB 3707 (Hatcher VP, Cross DP, Lee C, 2 July 2021) at para. 27.

[319] *Rail Commissioner v Craig Rogers* [2021] FWCFB 371 (Hatcher VP, Masson DP, Wilson C, 27 January 2021) at para. 61.

[320] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 (8 August 2018) at para. 49 per Gageler J, [(2018) 264 CLR 541]; *Rail Commissioner v Craig Rogers* [2021] FWCFB 371 (Hatcher VP, Masson DP, Wilson C, 27 January 2021) at para. 61, citing *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at para. 44 per Gageler J [(2018) 264 CLR 541]; *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 at para. 168 [[2020] 297 IR 210].

[321] *House v The King* [1936] HCA 40 (17 August 1936) at p.505, [(1936) 55 CLR 499]*; BlueScope Steel Limited v Trevor Knowles* [2020] FWCFB 3439 (Millhouse DP, Young DP, Cirkovic C, 19 August 2020) at para. 26.

[322] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].

[323] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499]*; BlueScope Steel Limited v Trevor Knowles* [2020] FWCFB 3439 (Millhouse DP, Young DP, Cirkovic C, 19 August 2020) at para. 26.

the decision-maker at first instance.[324] The Full Bench may only intervene in such cases if it can be demonstrated that an appealable error has been made in exercising the powers of the Commission.[325]

The High Court decision of *House v The King*[326] describes appealable errors of this kind. They include where a decision-maker:

- acted upon a wrong principle
- was guided by irrelevant factors
- mistook the facts, or
- failed to take some material consideration into account.[327]

A Full Bench of the Commission may also intervene on the basis that the decision under appeal was, on the facts, unreasonable or plainly unjust[328] or 'contrary to the overwhelming weight of the evidence'.[329] There is a high threshold for intervening in a decision on this basis.

Appealable error will not be demonstrated simply because a decision-maker at first instance failed to give a particular matter 'sufficient weight' or failed to give it 'proper regard', unless the failure was, in substance, a failure by the decision-maker to exercise their discretion properly.[330]

Link to application form

- Form F7 – Notice of Appeal

All forms are available on the Forms page of the Commission's website.

[324] *House v The King* [1936] HCA 40 (17 August 1936), at pp.504-505, [(1936) 55 CLR 499].
[325] ibid. at p.505.
[326] ibid.
[327] ibid. at p.505. A further illustrative list of errors which may be made by a Tribunal is set out in *Craig v The State of South Australia* [1995] HCA 58 (24 October 1995), [(1995) 184 CLR 163] and approved in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30 (31 May 2001), [(2001) 206 CLR 323] and *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010), [(2010) 239 CLR 531].
[328] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499 at p.505.
[329] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, at pp. 155–156.
[330] *Appeal by BlueScope Steel Limited against decision of Riordan C of 11 May 2020 [2020] FWC 1015] Re: Knowles* [2020] FWCFB 3439 (Millhouse DP, Young DP, Cirkovic C, 19 August 2020) at para. 50.

Case example: **Permission to appeal granted – Jurisdiction of the Commission**[331]

Hempel v Northern Territory Air Services Pty Ltd [2021] FWCFB 3707 (Hatcher VP, Cross DP, Lee C, 2 July 2021).

Decision at first instance [2021] FWC 886 and order PR727109 (Bissett C, 4 March 2021).

Facts

Mr Hempel appealed a decision to dismiss his unfair dismissal application. The Commission found at first instance that the respondent was a small business employer (with fewer than 15 employees) and that Mr Hempel had not served the minimum employment period of one year. As a result, he was not protected from unfair dismissal.

Outcome

Permission to appeal was granted on some of the appeal grounds in the public interest, as the appeal had substantive merit and the decision had deprived Mr Hempel of the opportunity to obtain an unfair dismissal remedy.

At issue in the appeal was whether a co-worker was an employee or contractor of the respondent. If the co-worker was an employee, the respondent would not be a small business employer. Because this issue was determinative of whether the Commission had jurisdiction to deal with Mr Hempel's application, the task of the Full Bench was to decide whether the decision at first instance was correct.

On appeal, the Full Bench found the co-worker was an employee of the respondent and the respondent was not a small business employer. This meant Mr Hempel had served the relevant minimum employment period and he was eligible to apply for an unfair dismissal remedy.

Relevance

This case is an example of how the 'correctness standard' applies. Whether a person is an employee or independent contractor involves the application of a legal standard to a given set of facts. Although the answer requires an evaluation, it is not 'an exercise in, or akin to, discretionary decision-making'. The person can be 'either an employee or independent contractor'. That is, only one of these two possibilities will be legally correct in each case.

Where the correctness standard applies, the appellant's task is to demonstrate that the decision at first instance was wrong, not that there was some error in the decision-maker's reasoning process.

[331] See also – **permission to appeal granted:** *Obatoki v Mallee Track Health & Community Services and Others* [2015] FWCFB 1661 (Catanzariti VP, Smith DP, Blair C, 27 March 2015), *Dianna Smith T/A Escape Hair Design v Fitzgerald* [2011] FWAFB 1422 (Acton SDP, Cartwright SDP, Blair C, 15 March 2011) (duty to provide adequate reasons for decisions), *Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski* [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), (misapplication of statutory test) and *Ulan Coal Mines Limited v Honeysett* [2010] FWAFB 7578 (Giudice J, Hamberger SDP, Cambridge C, 12 November 2010)

Staying decisions

See Fair Work Act s.606

If the Commission hears an appeal from, or conducts a review of a decision, the Commission may order that the operation of the whole or part of the decision be stayed (that is, suspended from taking effect) by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate. For example, a stay order might operate until a decision in relation to the appeal or review is made, or until the Commission makes a further order.

If a Full Bench is hearing the appeal or conducting the review, a stay order in relation to the appeal or review may be made by:

- the Full Bench
- the President
- a Vice President, or
- a Deputy President.

(interpretation of Fair Work Act provisions); **permission to appeal refused:** *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) (not in public interest).

Role of the Court

Enforcement of Commission orders

If a person does not comply with an order to stop sexual harassment then:

- a person affected by the contravention
- a union or an employer organisation, or
- an inspector;

may seek enforcement of the Commission's order through civil remedy proceedings in:

- the Fair Work Division of the Federal Circuit and Family Court of Australia
- the Fair Work Division of the Federal Court of Australia, or
- an eligible State or Territory Court.[332]

Failure to comply with an order to stop sexual harassment may result in the Court imposing a pecuniary penalty or making other orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.

Related information

- Orders to stop sexual harassment at work

Types of order made by the Court

See Fair Work Act ss.545, 546, 547 and 570

The Federal Court or the Federal Circuit and Family Court of Australia may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision (such as s.789FG, which prohibits a person contravening an order to stop sexual harassment).

Orders the Federal Court or Federal Circuit and Family Court of Australia may make include the following:

[332] Fair Work Act s.539, table item 38.

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention, and
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest).

Pecuniary penalty orders

The Federal Court, the Federal Circuit and Family Court of Australia or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in s.539(2) of the Fair Work Act.

In the case of a body corporate, the maximum penalty is 5 times the maximum for an individual.

A **pecuniary penalty** is a penalty requiring the payment of money.

*A **penalty unit*** is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening s.789FG in preserved Part 6-4B of the Fair Work Act (which prohibits a person contravening an order to stop sexual harassment) is 60 penalty units.

From 1 January 2023 a penalty unit is $275:[333]

- for an individual – 60 penalty units = $16,500
- for a body corporate – 5 x 60 penalty units = $82,500.

The value of a penalty unit will next be indexed on 1 July 2023.

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

[333] *Crimes Act 1914* (Cth) s.4AA.

Costs orders

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.[334]

[334] Fair Work Act s.570.

APPENDIX A – Part 6-4B of the Fair Work Act

Clause 60 of Part 26 of the Secure Jobs Better Pay Act preserves the operation of the stop sexual harassment order framework in Part 6-4B of the Fair Work Act as it was immediately before 6 March 2023, in relation to sexual harassment that occurred or commenced before 6 March 2023.

Part 6-4B of the Fair Work Act, immediately before 6 March 2023, provided as follows:

Part 6-4B—Workers bullied or sexually harassed at work

Division 1—Introduction

789FA Guide to this Part

This Part allows a worker who has been bullied or sexually harassed at work to apply to the FWC for an order to stop the bullying or sexual harassment.

789FB Meanings of *employee* and *employer*

In this Part, ***employee*** and ***employer*** have their ordinary meanings.

Division 2—Stopping workers being bullied or sexually harassed at work

789FC Application for an FWC order to stop bullying or sexual harassment

(1) A worker who reasonably believes that he or she has been bullied or sexually harassed at work may apply to the FWC for an order under section 789FF.

(2) For the purposes of this Part, ***worker*** has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

(3) The application must be accompanied by any fee prescribed by the regulations.

(4) The regulations may prescribe:

(a) a fee for making an application to the FWC under this section; and

(b) a method for indexing the fee; and

(c) the circumstances in which all or part of the fee may be waived or refunded.

789FD When is a worker *bullied at work* or *sexually harassed at work*?

(1) A worker is ***bullied at work*** if:

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(2A) A worker is ***sexually harassed at work*** if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.

(3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a ***constitutionally-covered business***.

789FE FWC to deal with applications promptly

(1) The FWC must start to deal with an application under section 789FC within 14 days after the application is made.

Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.

(2) However, the FWC may dismiss an application under section 789FC if the FWC considers that the application might involve matters that relate to:

(a) Australia's defence; or

(b) Australia's national security; or

(c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or

(d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

Note: For another power of the FWC to dismiss applications under section 789FC, see section 587.

789FF FWC may make orders to stop bullying or sexual harassment

(1) If:

(a) a worker has made an application under section 789FC; and

(b) either or both of the following apply:

(i) the FWC is satisfied that the worker has been bullied at work by an individual or a group of individuals, and the FWC is satisfied that there is a risk that the worker will continue to be bullied at work by the individual or group;

(ii) the FWC is satisfied that the worker has been sexually harassed at work by one or more individuals, and the FWC is satisfied that there is a risk that the worker will continue to be sexually harassed at work by the individual or individuals;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to:

(c) if subparagraph (b)(i) applies—prevent the worker from being bullied at work by the individual or group; or

(d) if subparagraph (b)(ii) applies—prevent the worker from being sexually harassed at work by the individual or individuals; or

(e) if subparagraphs (b)(i) and (ii) apply:

(i) prevent the worker from being bullied at work by the individual or group; and

(ii) prevent the worker from being sexually harassed at work by the individual or individuals.

(2) In considering the terms of an order, the FWC must take into account:

(a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and

(b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and

(c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and

(d) any matters that the FWC considers relevant.

789FG Contravening an order to stop bullying or sexual harassment

A person to whom an order under section 789FF applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

789FH Actions under work health and safety laws permitted

Section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application under section 789FC.

Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied or sexually harassed at work, then section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws would prohibit a

proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying or sexual harassment. This section removes that prohibition.

789FI This Part is not to prejudice Australia's defence, national security etc.

Nothing in this Part requires or permits a person to take, or to refrain from taking, any action if the taking of the action, or the refraining from taking the action, would be, or could reasonably be expected to be, prejudicial to:

(a) Australia's defence; or

(b) Australia's national security; or

(c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or

(d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

789FJ Declarations by the Chief of the Defence Force

(1) Without limiting section 789FI, the Chief of the Defence Force may, by legislative instrument, declare that all or specified provisions of this Part do not apply in relation to a specified activity.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

789FK Declarations by the Director-General of Security

(1) Without limiting section 789FI, the Director-General of Security may, by legislative instrument, declare that all or specified provisions of this Part do not apply in relation to a person carrying out work for the Director-General.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

789FL Declarations by the Director-General of ASIS

(1) Without limiting section 789FI, the Director-General of the Australian Secret Intelligence Service may, by legislative instrument, declare that all or specified provisions of this Part do not apply in relation to a person carrying out work for the Director-General.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.