Benchbook

Orders to stop bullying

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 under the *Fair Work Act 2009* (Cth) (the Fair Work Act) for orders to stop bullying. Information is provided to parties to assist in the preparation of material for matters before the Commission.

For information about applications for orders to stop workplace sexual harassment, see the Commission's Orders to stop sexual harassment: Transitional arrangements Benchbook (where the alleged sexual harassment occurred or commenced before 6 March 2023), and the Sexual Harassment Disputes Benchbook (where the alleged sexual harassment in connection with work commenced on or after 6 March 2023).

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 regular 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 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 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.

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Quick Links

General

What is workplace bullying?

Who is covered by anti-bullying laws?

Examples of workplace bullying

What does ‘at work’ mean?

What if the employee has been dismissed?

What can the Commission order?

Employer or principal

What is reasonable management action?

Responding to an application

Employee or worker

How do you make an application?

Person named

Responding to an application

Contents

About this Benchbook 1
Disclaimer i
Case examples i
Links to external websites i
Copyright i
Quick Links iii
Contents iv
Part 1 – How to use this Benchbook 1
About the Commission 1
Workplace relations legislation, regulations and rules 4
Case law 4
Referencing 5
Guide to symbols 7
Glossary of terms 8
Part 2 – Overview of this Benchbook 14
Overview of the Commission's bullying jurisdiction 14
Who can apply for orders to stop bullying at work? 15
When does bullying at work occur? 15
Process for dealing with bullying at work under the Fair Work Act 16
Other avenues for dealing with bullying at work 17
Where to get legal help 18
Part 3 – What is workplace bullying? 20
Definition of bullying 20
Examples of bullying 20
Effects of bullying 21
Part 4 – Who is covered by laws to stop bullying at work? 23
Definition of 'Worker' 23
Definition of 'constitutionally-covered business' 29
Part 5 – When is a worker bullied at work? 53
What does 'at work' mean? 65
Reasonable belief of bullying at work 67
Qualification — 'reasonable management action carried out in a reasonable manner' 70
What is management action? 70
When is management action reasonable? 73

What is a reasonable manner? 74
Part 6 - Risk of continued bullying at work 84
Absence of future risk of bullying 84
Change in circumstances 88
Other options for workers who are no longer working for the employer/principal 88
Part 7 – Making an application 91
Responding to an application 94
Part 8 – Commission process – Hearings and conferences 96
Commission to deal with applications promptly 96
Powers of the Commission 96
Procedural issues 98
Rescheduling or adjourning matters 122
Bias 123
Part 9 – Evidence 128
Privilege against self-incrimination 130
Part 10 – What are the outcomes? 132
Conciliated outcomes 132
Orders to stop bullying at work 132
Considerations 137
When can the Commission dismiss an application? 141
Contravening an order of the Commission 147
Part 11 – Associated applications 149
Costs 149
What are costs? 149
Applying for costs 150
When are costs ordered? 150
Appeals 155
Staying decisions 162
Role of the Court 163
Enforcement of Commission orders 163
Types of order made by the Court 164

Part 1 – How to use this Benchbook

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

To access the electronic version please visit: https://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 bullied at work.

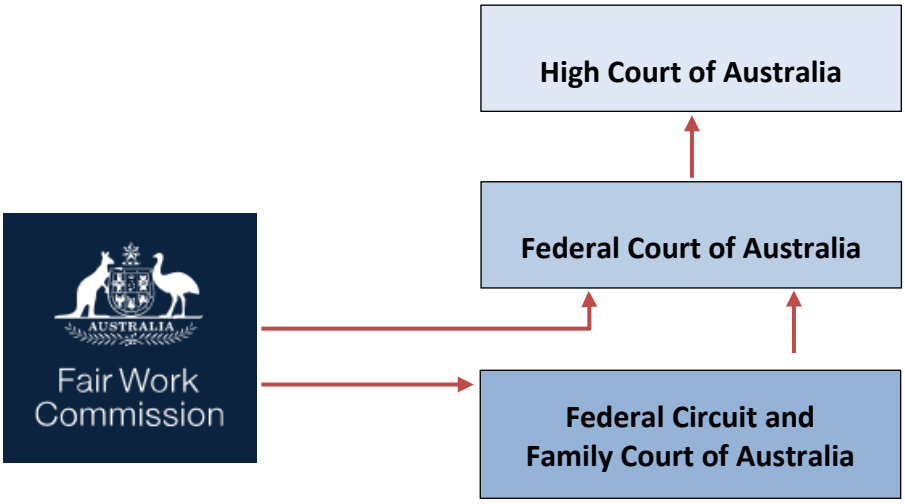
Relationship between the Fair Work Commission and the Courts

📖 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 and in providing a fair hearing for all participants.

When coming to the Commission:

- it is important to arrive early for the conference or hearing because proceedings begin on time
- notify the Commission staff upon 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
- bring enough copies of documents so everyone involved can have a copy (eg three copies: one to keep, one for the other party and one for the Member), and
- 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 bullying

Name of the Tribunal

The name of the national workplace relations tribunal has changed a number of times throughout its history. For consistency, in this document, it has been 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 identifies the more recent Commonwealth workplace relations legislation and the dates it came into operation. The current legislation governing the Commission's powers to deal with applications regarding workplace bullying 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 2011) 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 2011) [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 bullying matters have generally been referred to in this Benchbook as 'worker', 'person named' (as allegedly having engaged in bullying) and 'employer' or 'principal'.

After an application for an order to stop bullying 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 bullying behaviour), and
- Person named (person who has allegedly engaged in bullying behaviour).

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).

What is a day?

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

> *(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.[2]

Adjournment	To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or indefinitely.
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.

[1] This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).
[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].

Applicant	A person who makes an application to the Commission.
Application	The way of starting a case before the Commission. An application can 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.
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 employs 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.
Evidence	Information provided to the Commission which tends to prove or disprove the existence of a particular belief, fact or proposition. 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.

[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.

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; in the context of stop bullying matters, this could include another worker at the workplace, a visitor or client.
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. Also known as a directions hearing or case management conference.

Notice of Listing	A formal notification 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 (PCBU)	A legal entity responsible for a 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 bullying behaviour.
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 employs 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 7 of this Benchbook.
Respondent	A party against whom an application is made. In the case of an application to stop bullying this can be the: • employer or principal, and/or • person named (person who is named as engaging in bullying behaviour).
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.
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 bullying at work. 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 these issues in the same order as the *Fair Work Act 2009* (the Fair Work Act).

For information about alleged workplace sexual harassment, please refer to the:

- Sexual Harassment Disputes Benchbook (where the alleged sexual harassment occurred (or commenced) on or after 6 March 2023), or
- Orders to stop sexual harassment: Transitional arrangements Benchbook (where the alleged sexual harassment occurred, or was part of a course of conduct that commenced, before 6 March 2023).

Overview of the Commission's bullying jurisdiction

Since 1 January 2014, Part 6-4B of the Fair Work Act has provided for the Commission to make orders to stop bullying at work.

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

The provisions dealing with orders to stop bullying at work changed again from 6 March 2023 as a result of amendments to the Fair Work Act made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022.*

From 6 March 2023, an application for orders to stop bullying at work is made separately to any application in relation to workplace sexual harassment. This is the case regardless of when the alleged bullying occurred.

The way that sexual harassment is dealt with in the Fair Work Act and the processes for applying to the Commission to deal with workplace sexual harassment are explained in:

- The Sexual Harassment Disputes Benchbook (where the alleged sexual harassment in connection with work occurred or commenced on or after 6 March 2023), and
- The Orders to stop sexual harassment: Transitional arrangements Benchbook (where the alleged sexual harassment at work occurred or commenced before 6 March 2023).

Who can apply for orders to stop bullying at work?

A person can apply for orders to stop bullying at work 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 the bullying behaviour while at work in a constitutionally-covered business.[6]

Related information

- Part 4 – Who is covered by laws to stop bullying at work?

When does bullying at work occur?

See Fair Work Act s.789FD(1)

Workplace bullying occurs when an individual or a group of individuals repeatedly behaves unreasonably towards a worker, or a group of workers of which the worker is a member, at work and that behaviour creates a risk to health and safety.

A worker is not bullied at work if the alleged bullying was reasonable management action, carried out in a reasonable manner.

A worker could be bullied by another worker or by another person while 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).

Related information

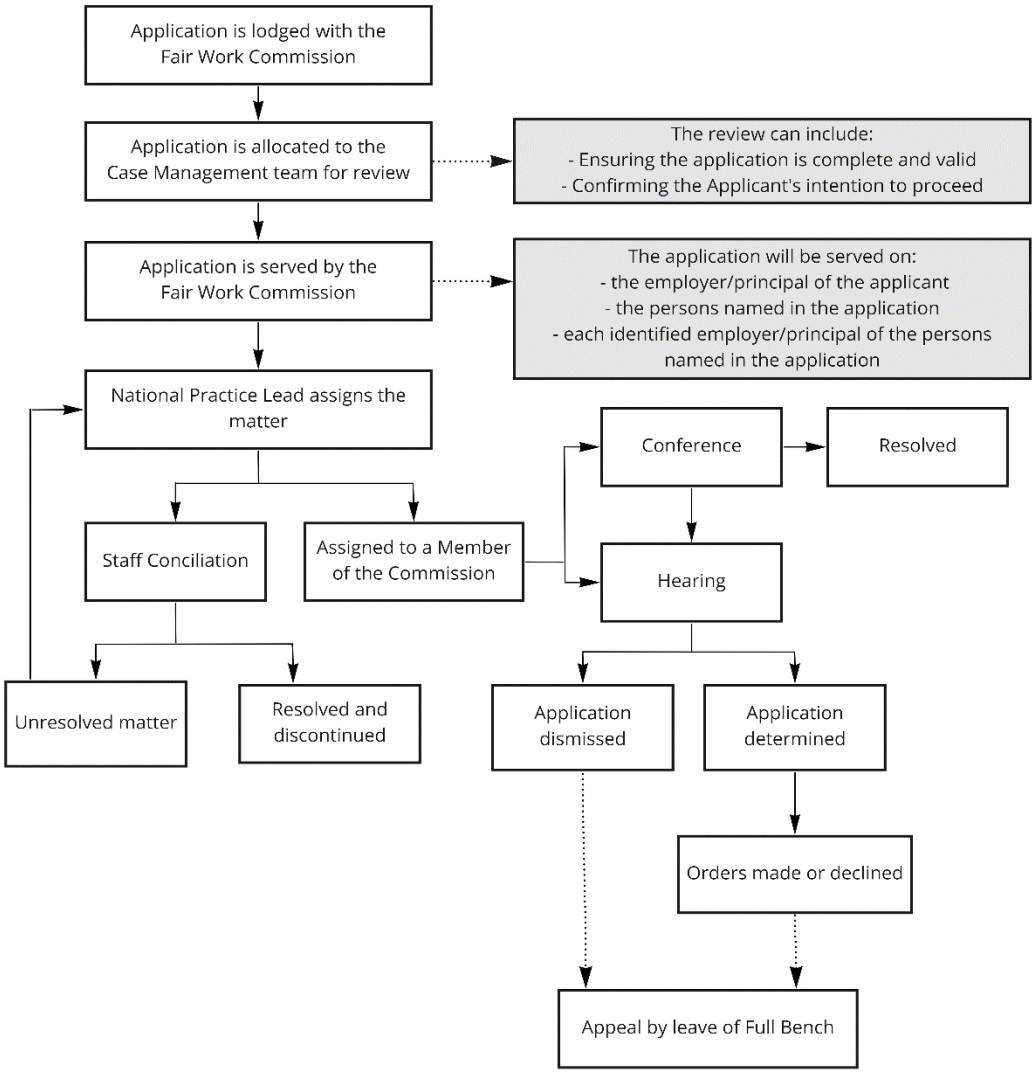
- Part 3 – What is workplace bullying?
- Part 4 – Who is covered by laws to stop bullying at work?
- Part 5 – When is a worker bullied at work?

[4] Fair Work Act s.789FC(2).
[5] Fair Work Act s.789FC(2).
[6] Fair Work Act s.789FD(1)(a).

Process for dealing with bullying at work under the Fair Work Act

The role of the Commission when dealing with alleged bullying at work is **preventative** – not remedial, punitive or compensatory. Similarly, orders that the Commission may make to stop bullying at work are intended to prevent the risk of further harm, but not to punish or provide financial compensation for past harm.

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



Other avenues for dealing with bullying at work

When dealing with applications for orders to stop bullying, the Commission can make any order it considers appropriate **to prevent the worker from being bullied at work** by the named individual or individuals.[7] However, the Commission **cannot order the payment of money** (compensation) to an applicant and cannot make any orders if there is no risk that the applicant will continue to be bullied at work by the named individual or individuals.

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

Complaints might be able to be made under federal, state and territory laws dealing with human rights, anti-discrimination and equal opportunity, where the alleged bullying behaviour is linked to a protected attribute (such as age or gender). To find out more about the requirements for making a complaint to those bodies, how to do so and the remedies available, visit:

- the Australian Human Rights Commission (AHRC) website, which includes information about discriminatory conduct
- the human rights, anti-discrimination or equal opportunity commission in your state or territory:
    - ACT Human Rights Commission
    - Anti-Discrimination NSW
    - NT 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 bullying 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. To find out more, visit:

- Fair Work Ombudsman for advice on bullying in the workplace

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

- 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 bullying 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 bullying at work. These include general protections, unfair dismissal and unlawful termination applications.

Related information

- General Protections Benchbook
- Unfair Dismissals Benchbook
- Unlawful Termination

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 find 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 workplace bullying?

Definition of bullying

See Fair Work Act s.789FD(1)

Workplace bullying occurs when:

- an individual or group of individuals **repeatedly** behaves **unreasonably** towards a worker or a group of workers **at work**,

AND

- the behaviour creates a **risk to health and safety**.[8]

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.[9]

Related information

- Qualification — 'reasonable management action carried out in a reasonable manner'

Examples of bullying

Depending on the nature and context of the conduct, bullying behaviours can include:

- the making of vexatious allegations against a worker
- spreading rude and/or inaccurate rumours about an individual, and
- conducting an investigation in a grossly unfair manner.[10]

In *Amie Mac v Bank of Queensland Limited and Others*[11] the Commission indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were:

[8] Fair Work Act s.789FD(1).
[9] Fair Work Act s.789FD(2).
[10] *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at [105].
[11] *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at [99].

> ... intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.

The following behaviours could also be considered as bullying, based on cases heard in other jurisdictions:

- aggressive and intimidating conduct[12]
- belittling or humiliating comments[13]
- victimisation[14]
- spreading malicious rumours[15]
- practical jokes or initiation[16]
- exclusion from work-related events[17], and
- unreasonable work expectations.[18]

Effects of bullying

Workplace bullying often results in significant negative consequences for an individual's health and wellbeing.[19]

The following consequences are indicative and will not be relevant to all victims of workplace bullying:

- depression
- anxiety
- sleep disturbances
- nausea, and

[12] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618 (24 June 2005).
[13] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618 (24 June 2005); *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914 (12 May 2005).
[14] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618 (24 June 2005).
[15] *Willett v State of Victoria* [2013] VSCA 76 (12 April 2013).
[16] *WorkCover Authority (NSW) (Inspector Maddaford) v Coleman* [2004] NSWIRComm 317 (3 November 2004), [(2004) 138 IR 21].
[17] *Willett v State of Victoria* [2013] VSCA 76 (12 April 2013).
[18] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618 (24 June 2005).
[19] House of Representatives Standing Committee on Education and Employment report, Workplace bullying "We just want it to stop", at p. 12.

- musculoskeletal complaints and muscle tension.[20]

To obtain an order to stop bullying, an applicant does not need to show actual harm to their health and safety. However, an applicant must demonstrate that there is a *risk* to health and safety as a result of the bullying behaviour. This is different to the Commission's stop sexual harassment jurisdiction.[21]

Related information

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[20] ibid.

[21] *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 50. As sexual harassment is a known safety risk, applicants do not need to show that the sexual harassment poses a risk to their health and safety.

Part 4 – Who is covered by laws to stop bullying at work?

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

A person will be covered, and therefore eligible to make an application for orders to stop bullying at work, if they:

- are a worker (as defined in the *Work Health and Safety Act 2011* (Cth) (WHS Act))[22]
- are not a member of the Defence Force[23], and
- have experienced repeated, unreasonable behaviour while at work in a constitutionally-covered business.[24]

The laws also cover:

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

Related information

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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:[25]

- an employee[26]

[22] Fair Work Act s.789FC(2).
[23] Fair Work Act s.789FC(2).
[24] Fair Work Act s.789FD(1)(a).
[25] WHS Act s.7(1).

- a contractor or subcontractor[27]
- an employee of a contractor or subcontractor[28]
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking
- an outworker[29]
- 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).[30]

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.[31]

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 bullying.

The following cases set out examples of where someone has been found to be, or not be, a 'worker' for the purposes of an application to stop bullying at work.

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.

[26]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.
[27] ibid.
[28] ibid.
[29] Fair Work Act s.12.
[30] 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.
[31] WHS Act s.7(2).

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) (the 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 terms of 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, whilst 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 after becoming 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. The Commission found that Mr Bibawi did not satisfy the definition of 'worker' in s.789FC of the Fair Work Act (which has the same meaning as s.7 of the WHS Act) and that it had no jurisdiction to determine the application. It was not in dispute that Stepping Stone employed a number of mental health support workers.

On appeal Mr Bibawi argued that he undertook volunteer work 'in any capacity for' Stepping Stone consistent with the WHS Act definition. The Full Bench found that Mr Bibawi was a 'worker' and could make an application for an order to stop bullying at work 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 any 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 in 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 Defence Force (the Royal Australian Navy, Australian Army and the Royal Australian Air Force) is excluded from the definition of 'worker'.[32]

The employment of, or service by, a member of the Defence Force is also excluded from the definition of 'public sector employment' in the Fair Work Act.[33]

Declarations that laws dealing with orders to stop bullying at work do not apply

See Fair Work Act ss.789FJ–789FL

The following declarations may only be made with the approval of the Commonwealth Minister.[34]

Declarations by the Chief of the Defence Force

The Chief of the Defence Force[35] may, by legislative instrument, declare that all or some provisions of the 'Workers bullied at work' provisions do not apply in relation to a specified activity.

Declarations by the Director-General of Security

The Director-General of Security[36] may, by legislative instrument, declare that all or some provisions of the 'Workers bullied at work' provisions do not apply in relation to a person carrying out work for the Director-General.

Declarations by the Director-General of ASIS

The Director-General of the Australia Secret Intelligence Service[37] may, by legislative instrument, declare that all or some provisions of the 'Workers bullied at work' provisions do not apply in relation to a person carrying out work for the Director-General.

The laws dealing with orders to stop bullying 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).[38]

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.

[32] Fair Work Act s.789FC(2).
[33] Fair Work Act s.795(5)(a) and *Fair Work Regulations 2009* (Cth) reg 6.08(2).
[34] Fair Work Act ss.789FJ–789FL.
[35] See *Defence Act 1903* (Cth) s.9.
[36] See *Australian Security Intelligence Organisation Act 1979* (Cth) s.7.
[37] See *Intelligence Services Act 2001* (Cth) s.17.
[38] 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 bullying at work, a worker must be a worker 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 bullying at work, a worker must, when the alleged bullying occurred, have been:

- ‘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).[39]

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

Related information

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- What is the Commonwealth?
- 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.

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

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- 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 responsible for 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 as represented by its Departments, as well as local governments and other government businesses and undertakings.

Not all PCBUs are covered by the laws to stop bullying at work under the Fair Work Act, because not all of them are constitutionally-covered businesses.

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)[40] may conduct a business or undertaking alone or with others.[41] It is irrelevant whether the business or undertaking is conducted for profit or gain.[42]

Exclusions

The following are examples of persons or bodies that are not a PCBU (a person conducting a business or undertaking) under these laws:

- a person engaged solely as a worker in, or as an officer of, the business or undertaking[43]
- an elected member of a local authority (acting in that capacity),[44] or
- a wholly 'volunteer association' that does not employ anyone (whether incorporated or not).[45]

Volunteer associations

Volunteer associations (whether incorporated or not) that do not employ anyone, do not conduct a business or undertaking[46]. The Commission does not have power to deal with workplace bullying claims made by persons who may be at work in a volunteer association.

A ***volunteer association*** is a group of volunteers which acts together for one or more community purposes where none of the volunteers, either alone or jointly with any other

[40] 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).
[41] WHS Act s.5(1)(a).
[42] WHS Act s.5(1)(b).
[43] WHS Act s.5(4).
[44] WHS Act s.5(5). It is however possible that an elected member could be an individual whose conduct could be relied upon as bullying behaviour under Fair Work Act s.789FD(1).
[45] WHS Act s.5(7).
[46] WHS Act s.5(7).

volunteers, employs any person to carry out work for the volunteer association.[47]

'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'.[48]

If a person is employed to carry out work,[49] 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'.[50]

Undertakings usually have 'elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature'.[51]

Related information

- What is a Territory or a Commonwealth place?
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- What is the Commonwealth?
- 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.

Commonwealth authorities include 'corporate Commonwealth

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

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

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- What is a body corporate incorporated in a Territory?

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

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: 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 at work, 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.

The applicant would also 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 AVI when the alleged bullying at work occurred. The applicant was instead working 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 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).[52]

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 corporations as 'a corporation to which paragraph 51(xx) of the Constitution applies'.[53]

Paragraph 51(xx) of the Constitution applies to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[54]

There are 2 types of constitutional corporation.[55] 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.[56]

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[52] *Australian Constitution* s.52(i); Fair Work Act s.12.
[53] Fair Work Act s.12.
[54] *Australian Constitution* s.51(xx).
[55] *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].
[56] 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.[57]

The issue of whether an employer is a constitutional corporation usually arises where the employer is a State or local government entity or a not-for-profit organisation in industries such as health, education and community services.[58]

Foreign corporations

A foreign corporation is a corporation formed outside of Australia.[59]

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 and therefore fall within the Commission's jurisdiction to stop bullying at work.[60]

[57] A Stewart, *Stewart's Guide to Employment Law* (7th ed, 2021), at p.38.
[58] ibid., at p. 34.
[59] *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].
[60] See also *Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (Gooley C, 25 February 2010) at para. 24.

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 dismissal was in Australia.

Relevance

The Commission found that it had jurisdiction to deal with applications against foreign corporations in relation to employees employed to work in Australia.[61]

Trading or financial corporation formed within the limits of the Commonwealth

Trading denotes the activity of providing goods or services for payment.[62]

The Commission will consider the nature of a corporation with reference to its activities, rather than the purpose for which it was formed.[63]

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.[64]

[61] 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.
[62] *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].
[63] *R v Federal Court of Australia; Ex parte WA National Football League* [1979] HCA 6 (27 February 1979) at para. 53 (Barwick CJ), [(1979) 143 CLR 190 at p. 208].
[64] ibid., at para. 10 (Murphy J), [(1979) 143 CLR 190 at p. 239].

A corporation will be a trading corporation if the trading engaged in is 'a sufficiently significant proportion of its overall activities'.[65]

A corporation can be a trading corporation even if it was not originally formed to trade.[66]

One factor that may be considered is the commercial nature of the activity.[67] 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.[68]

A **financial corporation** is one 'which borrows and lends or otherwise deals in finance as its principal or characteristic activity ...'[69]

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.[70]

Summary of cases[71]

Trading or financial corporation	**NOT a trading or financial corporation**
Professional sporting organisation or club	Amateur sports club

[65] ibid., at para. 31 (Mason J), [(1979) 143 CLR 190 at p. 233].
[66] *Garvey v Institute of General Practice Education Incorporated* [2007] NSWIRComm 159 (28 June 2007) at para. 30, [(2007) 165 IR 62].
[67] *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].
[68] *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].
[69] *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].
[70] *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].
[71] 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).

Building society	Medical research institute
Community services organisations	Disability services organisation
Statutory public transport agency	

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 a charging a contribution to managerial and administrative expenses and a difference in the calculation of interest, lent to their members at the same rate 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 were 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 relationship 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. It argued 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 that 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 the hiring of 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

Whilst perhaps not charged at market rates, the 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 the 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 the 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 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 and the WHS 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.[72]

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.[73]

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

[72] Butterworths Australian Legal Dictionary, 1997, at p. 224.
[73] 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.[74] 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.

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

Part 5 – When is a worker bullied at work?

See Fair Work Act s.789FD

A worker is bullied at work if, while the worker is at work in a constitutionally-covered business, an individual, or group of individuals, repeatedly behaves unreasonably towards the worker (or a group of workers of which the worker is a member), and that behaviour creates a risk to health and safety.

Bullying can involve the behaviour of one or more people.

Repeated unreasonable behaviour

The concept of repeatedly behaving unreasonably refers to the existence of persistent unreasonable behaviour, and may include a range of behaviours over time. There is no specific number of incidents required for the behaviour to be 'repeated', although there must be more than one occurrence. There is no requirement that the same specific behaviour be repeated.[75]

Unreasonable behaviour is behaviour that a reasonable person, having regard to the circumstances, would see as unreasonable. In other words, it is an objective test.[76] It is not concerned with the motives or reasons of the person who engaged in the behaviour, or what they actually intended. 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.[77]

Unreasonable behaviour would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.[78]

Risk to health and safety

A ***risk to health and safety*** means the possibility of danger to health and safety, and is not confined to actual danger to health and safety.[79] The ordinary meaning of 'risk' is exposure to the chance of injury or loss.[80] The risk must be real and not simply conceptual.[81]

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[75] *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 41. This is different to the Commission's jurisdiction to deal with sexual harassment, under which a single incident can constitute sexual harassment.
[76] ibid., at para. 43.
[77] In the context of sexual harassment, see: 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.
[78] House of Representatives Standing Committee on Education and Employment report, Workplace bullying "We just want it to stop",at p. 15.
[79] *Thiess Pty Limited v Industrial Court of New South Wales* [2010] NSWCA 252 (30 September 2010) at paras 65–67, [78 NSWLR 94]; *Abigroup Contractors Pty Limited v Workcover Authority of New South Wales (Inspector Maltby)* [2004] NSWIRComm 270 (24 September 2004) at para. 58, [(2004) 135 IR 317].
[80] Macquarie Concise Dictionary definition; *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 45.
[81] *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 45.

The bullying behaviour must ***create*** the risk to health and safety. Therefore, there must be a causal link between the behaviour and the risk.[82] Cases on causation in other contexts suggest that the behaviour does not have to be the only cause of the risk, provided that it was a substantial cause of the risk viewed in a common sense and practical way.[83]

Reasonable management action carried out in a reasonable manner **is NOT bullying**.[84]

Related information

- Part 3 – What is workplace bullying?
- Examples of bullying
- Qualification — 'reasonable management action carried out in a reasonable manner'

Bullying – Case examples

Note: In addition to decisions concerning what may constitute bullying at work under Part 6-4B of the *Fair Work Act 2009* (the Fair Work Act), the following examples include cases about bullying in other legal contexts.

The Commission cannot order the payment of money if it makes a finding of bullying at work.

Many of the following cases are extreme examples of workplace bullying. Bullying can take many forms. It can involve less overt, less severe and more subtle behaviours. More subtle behaviours such as exclusion can, if frequently repeated over an extended period of time, amount to a significant psychological hazard for a worker.

WHS regulators can also assess and investigate bullying complaints 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.

For the Commission to make an order to stop bullying at work, a worker will need to show, on the balance of probabilities, that they were bullied at work, that the behaviour creates a risk to health and safety, and that there is a risk that they will continue to be bullied at work.

[82] This is different to the Commission's jurisdiction to deal with sexual harassment, where an applicant does not need to show that the sexual harassment poses a risk to their health and safety. Sexual harassment is a known safety risk.
[83] *Newcastle Wallsend Coal Co Pty Ltd v Workcover Authority (NSW) (Inspector McMartin)* [2006] NSWIRComm 339 (5 December 2006) at para. 301; *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 44.
[84] Fair Work Act, s.789FD(2).

Case example: **Examples of bullying behaviour – Repeated unreasonable behaviour**

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 and their employer, including the manager:

- finding fault with work where there was none
- raising his voice and being intimidating and turning red
- hiding in buses in order to frighten the second applicant
- directing the second applicant to inaccurately fill out his logbook in contravention of fatigue laws, and
- acting in a confrontational manner with the first applicant.

In total 12 bus drivers, including the applicants, gave evidence complaining about the Manager's behaviour. The manager and employer provided a joint defence and accepted that whilst the manager engaged in some inappropriate behaviour, they denied that this amounted to bullying.

The manager's duties were altered so that he was no longer responsible for supervision of drivers, investigating incidents, assessing drivers or disciplining drivers. He remained responsible for training drivers and recording breathalyser results from time to time.

Outcome

The Commission was satisfied that the manager's behaviour was unreasonable; that it was not reasonable management action carried out in a reasonable manner, and that the manager had bullied both applicants. The Commission also accepted that the change in the manager'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 the manager 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 accepted that there was a serious risk that bullying conduct would continue. However, the risk of the conduct continuing had been substantially reduced by the change in the manager's role. The Commission considered that finding that bullying had occurred and the reduced risk from the manager's new role should be sufficient to protect the applicants from a risk of further bullying. It was therefore not necessary or appropriate to make an order in the circumstances of the case.

Relevance

In this matter the Commission was presented with evidence from the applicants and other drivers that established a number of incidents where the manager swore at drivers or humiliated drivers or unnecessarily harassed drivers. This helped to show that the unreasonable behaviour was repeated, and that there was a risk that the drivers would continue to be bullied at work. The Commission accepted that the risk of bullying conduct continuing was substantially reduced by the change in the manager's role, and that it was not possible to avoid contact between the applicants and the manager. The Commission did not consider that an order requiring complete separation between the manager and other drivers, and the applicants in particular, or requiring another person to always be present, would be a practical or balanced response.

Case example: **Allegations of bullying behaviour - Not bullied at work**

Application by Shane Atkins [2020] FWC 305 (McKinnon C, 20 January 2020)

Facts

The applicant was employed as a Ranger with Parks Victoria. Following an aggravation of a workplace injury the applicant was largely confined to office work. Since then, the applicant had difficulty meeting the performance standards of his new office-based job and was placed on a performance improvement plan by his manager.

The relationship between the applicant and his manager deteriorated and the applicant alleged a pattern of bullying against him including:

- a threat of disciplinary action in a staff meeting
- direction to complete a signage plan for certain parks or 'fail' his end of year review
- micromanagement of a project, including rude behaviour
- a direction to use unsafe equipment and denial of access to certain equipment, and
- management inaction/lack of investigation of the applicant's complaints and procedural failures in relation to those complaints.

Outcome

The Commission considered the allegations in turn and found that the evidence presented did not establish that the applicant had been bullied at work.

The Commission found that there was a clear history that Parks Victoria had taken a number of active steps over the 3-year period to address the applicant's complaints and allegations and had offered 'health checks' for the wellbeing of the affected employees.

The Commission found that the applicant's manager had not threatened him as alleged and that a number of requests made to complete particular pieces of work were not communicated in an unreasonable manner and comprised reasonable management action. The application was dismissed.

Relevance

For bullying at work there needs to have been repeated unreasonable behaviour towards the applicant. Each of the allegations made by the applicant were considered and found to be unsubstantiated. Whilst concerning that both the applicant and the manager had experienced mental health issues as a result of the deterioration of their working relationship, the manager's actions towards the applicant were found to be reasonable management action. There was no apparent future risk of continued bullying of the type alleged as the manager was no longer managing the applicant in terms of their daily roles and responsibilities.

Case example: **Whether alleged bullying conduct occurred 'at work'**

Application by Dianne Loveday [2021] FWC 6575 (McKinnon C, 22 August 2022)

Facts

The applicant (a small business owner) ran a family mediation service from 2 commercial units she owned. She applied for orders to stop bullying at work against 2 other occupants of the building who also ran businesses there, Mr Beling and Mr Tyers. The applicant had previously been the chair of the owner's corporation for the building but had recently been replaced by Mr Beling.

The alleged bullying by Mr Beling began after the applicant refused to sell him an additional car parking space (having initially agreed to do so). The alleged conduct primarily consisted of rude, insulting and belittling conduct in owner's committee meetings and email exchanges, but also included dismissive or intimidatory behaviour when the applicant ran into Mr Beling in common areas of the building or the café downstairs. Similar allegations were made against Mr Tyers.

Both Mr Beling and Mr Tyers denied that the applicant had been bullied at work. While Mr Tyers denied bullying the applicant he apologised for any distress she had suffered. Mr Beling claimed the allegations of bullying were nonsense and did not apologise for his conduct.

Outcome

Much of the alleged bullying occurred while the applicant was carrying out work in her capacity as chair or member of the owner's corporation. As the owner's corporation was found not to be a constitutional corporation, this conduct was not covered by Part 6-4B of the Fair Work Act.

Having considered the evidence, the Commission was satisfied that some of Mr Beling's behaviour had occurred whilst the applicant was at work in her own mediation business, including when the applicant and Mr Beling came into contact with each other in the course of their work in common areas of the building and the café downstairs. The Commission found that this conduct had repeatedly been unreasonable —Mr Beling had acted rudely toward the applicant in these encounters, including on occasions by letting doors close as she approached and staring at her with the intention of intimidating her while saying words she could not hear. This created a risk to the applicant's health and safety.

The Commission made orders to constrain the opportunity for conflict between the applicant and Mr Beling and set some basic parameters for how they interacted with each other while at work. The Commission was not satisfied that Mr Tyers had bullied the applicant at work and made no orders against him.

Relevance

For a finding that workplace bullying has occurred, the conduct must occur whilst the applicant is 'at work' in a 'constitutionally-covered business'. In this case, as the owner's corporation was not a constitutionally-covered business. Activities for the benefit of the owner's corporation were not covered by Part 6-4B. However, bullying conduct which occurred in and around the same premises while the applicant was at work in her own business was covered.

Bowker and Others v DP World Melbourne Limited T/A DP World and Others [2015] FWC 7312 (Gostencnik DP, 16 November 2015).

Facts

Three employees (the applicants) of DP World Melbourne Limited (DP World) employed at its West Swanson terminal each made an application for an order to stop bullying. The applications included allegations of conduct engaged in by individuals who are, or were, employees of DP World, members of The Maritime Union of Australia (the MUA) and/or officials of the MUA.

The unreasonable behaviour began after a complaint was made by one of the applicants to DP World concerning derogatory comments made about her by another employee of DP World. Between mid-2013 and July 2015, the applicants raised with DP World in excess of 212 complaints and concerns about conduct by other employees of DP World and representatives of the MUA, which they believed constituted bullying at work. The applicants alleged in the order of 37 instances of bullying in their application to the Commission. These included:

- Facebook posts making various unreasonable and insulting allegations and comparisons of two of the applicants
- a code of silence and bullying workplace culture
- ostracism from the employee and union group
- a lack of support from MUA officials, and
- employees of DP World and MUA members had made various threats to one of the applicants and encouraged other members not to associate with them.

Outcome

The Commission was satisfied that each applicant was subjected repeatedly to unreasonable behaviour engaged in by an individual or a group of individuals, and that behaviour created a risk to their health and safety, saying that 'the conduct engaged in … is something about which no respondent party to these proceedings should be proud'. The Commission found that a code of silence, said to be a 'prevailing culture or paradigm where employees at the WS Terminal will not make complaints to DP World or verify complaints made, for fear of being labelled a 'lagger' or being ostracised in the workplace' still existed and, while steps had been taken by DP World to address the code, more could be done.

Relevance

The ongoing unreasonable behaviour in this case was varied and frequent, with the applicants raising in excess of 212 complaints and concerns. Further impacting the effect of the behaviour was the fact that DP World had, on numerous occasions, failed to comply with the requirement under its *Workplace and Bullying Policy* to promptly deal with complaints. This slow response along with the negative workplace culture and the 'code of silence' exacerbated the effect of the workplace bullying on the applicants.

Not dealing with allegations of workplace bullying appropriately may give the impression that unreasonable behaviour is an accepted part of the workplace.

Case example: **Examples of bullying behaviour**

CF and NW [2015] FWC 5272 (Hampton C, 5 August 2015).

Facts

Two applicants made applications for orders to stop bullying. The applicants were employees of a relatively small real estate business and remained employed at the time the applications were heard. The applications alleged bullying conduct by a Property Manager engaged by the employer and then subsequently employed by a related company. Both applications concerned alleged conduct in the same workplace and the same unreasonable behaviour.

The alleged behaviour by the Property Manager included:

- belittling conduct
- swearing
- yelling and use of otherwise inappropriate language
- physical intimidation, and
- threats of violence.

The applicants raised some concerns with the employer, these were the subject of an informal investigation and an attempted workplace mediation. With the support of the employer, the Property Manager resigned her employment with the employer but took up an equivalent position with a related company.

At hearing the employer conceded that a finding that bullying conduct had taken place in the workplace could be made.

Outcome

The Commission found that the conduct revealed a workplace culture where unprofessional and unreasonable conduct and interactions had taken place which created a risk to health and safety of a number of workers involved. The Commission further found that the applicants had been bullied at work and was satisfied that there was a risk that the applicants would continue to be bullied at work.

Relevance

As it was practical in the circumstances to do so, orders were made for the relevant parties to avoid each other. In addition, orders were made to address the culture of the workplace, including the establishment of appropriate anti-bullying policies, procedures and training.

Case example: **Examples of bullying behaviour – NOT reasonable management action conducted in a reasonable manner**

Burbeck v Alice Springs Town Council; Georgina Davison; Skye Price; Clare Fisher [2017] FWC 4988 (Wilson C, 6 October 2017).

Facts

The applicant was subject to six separately identifiable instances of management action.

Outcome

The Commissioner considered each instance in turn, determining that some aspects of the action were unreasonable, including the failure of the employer to consider grievances lodged by the applicant. It was also found that a failure by the applicant's manager to adequately check her leave balance resulted in her annual leave being unreasonably refused.

In considering whether to issue orders, the Commissioner considered that there was a likelihood that the unreasonable behaviour would continue and there was some risk that it could create a risk to health a safety. In part, the ongoing nature of the behaviour was partly attributed to the applicant, considering that 'the presence of this contributory behaviour and conduct inevitably tempers consideration of what may be done about the conduct'.

Relevance

An applicant's own conduct is a matter that the Commission may consider relevant under s.789FF(2)(d) when considering the terms of an order. Orders included the provision of anti-bullying and positive communication training to all individuals involved in the application, including the applicant.

Case example: **NOT examples of bullying behaviour – Behaviour did not fall within the scope of bullying**

Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014).

Facts

The applicant managed a team of employees. It was alleged that two of the 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 the employees made bullying allegations against the applicant (immediately prior to the applicant lodging her application). An investigation by a legal firm was arranged by the employer 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, but as support for her proposition that there was a risk of ongoing bullying conduct; principally on the basis that no action was being proposed in relation to the employee.

The applicant sought orders from the Commission directed at stopping the alleged conduct of the remaining employee (the other alleged bully having left the organisation), compliance by the employer and others with the workplace bullying policies operating at the workplace, and the monitoring of workplace behaviour by the employer.

Outcome

The Commission was not satisfied that the alleged behaviour occurred and/or was unreasonable in the context that it occurred; some of the behaviour was bordering upon unreasonable but not such as to fall within the scope of bullying behaviour. Also the Commission was not satisfied that the limited degree of unreasonable behaviour by the individuals concerned was such that it created a risk to health and safety. As a result, the Commission was not satisfied that the applicant had been bullied at work and the application was dismissed.

The Commission noted that the applicant had not acted vexatiously in bringing her application and that the application was not made without any foundation. The Commission also noted that there were some cultural, communication and management issues in the workplace that needed to be addressed by senior management.

Relevance

It is necessary to examine whether an individual or group of individuals have repeatedly behaved unreasonably towards the applicant, and whether such behaviour has created a risk to health and safety.

Case example: **NOT examples of bullying behaviour – No repeated incidents of unreasonable behaviour**

Application by Singh [2015] FWC 5850 (Hampton C, 28 August 2015).

Facts

The applicant was a worker employed by Programmed Integrated Workforce Pty Ltd (PIW) and was often assigned to work at Coca Cola Amatil (CCA).

He alleged that he had experienced an incident where the person named in the application had both verbally and physically assaulted him. The applicant, however, accepted that the conduct only occurred once.

The respondent parties objected to the application on the basis that, even if the incident did occur as the applicant alleged, which was disputed, the behaviour did not amount to bullying within the definition of the Fair Work Act as the unreasonable behaviour had not occurred repeatedly.

Outcome

The Commissioner confirmed the decision in *Re Ms SB* where it was found that there 'is no specific number of incidents required for the behaviour to represent 'repeatedly' behaving unreasonably (provided there is more than on occurrence), nor does it appear that the same specific behaviour has to be repeated'.

It was reinforced, however, that '(t)he definition implies the existence of persistent unreasonable behaviour but might refer to a range of behaviours over time… The unreasonable behaviour must however be repeated'. The application was dismissed.

Relevance

Unreasonable behaviour can include a range of behaviours *over time* or an unreasonable behaviour that is *repeated*. In this case a single incident, whilst clearly unreasonable and inappropriate, was not enough to provide the necessary jurisdiction for the Commission to determine this particular application.

Case example: **NOT examples of bullying behaviour – No repeated incidents of unreasonable behaviour**

The Applicant v General Manager and Company C [2014] FWC 3940 (Roe C, 17 June 2014).

Facts

The applicant was a training manager responsible for the employer's training business in Victoria and had a team of seven or eight other employees including trainers. The financial performance of the training part of the business was not considered to be satisfactory. At a national conference the Managing Director announced that reporting arrangements would change.

The General Manager alleged that the applicant avoided him, failed to attend meetings, failed to keep him updated about important information about the business and about staff dissatisfaction, and discouraged the engagement of members of her team with the General Manager. On 30 October 2013 the General Manager called the applicant into his office and told the applicant that her behaviour was not acceptable and that he was not prepared to put up with it continuing.

The applicant alleged that what occurred at this meeting was bullying behaviour. The applicant further alleged that there were a number of subsequent incidents between 30 October 2013 and 28 November 2013, in which the General Manager failed to inform and encourage her involvement in relevant meetings, failed to provide adequate information about reporting responsibilities and expectations, undermined her position by going directly to members of her team, and was overly intrusive and micro-managing.

The applicant submitted that the instances of bullying generally occurred in private exchanges between the General Manager and herself and that in front of others the General Manager did not generally behave unreasonably.

Outcome

The Commission was satisfied that the health and safety of the applicant was negatively impacted and continued to be impacted by what happened at work. However, the Commission found that the only instance of unreasonable behaviour was in the General Manager failing to properly respond to the applicant's request to have a support person at future meetings. The Commission was not satisfied there were repeated incidents of *unreasonable* behaviour which were not reasonable management action carried out in a reasonable manner.

Relevance

For orders to be made, the Commission must find repeated instances of unreasonable behaviour that are not reasonable management action carried out in a reasonable manner.

What does ‘at work’ mean?

For a worker to be covered by the Commission’s jurisdiction to stop bullying at work, the alleged bullying must have occurred while the worker is ‘at work’.[85]

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 persons named as engaging in the alleged bullying behaviour 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 bullying.

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.[86]

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,[87] as well as when the worker is engaged in some other activity which is authorised or permitted by their employer.[88] 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[89] or at a work event or on a coffee break).[90]

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.[91]

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[85] Fair Work Act s.789FD(1).
[86] *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.
[87] *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.
[88] ibid at para. 51.
[89] 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.
[90] *Nasir Sheikh v Civil Aviation Safety Authority and Ors* [2016] FWC 7039 (Wilson C, 8 November 2016) and see also Explanatory Memorandum for the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* at para. 41.
[91] *Cain v Downing and Ors* [2020] FWC 1914 (Beaumont DP, 8 May 2020) at paras. 145-146.

Orders to stop bullying can be based on conduct outside the workplace if the conduct 'relates to work'[92] or where the applicant was performing activities that were 'closely connected to work'.[93] Whether the necessary connection is present depends on the particular facts and circumstances of the case.

Use of social media

Bullying can involve the use of technology including phone calls, SMS, emails and social media.

In *Bowker and Others v DP World Melbourne Limited T/A DP World and Others*[94] 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?[95]
>
> **[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.[96]
>
> **[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.[97]

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[92] Revised Explanatory Memorandum for the *Fair Work Amendment Bill 2013*, para. 119.
[93] Explanatory Memorandum for 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).
[94] *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).
[95] ibid.
[96] ibid.
[97] ibid.

Reasonable belief of bullying at work

See Fair Work Act s.789FC(1)

For a worker to be able to apply to the Commission for orders to stop bullying the worker must ***reasonably believe*** that they have been bullied 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[98], 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.[99]

[98] *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.
[99] 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 – no credible evidence to support belief of bullying –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 Commission found the disciplinary actions taken by the respondent were reasonable management action carried out in a reasonable manner. The application was dismissed on the grounds that on an objective analysis, there was no credible evidence to reach a finding that the applicant was bullied at work or that there was any future prospect of bullying. As a result, an order to stop bullying could not be made.

The Commission observed that 'whilst Mr Vine may believe that he has been bullied, the conduct must not only be perceived as being bullying, but that belief "must be reasonable in the sense that it is able to be supported or justified on an objective basis".'

Relevance

The Commission assessed all of the evidence and was not satisfied that there was any evidence of bullying. Whilst an applicant may genuinely believe that they have been bullied, that belief must be objectively reasonable in the sense that there is some support or rational basis for the holding of the belief for a worker to be eligible to apply for orders to stop bullying.

Case example: **Application for orders to stop bullying – no reasonable belief of bullying at work – Application dismissed**

Mr D C [2022] FWC 2124 **(McKinnon C, 29 August 2022)**

Facts

The applicant sought orders to stop bullying and civil damages for pain and suffering.

The application disclosed that the applicant believed the Victorian labour hire and construction industries were cooperating to punish him, on behalf of corrupt members of Victoria Police and 'northwest mental health', for discovering a secret police operation involving the monitoring and sharing of images and text messages about him for fun and to stir up trouble.

Outcome

The application was dismissed under s.587(1) of the Fair Work Act.

The Commission found that the applicant's beliefs about the alleged bullying at work were not reasonably held:

> 'Aside from being objectively unlikely, documents filed and referred to in support of the application (including one of more than 100 pages) do not establish any reasonable foundation for the beliefs held by Mr D.C. about the existence of a secret cooperative effort against him by Victorian industry, police and mental health providers.'

In addition, the applicant had not been 'at work' in any of the named businesses since March 2022. As the employment relationship had apparently come to an end, it was unlikely that orders could be made by the Commission in relation to the application. Further, the Commission had no jurisdiction to make orders for the payment of damages.

Relevance

The applicant was not eligible to apply under s.789FC(1) of the Fair Work Act for orders to stop bullying in the Commission, as his belief that he had been bullied at work was not reasonable.

Qualification — ‘reasonable management action carried out in a reasonable manner’

Contains issues that may form the basis of a jurisdictional issue

See Fair Work Act s.789FD(2)

Behaviour will not be considered bullying if it is reasonable management action carried out in a reasonable manner.[100] Section 789FD(2) is not so much an ‘exclusion’ but a qualification on the definition of when a worker is bullied at work.

This qualification is comprised of 3 elements:

- the behaviour must be management action
- it must be reasonable for the management action to be taken, and
- the management action must be carried out in a manner that is reasonable.

Related information

- What is management action?
- When is management action reasonable?
- What is a reasonable manner?

What is management action?

The following are examples of what may constitute management action:

- performance appraisals[101]
- ongoing meetings to address underperformance[102]
- counselling or disciplining a worker for misconduct[103]
- modifying a worker’s duties including by transferring or re-deploying the worker[104]
- investigating alleged misconduct[105]

[100] Fair Work Act s.789FD(2).
[101] *Thompson and Comcare* [2012] AATA 752 (31 October 2012).
[102] *Martinez and Comcare* [2012] AATA 795 (14 November 2012).
[103] *Truscott and Comcare* [2012] AATA 220 (17 April 2012).
[104] *Towns and Comcare* [2011] AATA 92 (14 February 2011).
[105] *State of Tasmania* v *Clifford* [2011] TASSC 10 (24 February 2011).

- denying a worker a benefit in relation to their employment, or[106]
- refusing an employee permission to return to work due to a medical condition.[107]

An informal, spontaneous conversation between a manager and a worker may not be considered management action, even if issues such as those listed above are raised.[108]

The term 'management action' has been extensively considered in the context of workers' compensation laws. Recent workers' compensation cases suggest that, to be considered management action, the action must be more than simply day-to-day operational instructions that are part and parcel of the work performed.[109]

The words used in s.789FD(2) however are less qualified: they exclude 'reasonable management action carried out in a reasonable manner'. Unlike some workers' compensation exclusions, they do not refer to prescribed actions taken 'in respect of the employee's employment' etc. or prescribe any list of 'management' or 'administrative' action. The Explanatory Memorandum suggests that the term may be required to be given a wider meaning under s.789FD(2):

> '112. Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions. They need to be able to make necessary decisions to respond to poor performance or if necessary take disciplinary action and also effectively direct and control the way work is carried out. For example, it is reasonable for employers to allocate work and for managers and supervisors to give fair and constructive feedback on a worker's performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated.'

This suggests that the legislature intended everyday actions to 'effectively direct and control the way work is carried out' to be covered by the term 'management action'.[110]

Note: Some of the following case examples related to 'management action' are taken from decisions made in other jurisdictions, under different laws. Whilst these laws contain similar provisions, they are not identical. As a result these examples do not directly relate to the term 'management action' as contained in the stop bullying provisions of the Fair Work Act.

[106] *Towns and Comcare* [2011] AATA 92 (14 February 2011).
[107] *Drenth v Comcare* [2012] FCAFC 86 (21 May 2012), [(2012) 128 ALD 1].
[108] *Rutledge and Comcare* [2011] AATA 865 (7 December 2011), [(2011) 130 ALD 94].
[109] *Commonwealth Bank of Australia v Reeve* [2012] FCAFC 21 (8 March 2012), [(2012) 217 IR 335].
[110] *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 48.

Case example: **NOT considered management action – Workers' compensation – General operational action**

Commonwealth Bank of Australia v Reeve [2012] FCAFC 21 (8 March 2012), [(2012) 217 IR 335].

Facts

A Commonwealth Bank manager sought workers' compensation after developing a depressive illness. The Administrative Appeals Tribunal found that a number of circumstances contributed to the worker's depression, including staffing changes affecting his branch in June 2008, and a number of events on the day of 18 July 2008. These included a telephone conference with fellow managers and his area manager in which the worker had to report poor results to colleagues and felt humiliated, an unsupportive visit from his area manager, his receipt of poor customer service results for the branch, and the anxiety he felt about reporting these results to his colleagues at an upcoming teleconference.

The Bank sought judicial review of the AAT's decision. It submitted that it was not liable to pay the worker's compensation because the actions that contributed to his depression, such as the staffing changes and use of teleconferences, were 'administrative action' and excluded the Bank from liability.

Outcome

A Full Court of the Federal Court did not accept the Bank's submission. It held that the exclusion applied to specific action taken in respect of an individual's employment, such as disciplinary action, as opposed to action forming part of the everyday tasks and duties of that employment. This meant that the ordinary work routine, changes to routine and directions to perform work were not 'reasonable administrative action taken in respect of the employee's employment'. The worker's claim for compensation was successful.

Relevance

In this case the appeal failed because the definition of 'administrative action' in s.5A of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) required that the action be taken 'in respect of the employee's employment'. Under the Fair Work Act the definition of 'reasonable management action carried out in a reasonable manner' does not have such an exclusion.

Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions to respond to poor performance, direct and control the way work is carried out or, if necessary, take disciplinary action.

Case example: **NOT considered management action – Workers' compensation – Regular meetings**

National Australia Bank Limited v KRDV [2012] FCA 543 (28 May 2012), [(2012) 204 FCR 436].

Facts

A worker attended regular weekly meetings with other team leaders and her manager, which were used to assess workloads for planning purposes. She was criticised for poor work performance during one of these meetings. The worker claimed workers' compensation, alleging injury after being 'picked on and singled out' by her manager, and subjected to personal criticism in front of other managers. The worker's employer denied the claim, arguing her condition was a result of reasonable administrative action taken in a reasonable manner in respect of her employment.

Outcome

The Federal Court held that, because the meeting was not arranged for the purpose of discussing the workers' performance, the behaviour did not fall within the 'reasonable administrative action' exclusion for a workers' compensation claim.

Relevance

When determining if actions are 'management action', it is necessary to examine the original intention of the actions. An informal, spontaneous conversation between a manager and a worker may not be considered management action, even if management issues are raised.

When is management action reasonable?

Determining whether management action is reasonable requires an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time, including:

- the circumstances that led to and created the need for the management action to be taken
- the circumstances while the management action was being taken, and
- the consequences that flowed from the management action.[111]

This covers the specific 'attributes and circumstances'[112] of the situation including the emotional state and psychological health of the worker involved.[113]

[111] *Georges and Telstra Corporation Limited* [2009] AATA 731 (24 September 2009) at para. 23; *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at paras 49–51.
[112] ibid.
[113] ibid.

The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'.[114] In general:

- management actions do not need to be perfect or ideal to be considered reasonable
- a course of action may still be 'reasonable action' even if particular steps are not[115]
- any 'unreasonableness' must arise from the actual management action in question, rather than the worker's perception of it[116], and
- consideration may be given as to whether the management action involved a significant departure from established policies or procedures and, if so, whether the departure was reasonable in the circumstances.[117]

At the very least, to be considered reasonable, the action must be lawful[118] and must not be 'irrational, absurd or ridiculous'.[119]

Any unreasonableness must arise from the actual management action in question rather than the worker's perception of it.[120]

What is a reasonable manner?

For the exemption in s.789FD(2) to apply, the management action must be carried out in a 'reasonable manner'.

As above, what is 'reasonable' is a question of fact and the test is an objective one.[121]

Whether the management action was taken in a reasonable manner will depend on the action, the facts and circumstances giving rise to the requirement for action, the way in which the action impacts upon the worker and the circumstances in which the action was implemented and any other relevant matters.[122]

This may include consideration of, for example:

- the particular circumstances of the individual involved

[114] *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004) at para. 79, [(2004) 135 FCR 105]; *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 51.
[115] *Department of Education & Training v Sinclair* [2005] NSWCA 465 (20 December 2005); *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 51.
[116] *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 51.
[117] ibid.; *Department of Education & Training v Sinclair* [2005] NSWCA 465 (20 December 2005).
[118] *Von Stieglitz and Comcare* [2010] AATA 263 (15 April 2010) at para. 67.
[119] ibid.; *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 51.
[120] *Blagojevic v AGL Macquarie Pty Ltd; Mitchell Sears* [2018] FWC 2906 (Saunders C, 23 May 2018) at para. 113.
[121] *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 52.
[122] *Keen v Workers Rehabilitation & Compensation Corporation* [1998] SASC 6519 (25 February 1998), [(1998) 71 SASR 42]; *Re Ms SB* [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 52.

- whether anything should have prompted a simple inquiry to uncover further circumstances[123]
- whether established policies or procedures were followed,[124] and
- whether any investigations were carried out in a timely manner.[125]

However the impact on the employee cannot by itself establish whether or not the management action was carried out in a reasonable manner, and some degree of humiliation may often be the consequence of a manager exercising his or her legitimate authority at work.[126]

An employee must be able to demonstrate that the decision to take management action lacked any evident and intelligible justification such that it would be considered by a reasonable person to be unreasonable in all the circumstances.[127]

[123] *Georges and Telstra Corporation Limited* [2009] AATA 731 (24 September 2009) at para. 23.
[124] *Yu and Comcare* [2010] AATA 960 (1 December 2010), [(2010) 121 ALD 583]; *Devasahayam and Comcare* [2010] AATA 785 (14 October 2010).
[125] *Wei and Comcare* [2010] AATA 894 (11 November 2010).
[126] *Comcare v Martinez (No 2)* [2013] FCA 439 (17 May 2013) at paras 73, 76.
[127] *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 102.

Case example: **Reasonable management action – Carried out in a reasonable manner – Discussions**

Application by E.K. [2017] FWC 3907 (Simpson C, 21 August 2017).

Facts

The applicant alleged that the behaviour engaged in by her manager and supervisor was repeated, unreasonable behaviour and did not constitute reasonable management action conducted in a reasonable manner.

On a number of occasions the applicant's supervisor had cause to address certain issues with the applicant. The applicant alleged that in each of these occurrences her supervisor commenced a discussion by raising their voice at the applicant.

Outcome

The Commissioner, in considering the case advanced by the applicant and the version of events from the perspective of the persons named, found that, whilst the applicant held a strong perception that she was the subject of bullying, it was not borne out by the evidence.

In dismissing the application the Commissioner considered that there was a pattern of the applicant making specific allegations about having been bullied when the evidence suggested that it was in fact her own behaviour that was inappropriate.

Relevance

When determining if the conduct of person(s) named is reasonable management action taken in a reasonable manner, it is necessary to examine the facts and circumstances of the matter. In this case the evidence demonstrated that the conduct of both the manager and supervisor of the applicant was at all times reasonable management action carried out in a reasonable manner.

Case example: **Reasonable management action – Carried out in a reasonable manner – Promotion**

Devasahayam and Comcare [2010] AATA 785 (14 October 2010).

Facts

A public servant claimed she suffered psychological injuries during the course of her work, due in part to a number of issues relating to her performance appraisals, failure to be promoted and being 'humiliated' in front of others. Her compensation claim was refused on the basis her condition was a result of 'reasonable administrative action undertaken in a reasonable manner'.

Outcome

The Administrative Appeals Tribunal upheld this decision, finding that all applicable guidelines had been followed.

Relevance

What is reasonable is assessed objectively and relates to the specific conduct involved in light of the process overall. Reasonableness must be assessed against what is known at the time without the benefit of hindsight, taking into account the attributes and circumstances, including the emotional state, of the employee concerned.

Case example: **Reasonable management action – Carried out in a reasonable manner – Performance appraisal**

Re Mr Sun [2014] FWC 3839 (Cloghan C, 16 June 2014).

Facts

The applicant was employed as an Application Developer. Later Mr A was appointed as General Manager, Information Systems. As a part of the performance appraisal process the applicant had to self-rate his performance. His direct manager queried some of the ratings; however the applicant received a rating of 'Meets Requirements' for each objective in the completed performance appraisal. On the day the applicant received notification of his annual discretionary bonus (which was less than he expected) he accessed Mr A's electronic diary and saw an email between Mr A and his direct manager regarding his performance.

The applicant collapsed at work and was taken to hospital. At a meeting to discuss his return to work he alleged the collapse was work related and that an unnamed person changed the weightings on his performance appraisal (the First Complaint). The employer advised him that it would formally investigate the complaint in accordance with policy. The investigation found that his allegation was not substantiated.

Upon his return to work the applicant had a meeting with his manager and Mr A to discuss his role and how he carried it out. Mr A informed the applicant that he could allocate employees to undertake tasks irrespective of whether they were within the employee's skills or position description, and that he was authorised to make such decisions and monitor those tasks and his expectations. This resulted in a situation where the applicant was critical of Mr A for requiring him to do a task which he considered was beyond his skills and capabilities, and consequently he accused Mr A of bullying (the Second Complaint).

Outcome

The Commission was satisfied that the applicant reasonably believed he was being bullied at work. However, with respect to the First Complaint, the alleged management action simply did not occur. Meanwhile, the Second Complaint involved management action by Mr A, which, when applying an objective test, was not bullying or unreasonable; it was reasonable and carried out in a reasonable manner.

Relevance

The Commission stated that caution should be exercised when considering whether payment of a discretionary bonus could be considered workplace bullying. The applicant's belief that he should have been paid more did not constitute workplace bullying unless payment of the discretionary bonus was applied in a punitive manner. Of concern was that the applicant accessed Mr A's email without permission; an employee does not have immunity from observing policies and practices expected in the workplace and employment relationship because they feel they are being bullied.

Case example: **Reasonable management action – Carried out in a reasonable manner – Performance review**

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 five persons employed by BOQ as the perpetrators of that bullying (jointly the respondents).

All staff undergo yearly Performance Development Assessments (PDAs). In her 2013 half-yearly PDA Ms Mac's supervisor raised a number of areas where she needed to improve, and made a number of suggestions concerning how she might improve, her work performance. Shortly after Ms Mac went through the full-year PDA process she was put on a performance improvement plan (PIP). By about mid-February management had formed the view that Ms Mac was not meeting the objectives of the PIP and had therefore 'breached' it. In March 2014, Ms Mac's solicitors sent a letter to BOQ advising that Ms Mac was on sick leave due to 'acute stress' caused by the PIP process and its surrounding circumstances.

Outcome

The Commission found that the decision to place Ms Mac on a PIP, and the manner in which the PIP process was implemented, were not unreasonable. Prior to the decision to place Ms Mac on a PIP being made, shortcomings in her performance had been identified by Ms Mac's managers over a considerable period of time. Those shortcomings were brought to Ms Mac's attention primarily through the documented PDA process, which was the established mechanism by which employees received feedback about their performance and were placed on notice if improvements were required. Although Ms Mac was rated as 'Competent' in her 2012 full-year PDA, significant shortcomings in her performance were identified. By the time of the 2013 full-year PDA, most of those shortcomings remained. The outcome of the 2013 PDA was an assessment of 'Needs development'. In that context, BOQ was clearly entitled to take some form of action to achieve an improvement in Ms Mac's performance.

The PIP process was the standard means by which this was done within BOQ. It was unsatisfactory that BOQ's Performance Management Policy made no reference to the PIP process, with the result that the process was not fully transparent to all employees. Nonetheless, performance plans which clearly identify targets for improvement, require achievement of those targets within identified timeframes, and which provide support and feedback to employees to assist them to achieve such targets, are a legitimate and commonly used means to improve employee performance. In that context, the use of the PIP process by BOQ in relation to Ms Mac was reasonable.

Relevance

Where applicants wish to allege that a decision to implement a PIP amounts to bullying, they must demonstrate that the decision lacks any evident and intelligible justification such that it would be considered by a reasonable person to be unreasonable in all the circumstances.

Case example: **Reasonable management action – Carried out in a reasonable manner – Perceived bullying and harassment**

Ferguson and Commonwealth Bank of Australia [2012] AATA 718 (17 October 2012).

Facts

An employee claimed she developed a major depressive disorder as a result of bullying and harassment at work. The employer appointed a new manager to an under-performing branch. The new manager had a number of one-on-one meetings with the employee relating to her performance and minimum standards. The employee claimed that the manager's manner was rude and belittling.

Outcome

The employer accepted that events at work had contributed to a significant degree to the employee's mental health condition, but her compensation claim was refused because it was the result of reasonable administrative action taken in a reasonable manner in respect of her employment. The Administrative Appeals Tribunal affirmed the decision.

Relevance

The mere fact that management action might have been conducted differently or in a more reasonable manner does not automatically render the management action unreasonable.

Case example: **Reasonable management action – NOT carried out in a reasonable manner – Adherence to established internal policies**

Yu and Comcare [2010] AATA 960 (1 December 2010), [(2010) 121 ALD 583].

Facts

A high school teacher claimed she suffered a psychological injury which was significantly contributed to by her employment, including the implementation of a performance management process. Her compensation claim was refused on the basis that her condition was a result of 'reasonable administrative action undertaken in a reasonable manner'.

Outcome

The Administrative Appeals Tribunal overturned this decision on appeal, finding that the employer failed to comply with the applicable employment instruments and policy provisions. This went well beyond '… a matter of legal or technical nicety'.

The Tribunal held that the management action in question was not within the meaning of 'reasonable administrative action' and that it was not undertaken in a reasonable manner. The worker for example had been denied procedural fairness and no documentation was produced setting out the evidence concerning the worker's alleged underperformance.

The Tribunal noted that the employer's inadequate record keeping may have adversely affected its case.

Relevance

It is important to keep records when dealing with performance or behaviour issues in the workplace. In this case it was in part the lack of evidence that the employer had complied with their own procedures and policies that saw the initial decision overturned.

Case example: **Reasonable management action – NOT carried out in a reasonable manner – Performance monitoring and mentoring**

Krygsman-Yeates v State of Victoria [2011] VMC 57 (4 November 2011).

Facts

An experienced teacher alleged that she sustained an adjustment disorder with mixed anxiety and depressed mood as a result of having her performance as a teacher subjected to monitoring and mentoring, and being bullied and harassed by the school principal.

Her compensation claim was refused on the basis that her condition was a result of 'management action taken on reasonable grounds and in a reasonable manner…'.

Outcome

The Court found that the action taken was 'management action' based on reasonable grounds. The teacher's employer had a legal duty and responsibility to respond to and take action in relation to complaints it had received about the teacher's performance.

However the management action was not taken in a reasonable manner because:

- a three-page letter detailing performance-related issues was provided to the worker on her first day after returning from long service leave
- guidelines on monitoring and mentoring weren't followed
- feedback was not provided to the worker during the monitoring and mentoring processes, and
- insensitive and unreasonable action was taken by continuing to provide comment by the delivery of letters, given the worker's 'eccentricities and her previous emotional response and reaction to receiving [such] letters'.

Relevance

The failure of the employer in this matter to comply with their own procedures and policies saw that whilst the management action was taken on reasonable grounds, it was not taken in a reasonable manner.

Case example: **Reasonable management action – NOT carried out in a reasonable manner – Excessive emails**

Application by Ms A [2018] FWC 4147 (Asbury DP, 13 July 2018).

Facts

The applicant, together with her husband, are directors of a company engaged to provide management services to a residential complex which is a community titles scheme (the Complex). The respondent is the Chairman of the Body Corporate Committee for the Complex.

The applicant complained of bullying conduct consisting largely of excessive emails sent continuously. The respondent argued his conduct was reasonable management action underpinned by the applicant's failure to comply with her managerial responsibilities. The applicant sought an order to stop the respondent from a range of behaviours.

Outcome

The Commission considered the evidence and found that the applicant's performance in providing management services was not ideal. However whilst many issues raised by the respondent were reasonable their manner, in frequency they were not. The Commission was satisfied that the respondent's behaviour was unreasonable and repeated, and it was likely to continue. The Commission found that this behaviour was negatively affecting the applicant's health.

The Commission issued an order dealing with the timing, subject matter and content of future emails by the respondent. The orders also required the respondent to attempt to contact the applicant by telephone before sending an email in relation to a particular issue.

Relevance

The bullying conduct involved the respondent sending emails to the applicant about matters which were not urgent, at times which were not reasonable. The bullying conduct also involved the inclusion in the emails of sarcastic and derogatory language in relation to the applicant and was exacerbated by the fact that the emails were disseminated to other members of the committee of management of the body corporate.

Part 6 - Risk of continued bullying at work

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

For the Commission to be able to make orders to stop bullying at work, it must be satisfied not only that a worker has been bullied at work by an individual or a group of individuals (the persons named in the application), but **also** that there is a risk that the worker will continue to be bullied at work **by that** individual or group of individuals.

It is not sufficient to satisfy the second condition in s.789FF(1)(b)(ii) by demonstrating that there is a risk of the applicant being bullied at work by individuals other than those who have been found to have engaged in bullying pursuant to s.789FF(1)(b)(i).[128]

Applying a dictionary definition, ***risk*** means exposure to the hazard or chance of continued bullying. Relevant considerations may include whether the worker is still working with the individual or group of individuals, and any action that may have been taken to deal with the behaviour.

Absence of future risk of bullying

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 bullied at work by the individual(s).

The circumstances in which this might arise include where: the person who bullied the worker is no longer working at the workplace;[129] the worker made an application after having ceased working in a workplace;[130] or the worker was dismissed or ceased work in a workplace after making an application but before the matter is dealt with by the Commission.[131]

If there is no risk that the applicant will continue to be bullied at work by the individual or individuals named in the application, the Commission has no power to make an order to stop bullying at work. In these circumstances, the Commission is likely to find that the application has no reasonable prospect of success and may exercise its discretion to dismiss the application.[132]

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

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[128] *Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetica and Others* [2019] FWCFB 2771 (Hatcher VP, Sams DP, Hampton C, 19 February 2019) at para. 29.
[129] 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.'
[130] *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.
[131] *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.
[132] Fair Work Act s.587. See also Part 10 of this Benchbook.

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.[133]

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 bullying at work if they remain concerned about the risk of bullying, provided the jurisdictional facts can be established in relation to that application.[134] Allegations of past bullying could be relied upon in support of any such application.[135]

[133] *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.

[134] *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.

[135] *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.

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 bullying may reduce or eliminate the risk that a worker will continue to be bullied at work. The Commission may take this into consideration when deciding whether or not to make an order.[136]

Changes that might be made include:

- the relocation or dismissal of the individual or individuals alleged to have bullied the applicant;
- the introduction of a workplace bullying policy;
- the delivery of training about bullying behaviours 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 bullying 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.

Other Commission Benchbooks

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

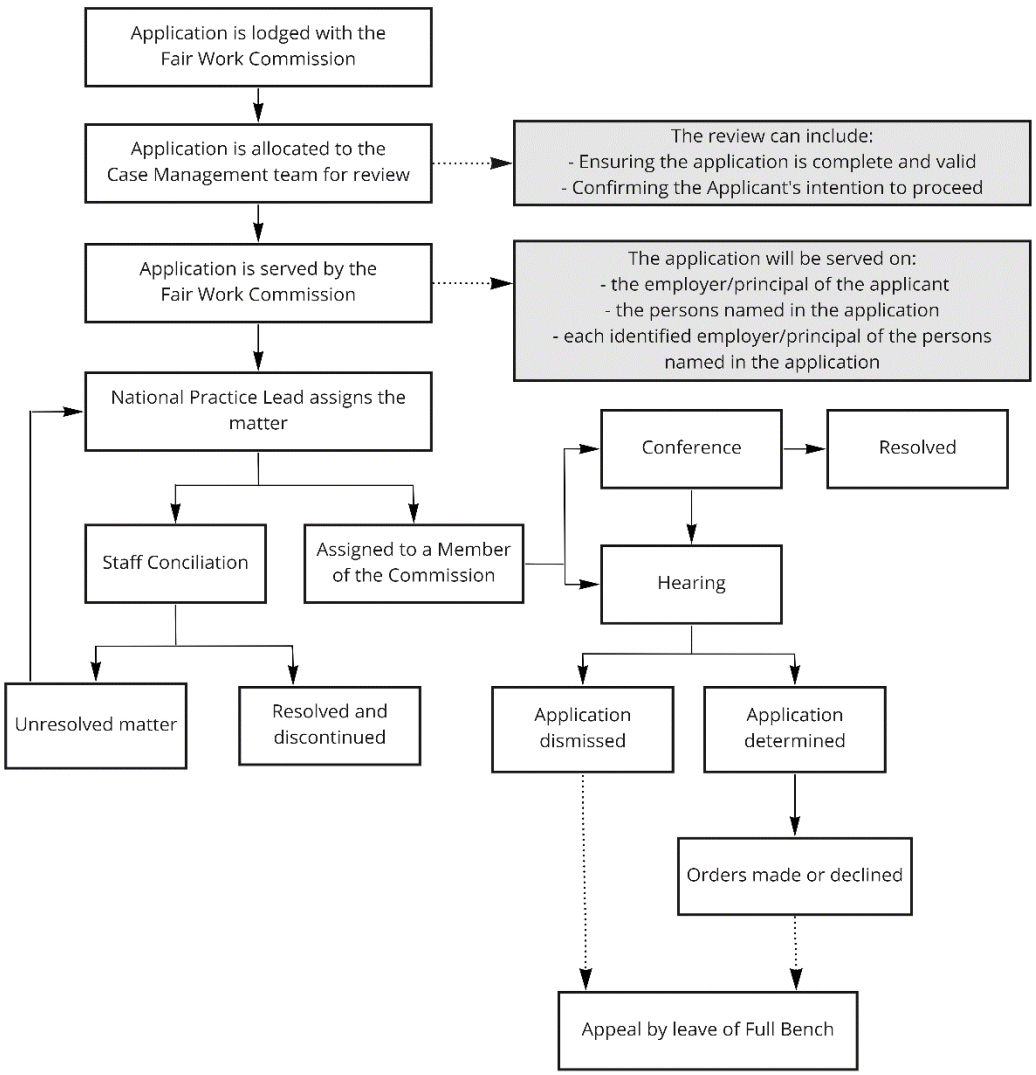
You can access the **General Protections** Benchbook through the following link: www.fwc.gov.au/resources/benchbooks/general-protections-benchbook

WHS regulators, as well as the AHRC and anti-discrimination bodies in the states and territories can also deal with complaints about bullying in some circumstances (depending on matters including where the conduct occurred, and whether the bullying was linked to a protected attribute).

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

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

See also –



Other avenues for dealing with

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 find 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.

Part 7 – Making an application

See Fair Work Act s.789FC

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

An application for an order to stop bullying made to the Commission must include a completed and signed application form [Form F72]. There is no timeframe for a worker lodging an application for an order to stop bullying. 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 bullying.[137]

Making an application to the Commission for an order to stop workplace bullying 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.

Application fee

An application to stop bullying at work must be accompanied by payment of the prescribed fee (or an application to waive the prescribed fee).[138] Failure to pay the filing fee or apply for a waiver at the time of making the application, may result in the Commission finding that the application has not been validly made.[139]

Links to application form

Form F72 – Application for an order to stop bullying:

- www.fwc.gov.au/documents/forms/Form_F72.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F72.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[137] *Appeal by Ms Anne Pilbrow* [2020] FWCFB 4373 (Hatcher VP, Asbury DP, Hunt C, 19 August 2020) at para 16.
[138] Fair Work Act s.789FC(4).
[139] 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.

Links to waiver form

Form F80 – Waiver of application fee:

- www.fwc.gov.au/documents/forms/Form_F80.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F80.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

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.[140]

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.[141] The power cannot be used to fundamentally change the nature of a claim (for example, from one type of claim to another).[142]

[140] 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].
[141] 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.
[142] *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 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, 19 February 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 stop bullying application 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 bullying **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.[143]

Links to response form

Form F73 – Response from an employer or principal to an application for an order to stop bullying

- www.fwc.gov.au/documents/forms/Form_F73.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/Form_F73.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/formsUp

Related information

- For calculating 7 calendar days - What is a day?

Person named as having engaged in bullying at work

A person who is named in an application for an order to stop bullying as having engaged in bullying at work can lodge a response to the application if they wish. Lodging a response is 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.[144]

Links to response form

Form F74 – Response from a person named as having engaged in bullying at work:

- www.fwc.gov.au/documents/forms/Form_F74.docx (Microsoft Word)
- www.fwc.gov.au/documents/forms/form_f74.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

[143] Fair Work Commission Rules 2013 r 23A(1).
[144] *Fair Work Commission Rules 2013* r.23A(3).

Service

The Commission must serve an application for an order to stop bullying at work on each person named in the application as an employer or principal and each individual named as allegedly engaging in bullying at work. Where the person named as having engaged in bullying 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.[145]

A response to an application for an order to stop bullying at work 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 allegedly engaging in bullying behaviour.

The response must be served within **seven calendar days** after receiving the application for an order to stop bullying 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

[145] *Fair Work Commission Rules 2013* rr.6(1) and (2).

Part 8 – Commission process – Hearings and conferences

Commission to deal with applications promptly

Under Part 6-4B of the Fair Work Act, the Commission must start to deal with an application for an order to stop bullying at work within 14 days after the application is made.[146]

This early intervention is intended to help resolve matters quickly and inexpensively, with the ultimate aim of restoring safe working relationships.[147]

Making of an application does not of itself stop any actions taking place at a workplace. This includes meetings in respect of performance, investigations to deal with alleged bullying 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 bullying at work. This may include contacting the employer or other parties to the application, conducting a conference or holding a determinative conference or formal hearing.[148]

The President may refer a matter to a work health and safety (WHS) regulator where it considers this necessary and appropriate.[149] 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 bullying at work before the Commission.[150]

Role of the Commission

The Commission is required to consider the evidence and objectively assess whether it is satisfied that bullying has occurred at work in relation to the worker (including whether or not the alleged bullying conduct was reasonable management action carried out in a reasonable manner).[151]

The Commission is not required to undertake a point-by-point merits review of each aspect of an applicant's claim.[152]

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[146] Fair Work Act s.789FE(1).
[147] Statement of Compatibility with Human Rights, Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at paras. 31 and 38.
[148] Fair Work Act s.590.
[149] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 117.
[150] Fair Work Act s789FH.
[151] See *Appellant v Respondent* [2015] FWCFB 1972 (Harrison SDP, Lawrence DP, Cambridge C, 22 April 2015) at para. 30.

The Commission does not have an investigatory role in relation to allegations of bullying 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 on the evidence that a worker has been bullied at work and whether there is a risk that the bullying will continue.

In order to be satisfied that a worker has been bullied 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 'bullying at work'. This requires the Commission to reach a conclusion as to the relevant elements of the conduct complained of.[153]

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 bullying at work.

Hearings and conferences

See Fair Work Act ss.592–593

Conferences

Any conference conducted by the Commission must be held in private unless the Commission specifically directs otherwise.[154]

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.[155] 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.

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.[156]

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 produced.

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

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[152] ibid.
[153] *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).
[154] Fair Work Act s.592(3).
[155] *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 49 (5 October 2006) at para. 25, [(2006) 230 CLR 486].
[156] Fair Work Act s.592(4).

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. Hearings are more formal than conferences.

The Commission may inform itself in relation to a matter before it as it sees fit. The Commission can only conduct a hearing if it considers it appropriate to do so.[157]

Procedural issues

Confidentiality – sending documents to the other parties

The service rules in relation to applications for orders to stop bullying at work, and responses to such applications, are discussed above. The Commission can decide to vary or dispense with the service rules in appropriate cases.[158]

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 this, the Commission may forward a copy to the other parties (or their representatives). This is about procedural fairness, ensuring that each party knows what the Commission has been told about the case and has an opportunity to respond.

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 contains personal medical details or other sensitive information) they should contact the Commission to discuss their options before sending the document(s) 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, and is required to publish written decisions and orders in relation to applications for orders to stop bullying at work.[159] However some bullying cases may involve disclosure of sensitive personal information (including medical information) in a way that is not appropriate for publication in a written decision.

[157] Fair Work Act ss.590 and 593.
[158] *Fair Work Commission Rules 2013* rr.6(1) and (2).
[159] Fair Work Act ss.577(c) and 601(4).

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.[160]

Considerations of open justice and the administration of justice are clearly relevant to the exercise of discretion to make an 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.[161]

The purpose of the workplace bullying jurisdiction is to ensure that workers can continue to work free from the risk to health and safety caused by workplace bullying. This may be defeated if the public disclosure of sensitive information during the course of proceedings would be likely to make the worker's continuing engagement at the workplace unviable. However, in accordance with the open justice principle, a non-disclosure order cannot be made merely because allegations have been made that are embarrassing, distressing or potentially damaging to reputations.[162] 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. It is not sufficient for this simply to be asserted.[163]

[160] Fair Work Act ss.593–594.
[161] *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.
[162] *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 9.
[163] ibid., at para. 10.

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

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 by a group of workers at the Carlton and United Breweries (CUB) site in Abbotsford, Victoria. The workers were engaged by Programmed Skilled Workforce Ltd and alleged that they were experiencing unreasonable behaviour as a result of the industrial action taking place at CUB.

The applicants submitted that the publication of their names in dealing with their anti-bullying applications would likely result in an escalation of the behaviour they were experiencing at the workplace, prior to the substantive issues of the stop bullying application being dealt with.

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 held by the person that the disclosure and publication of their name or address might result in some form of retribution, harassment or intimidation.

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

Bowker and Others v DP World Melbourne Limited T/A DP World and Others [2014] FWC 7381 (Gostencnik DP, 21 October 2014).

Facts

Three applicants each applied to the Commission for an order to prevent each of them from being bullied at work. The applications were not joined but were dealt with by the Commission concurrently. The applicants were each employed by DP World Melbourne Limited (DP World) a respondent to each application. The Maritime Union of Australia (MUA) was also a respondent to each application.

The MUA applied for orders under sections 593 and 594 of the Fair Work Act which would have the effect of de-identifying the parties to these proceedings, the workplace and location of the workplace at which bullying conduct was alleged to have occurred, the industry in which the bullying conduct was said to have occurred, the persons against whom bullying allegations were made, and restricting the identification of these persons and places in any decision of the Commission.

The MUA submitted it would be prejudiced if the orders sought were not made and applications were not dealt with in private. It said that the allegations made by the applicants against the MUA and its members were particularly damaging. Furthermore the allegations were particularly prejudicial to the reputation of the individuals named in the allegations, and this was amplified because the industry was a relatively close knit and small industry, and so the consequences for those individuals could be wide reaching and might prejudice future employment prospects.

The applicants opposed the making of an order and said the proceeding should be conducted in open hearing and in the normal way according to the fundamental principle of open justice. They said that the MUA provided no evidence in support of its various grounds.

Outcome

Whilst the Commission had some sympathy with the position in which the MUA found itself, on balance the Commission was not persuaded to make the orders sought for reasons including:

- the risk of prejudice of the kind identified by the MUA was not unique to the circumstances of this case
- the MUA took no steps to seek a de-identification order when the allegations that were threshold matters were determined by a Full Bench, and
- under the rules of the MUA, the fact that the applicants have brought charges against particular members and officers of the MUA would be published.

Relevance

The risk of embarrassment or a risk of some future prejudice, which is common to many applications that proceed before the Commission, do not outweigh the desirability for open justice.

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

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 have 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 that allegations have been made which are embarrassing, distressing or potentially damaging to reputations.

Interim Orders

See Fair Work Act ss.589 and 789FF

Sometimes, parties to workplace bullying matters 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 bullying at work unless it is satisfied that the worker has been bullied at work and there is a continuing risk of bullying.

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 to stop bullying at work, 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, including that the applicant had been bullied at work and that there was a risk of future bullying at work.

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?
- **Error! Reference source not found.**
- Not in a conference or hearing
- **Error! Reference source not found.**

Definitions

A ***lawyer*** is a person who is admitted to the legal profession by a Supreme Court of a state or territory.[164]

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.[165]

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 bullying at work (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.[166] Permission is not required if the lawyer or paid agent is an officer of the entity they represent, or is an employer association or union representative.[167]

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.[168]

[164] Fair Work Act s.12.
[165] Fair Work Act s.12.
[166] Fair Work Act s.596(1) and *Fair Work Commission Rules 2013* rr.12(1)(b) and 12(3).
[167] Fair Work Act s.596(4) (when a person is taken not to be represented by a lawyer or paid agent).
[168] *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.

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.[169] The notice must be served on all parties to the matter.[170]

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.[171]

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.[172]

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
- lodging documents with the Commission
- sending letters or emails to the Commission, another party or another lawyer or paid agent, or

[169] *Fair Work Commission Rules 2013* r.11(1).
[170] *Fair Work Commission Rules 2013* Schedule 1.
[171] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 17.
[172] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 16.

- carrying out work incidental to any of the above.[173]

Links 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:

www.fwc.gov.au/documents/forms/Form_F53.docx (Microsoft Word)

www.fwc.gov.au/documents/forms/Form_F53.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

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.[174] The notice must also be served on all of the other parties to the matter.[175]

Links to form

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

www.fwc.gov.au/documents/forms/Form_F54.docx (Microsoft Word)

www.fwc.gov.au/documents/forms/Form_F54.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

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:
    - an organisation (including a union or employer association), or

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

- an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009* (Cth), or
- a peak council, or
- a bargaining representative, or

- a bargaining representative.[176]

In these circumstances the person is **taken not to be represented** by a lawyer or paid agent.[177]

Other support persons

Where the 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.[178]

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.[179]

The Barristers' conduct rules describe the work of a barrister in the following way: [180]

> '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

[176] Fair Work Act s.596(4).
[177] Fair Work Act s.596(4).
[178] *Cooper v Brisbane Bus Lines Pty Ltd* [2011] FWA 1400 (Simpson C, 3 March 2011) at para. 13.
[179] *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.
[180] 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.

(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.

Outside 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.[181]

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.[182]

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'.[183]

The meaning of **represent** as used 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. R**epresenting** a person generally means the activity will need to 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.[184]

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
- 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

[181] *Fitzgerald v Woolworths Limited* [2017] FWCFB 2797 (Hatcher VP, Dean DP, Wilson C, 17 October 2017) at para. 34.
[182] ibid. at para. 36.
[183] ibid. at para. 37.
[184] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 22.

documents or cataloguing exhibits for an advocate, or making suggestions to an advocate as how best to conduct the case).[185]

Representation – In a conference or hearing

A person must not be represented by a lawyer or paid agent in a conference or hearing relating to an application for orders to stop bullying at work without the permission of the Commission.[186]

This requirement for permission does not apply to lawyers and paid agents who are covered by s.596(4) of the Fair Work Act[187] 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 bullying 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. [188]

Links 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:

www.fwc.gov.au/documents/forms/Form_F53.docx (Microsoft Word)

www.fwc.gov.au/documents/forms/Form_F53.pdf (Adobe PDF)

All forms available on the Commission's 'Forms' webpage:
www.fwc.gov.au/about-us/resources/forms

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 bullying.[189]

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 bullying. A person cannot be represented by a lawyer or paid agent in

[185] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 23.
[186] Fair Work Commission Rules 2013 r 12(1).
[187] *Fair Work Commission Rules 2013*, Note to r.12(1).
[188] *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).
[189] *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.

a conference before a Commission Member in relation to a s.789FC application without the permission of the Commission.[190]

Despite the 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.[191]

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.[192]

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.[193]

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**) [194]
- 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**), [195] 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**).[196]

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 granted for one of these reasons, it is not necessary to also consider the other reasons given for

[190] *Fair Work Commission Rules 2013* r.12(4).
[191] *Fair Work Commission Rules 2013* r.12(3).
[192] Fair Work Commission Rules 2013 r 12(1).
[193] Fair Work Commission Practice Note, Lawyers and paid agents, 1 May 2020 at para. 26.
[194] Fair Work Act s.596(2)(a).
[195] Fair Work Act s.596(2)(b).
[196] Fair Work Act s.596(2)(c).

seeking permission. Granting permission is discretionary and even if one of the reasons applies, permission may not be granted.[197]

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.[198]

In granting permission, the Commission will have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.[199]

The discretion afforded to the Commission will be exercised on the facts and circumstances of the particular case.[200]

The Commission is obliged to perform its functions and exercise its powers in a manner that is 'fair and just'.[201] 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.[202]

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.[203]

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.[204]

Partial representation may be permitted during examination-in-chief and cross-examination of the party seeking representation[205] or during argument about jurisdictional issues.[206]

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[197] *Kaur v Hartley Lifecare Incorporated* [2020] FWCFB 6434 (Hatcher VP, Mansini DP, McKinnon C, 1 December 2020) at para. 21.
[198] *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.
[199] 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.
[200] *Rodgers v Hunter Valley Earthmoving Company Pty Ltd* [2009] FWA 572 (Harrison C, 9 October 2009) at para. 12.
[201] Fair Work Act s.577(a).
[202] *Warrell v Fair Work Australia* [2013] FCA 291 (4 April 2013) at para. 27.
[203] *Azzopardi v Serco Sodexo Defence Services Pty Limited*[2013] FWC 3405 (Cambridge C, 29 May 2013).
[204] *Viavattene v Health Care Australia* [2012] FWA 7407 (Booth C, 9 October 2012) at para. 4.
[205] *Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green* [2011] FWA 2720 (Gooley C, 10 May 2011) at para. 6.
[206] *O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section)* [2010] FWA 1143 (Leary DP, 17 February 2010) at para. 31.

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. [207]

A significant number of documents and wide-ranging issues does not necessarily equate to a matter being complex.[208]

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.[209]

Whilst an employer may raise an objection to an application on the basis that a worker was not bullied at work as the alleged behaviour was reasonable management action carried out in a reasonable matter, this is not a jurisdictional objection in the strict sense.[210] However, it may be the case that this does add a level of complexity that means representation would enable the matter to be dealt with more efficiently.[211]

Effectiveness

Where a person would be unable to effectively represent themselves, permission for representation may be granted.[212]

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.[213]

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[207] 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.
[208] *King v Patrick Projects Pty Ltd* [2015] FWCFB 2679 (Catanzariti VP, Drake SDP, Riordan C, 4 May 2015) at para. 17.
[209] 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.
[210] *Aly v Commonwealth Back of Australia; Michelle Gentile; Russel Hayman* [2015] FWC 3604 (Bissett C, 27 May 2015) at para. 12.
[211] ibid., at para. 16.
[212] Fair Work Act s.596(2)(b).
[213] *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.

Example

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.[214]

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.[215]

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.[216]

[214] Fair Work Act, Note (a) to s.596(2).
[215] Fair Work Act s.596(2)(c).
[216] Fair Work Act, Note (b) to s.596(2).

Case example: **Permission granted for representation – Complexity**[217]

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

Facts

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

Outcome

The Commission was satisfied that there was a level of complexity in the matter, given that 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 (noted that this was not a jurisdictional objection in the strictest 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.

[217] 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**[218]

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 she 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.

[218] 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 applicant in other matters.

Outcome

Permission for legal representation was granted to both parties. The Commission was satisfied that the respondent 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**[219]

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.

[219] 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.

There should be no presumption that an adjournment will be granted.[220] The principles in relation to adjourning (or staying) proceedings are as follows:

- a party to a matter before the Commission has a right to have the matter determined as quickly as possible
- serious consideration needs to be given before any action interferes with this right
- the party who applies for the adjournment must prove that it is necessary
- 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.[221]

The Commission's task is a 'balancing of justice between the parties' taking all relevant factors into account.[222]

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. In that respect 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.[223]

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 not only fairly and justly but also quickly.[224]

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 bullying at work, s.789FE(1) sets a 14 day timeframe). Adjournments and associated loss of valuable hearing days may prejudice the Commission's capacity to promptly deal with matters. For this reason, when

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[220] *Sanford v Austin Clothing Company Pty Ltd trading as Gaz Man* Print S8287 (AIRC, Watson SDP, 19 July 2000) at para. 26.
[221] *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.
[222] *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).
[223] *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.
[224] ibid.

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 may not readily be granted.[225]

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 for an order to stop bullying at work. 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.[226]

Bias

A Commission member should not hear a case if there is a reasonable apprehension that they are, or will be seen to be, biased.[227]

[225] ibid. See generally *Aon Risk Services Australia Limited v Australian National University* [2009] HCA 27 (5 August 2009).
[226] See for eg *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).
[227] *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].

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'.[228]

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.[229] 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.[230]

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.[231]
- 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 they will have their case heard by someone thought to be more likely to decide the case in their favour.[232]

[228] *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).
[229] *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.
[230] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 352].
[231] *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).
[232] *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].

Expression of a view or prejudgment

In deciding whether a Commission member should be disqualified for the appearance of bias, the Commission 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.[233]

The question is not whether the decision maker's mind was blank, but whether their mind was open to persuasion.[234]

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.[235]

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.[236] 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.[237]

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.[238]

A central element of the justice system is that a judge (or Commission Member) should try the case based on the evidence and arguments presented.[239] A judge (or Commission Member) should not

[233] *Johnson v Johnson* [2000] HCA 48 (7 September 2000) at para. 11, [(2000) 201 CLR 488].
[234] *The Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17 at para. 71, [(2001) 205 CLR 507].
[235] *Oram v Derby Gem Pty Ltd* PR946375 (AIRCFB, Lawler VP, Kaufman SDP, Blair C, 22 July 2004) at para. 110, [(2004) 134 IR 379].
[236] *Re Polites; Ex parte Hoyts Corporation Pty Ltd* [1991] HCA 25 at para. 10, [(1991) 173 CLR 78].
[237] ibid.
[238] *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].
[239] *Re J.R.L. Ex parte C.J.L.* [1986] HCA 39 (30 July 1986), [(1986) 161 CLR 342, 350].

take into account, or indeed receive, secret or private representations from a party or from a stranger about the case they are to decide.[240]

[240] *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 therefore issued for the filing of submissions and evidence in relation to the application. 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 carefully considered the passages from her costs decision in relation to the applications of the initial applicants. In that decision, the Commissioner made findings in 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 there were views expressed in that decision that may lead a lay observer to apprehend that the Commissioner may not bring an impartial mind to the determination of the application of Ms King. 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 in 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 2009* (the Fair Work Act) outlines the ways in which the Fair Work Commission (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'.[241]

Commission Members are expected to act judicially and in accordance with 'notions of procedural fairness and impartiality'.[242]

Commission Members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.[243]

[241] *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].
[242] *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.
[243] 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.[244]However, if a person has a reasonable excuse not to answer the question or provide the document, they are not required to do so.[245]

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'.[246]

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.[247]

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

[244] Fair Work Act s.677(3).
[245] Fair Work Act s.677(4).
[246] *Sorby v Commonwealth* [1983] HCA 10 (18 March 1983) at para. 11, [(1983) 152 CLR 281].
[247] 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.[248]

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*.[249] The Full Bench confirmed that *McMahon v Gould*[250] sets down non-exhaustive guidelines and that it is necessary for the Commission to determine what justice requires in the circumstances.[251]

A corporate entity does not have a privilege against self-incrimination.[252]

[248] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commissioner* [2018] FCAFC 4 (30 January 2018).
[249] *Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar* [2018] FWCFB 1255 (Ross J, Binet DP, Platt C, 5 March 2018).
[250] *McMahon v Gould* (1982) 7 ACLR 202 (19 February 1982).
[251] *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.
[252] *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 under Part 6-4B for orders to stop bullying at work 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 bullying, workplace safety, 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 bullying 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 bullied at work by an individual or a group of individuals and there is a risk that the worker will continue to be bullied at work by that individual or group, the Commission may make an order to stop bullying at work.[253]

The Commission can make any order it considers appropriate (other than an order requiring the payment of money) to prevent a worker from being bullied at work by an individual or group of individuals.

[253] Fair Work Act s.789FF(1).

Where a finding of bullying is made and there is some future risk, orders to stop bullying at work would usually follow. Such orders would, in appropriate cases, aim to establish a suitable basis for a future mutually safe and constructive working relationship.[254]

The laws to stop bullying at work are directed at preventing future bullying 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 restoring a safe working environment.[255]

Orders are not available in cases where the Commission finds that there is no risk of future bullying, which may be the case, for example, if the person found to have bullied the worker is no longer connected to the workplace.[256]

Related information

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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 workplace bullying as well as their respective employer(s)/principal(s). As noted in the Explanatory Statement for 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.[257]

Where the parties agree that orders should be made and the Commission is satisfied that workplace bullying has taken place, and there is a risk of further bullying, consent orders may be issued by the Commission.

What orders can be made?

The Commission has wide powers to make orders to stop bullying at work, although 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 bullied at work.[258]

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[254] See *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para. 50.
[255] 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.
[256] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 47.
[257] 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 workplace bullying found to have occurred. Orders must be directed towards the prevention of the worker being bullied 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.[259]

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.[260]

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.[261]

Examples of orders the Commission has made in response to applications for orders to stop bullying 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
    - not deliberately or unreasonably delay the performance of work
    - refrain from making written and/or oral statements to each other or others that are abusive, offensive, or disparaging;

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[258] Explanatory Statement, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 at para 48.
[259] *Churches and Others v Jackson and Woods* [2016] FWCFB 2367 (O'Callaghan SDP, Clancy DP, Hampton C, 14 April 2016) at para 32.
[260] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 121.
[261] *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.

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.[262]

Physical and/or functional separation in the workplace of a person who has alleged bullying at work and the persons named in their application to stop bullying at work may also prevent future bullying, although this may be a last resort where other practical measures will not be effective.[263]

If an applicant is suffering from a medical condition that prevents their return to the workplace without appropriate modifications, the Commission may consider such measures in an order.[264]

What cannot be ordered –the payment of money

The Commission cannot order the payment of compensation or another amount of money.[265]

However, 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.[266]

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.[267]

Workplace Advice Service

[262] 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).
[263] *South Eastern Sydney Local Health District v Lal* [2019] FWCFB 1475 (Hatcher VP, Sams DP, Hampton C, 7 March 2019) at para. 24.
[264] *Re G.C.* [2014] FWC 6988 (Hampton C, 9 December 2014) at para. 168.
[265] Fair Work Act s.789FF(1) and Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 120. See also *Application by Chopra* [2020] FWC 3491 (Clancy DP, 2 July 2020) at para. 69(i).
[266] See *South Eastern Sydney Local Health District v Lal* [2019] FWCFB 1475 (Hatcher VP, Sams DP, Hampton C, 7 March 2019) at para. 27.
[267] ibid.

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. The 'where to find 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.

Considerations

When considering the terms of an order to prevent further bullying 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 arising out of any procedures available to the worker for resolving grievances or disputes, and
- any matters that the Commission considers relevant.[268]

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 WHS regulator or another body, to ensure consistency with those actions.[269]

Outcomes arising from investigations by another person or body

A number of different persons and bodies have the power to deal with complaints of workplace bullying. The powers of each person or body and the way in which they deal with bullying complaints differ between organisations, as will the resulting remedies.

A worker who has made an application to the Commission for an order to stop bullying can also seek intervention by a WHS regulator under the WHS Act or the corresponding state or territory work health and safety laws.[270] 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 bullying 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.[271]

[268] Fair Work Act s.789FF(2).
[269] See revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 123.
[270] Fair Work Act s.789FH.
[271] Fair Work Act s.789FF(2)(a).

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 of the 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 the 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; principally on the basis that 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 enough 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.

Procedures available to the worker 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 under a WHS law or an enterprise agreement or award.

Some workplaces will have policies which contain specific provisions on workplace bullying, 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 bullying cannot proceed. An individual may still apply to the Commission to help resolve the matter quickly and inexpensively if they have been bullied at work.[272]

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 bullying.

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.[273] This might include:

- the applicant being on leave from the workplace
- that the individual(s) involved in the bullying 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 bullying, or
- any other developments in the workplace.[274]

[272] 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.

[273] *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) at para.39.
[274] *Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016) 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 employed as a Food and Beverage Attendant at a family-owned restaurant. She sought orders to stop certain alleged conduct by the 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 these 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 these 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 would have 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 from the parties 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.

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.[275]

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 Fair Work Act, or
- the application is frivolous or vexatious, or
- the application has no reasonable prospects of success.[276]

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.[277]

No reasonable prospect of success

Generally, for an application to have no reasonable prospect of success, it must be manifestly untenable and groundless.[278]

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.

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.

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[275] Fair Work Act s.587(3).
[276] Fair Work Act s.587(1).
[277] *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].
[278] *Wright v Australian Customs Services* PR926115 (AIRCFB, Giudice J, Williams SDP, Foggo C, 23 December 2002) at para. 23.

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.[279]

An application can be dismissed on the basis that it has no reasonable prospects of success 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.[280]

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 a range of different cases in the Commission, including cases dealing with bullying at work.

Related information

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[279] *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.
[280] *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 – Frivolous or vexatious**[281]

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.

[281] 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).

Case example: **Application dismissed – No reasonable prospects of success**[282]

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 is that there is a risk that the worker will continue to be bullied at work. Once the employee has been dismissed then there would not usually be a risk that the employee will continue to be bullied at work.

[282] 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 the 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.

Defence, Security and Australian Federal Police (AFP) Operations

The Commission may dismiss an application for an order to stop bullying if the Commission considers that the application might involve 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).[283]

A ***covert operation*** is a 'function' or 'service' of the AFP[284] 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'.[285]

A covert operation might, for example, include an undercover operation to identify those involved in drug trafficking, but would not include general duties policing.[286]

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.[287]

[283] Fair Work Act s.789FE(2).
[284] *Australian Federal Police Act 1979* (Cth) s.8.
[285] WHS Act s.12E(2).
[286] Note to WHS Act s.8.
[287] WHS Act s.12E(2).

Contravening an order of the Commission

A person to whom an order to stop bullying applies must not contravene a term of the order.[288]

The requirement to abide by an order to stop bullying is a civil remedy provision.[289]

A ***civil remedy provision*** is a provision of the Fair Work Act that if breached, allows the 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 regarding a breach of a civil remedy provision is made to the Federal Court, the Federal Circuit and Family Court or an eligible State or Territory court. This application may be made by the person affected by the contravention, an industrial association or a Fair Work inspector.[290] 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.[291]

Related information

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 by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate, until a decision in relation to the appeal or review is made, or 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

[288] Fair Work Act s.789FG.
[289] Fair Work Act, s.539(1) (see item 38 of the table at s.539(2)) .
[290] Fair Work Act s.539(2).
[291] Fair Work Act s.544.

- the President
- a Vice President, or
- a Deputy President.
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- Role of the Court

Part 11 – Associated applications

Costs

See Fair Work Act s.611

People who incur legal costs in a matter before the Commission generally pay their own costs.[292]

The Commission has the discretion to order one party to pay the other party's legal costs in limited circumstances.[293]

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.[294] 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.[295]

Indemnity costs cover a larger proportion of the legal costs than party-party 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.[296]

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[292] Fair Work Act s.611(1).
[293] Fair Work Act s.611(2).
[294] LexisNexis Australia, *Encyclopaedic Australian Legal Dictionary* (online at 21 July 2021) 'party and party costs'.
[295] Ibid. (online at 21 July 2021) 'indemnity costs'.
[296] *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.

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.[297]

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.[298]

Applying for costs

An application for costs **must be made within 14 days** after the Commission finishes dealing with the dispute.[299]

Related information

- For calculating 14 days - What is a day?

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.[300]

[297] Fair Work Regulations reg 3.04; sch 3.1.
[298] 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.
[299] Fair Work Act s.377.
[300] *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.

Vexatiously

An application is made vexatiously if:

- the main purpose of an application (or response) is to harass, annoy or embarrass the other party,[301] or
- there is another purpose for the action other than resolving the issues arising from the application (or response).[302]

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'
- 'discloses a case which the Court is satisfied cannot succeed', or
- 'under no possibility can there be a good cause of action'.[303]

The Commission may also consider whether, at the time the application (or response) was made, there was a 'substantial prospect of success.'[304] 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.[305]

An application (or response) is not without reasonable cause just because the court rejects a person's arguments.[306]

In simple terms, ***without reasonable cause*** means that an application (or response) is made without there being any real reason, basis or purpose.

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[301] *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].
[302] ibid.
[303] *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].
[304] *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.
[305] ibid.
[306] *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].

'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.[307]

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.'[308]

An ***objective test*** considers the view of a reasonable person. In this case 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.

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.

[307] *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].
[308] *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.

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 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 being 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**[309]

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.

[309] 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 bullying 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.

Note: The examples used in this section do not only refer to workplace bullying matters; they also include decisions related to other types of matters heard by the Commission. These examples have been used because they help explain the principles behind the appeal process.

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.[310]

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.[311]

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.[312]

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.[313] There are also limited rights for government ministers to make submissions in certain cases in the public interest.[314]

[310] Fair Work Act s.604(1).
[311] 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).
[312] *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).
[313] *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.
[314] *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.[315] If an appeal is lodged late, application also needs to be made for an extension of time to lodge the appeal.[316] 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 - What is a day?

Considerations

An appeal under s.604 of the Fair Work Act is an appeal by way of rehearing[317] 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 bullying at work. An appeal may only be made with the permission of the Commission.[318]

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 to do so.[319] 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 community, as opposed to something that is in the private interests of the individual.

[315] Fair Work Commission Rules r 56(2)(a)–(b).
[316] Fair Work Commission Rules r 56(2)(c). To do so the appellant needs to indicate this in the Notice of Appeal (Form F7).
[317] 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].
[318] 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.
[319] Fair Work Act s.604(2).

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[320]

Some considerations that the Commission 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.[321]
- 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.[322] 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'.[323]
- It is generally considered to be in the public interest to discourage appeals from preliminary or procedural rulings.[324]

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. [325]

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

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[320] *Coal and Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].
[321] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].
[322] 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.
[323] 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 (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.
[324] 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).
[325] Fair Work Act s.604(2).

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.[326]

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.[327]

A Full Bench of the Commission must identify some error of law or fact in the decision at first instance before it can intervene.[328] 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:[329]

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'.[330] 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. 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.[331]

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

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[326] *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].

[327] *Vassallo v Easitag P/L* [2021] FWCFB 3974 (Dean DP, Colman DP, Platt C, 26 July 2021) at para. 13.

[328] *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157 (13 December 2013) at para. 40.

[329] *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd* [2021] FWCFB 5030 (Clancy DP, Colman DP, McKinnon C, 13 August 2021) at para. 11.

[330] *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30,264 CLR 541 at para. 49 per Gageler J.

[331] *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 at paras. 4-5, 171-173 and 252, [[2020] 297 IR 210].

open.[332] 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.[333] 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.[334]

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'.[335]

The correctness of a discretionary decision can only be challenged by showing error in the decision-making process.[336] 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.[337] 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.[338] It is not enough that a Full Bench would have arrived at a different conclusion to that of the decision-maker at first instance.[339] 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.[340]

The High Court decision of *House v The King*[341] describes appealable errors of this kind. They include where a decision-maker:

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[332] *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).
[333] *Hempel v Northern Territory Air Services Pty Ltd* [2021] FWCFB 3707 (Hatcher VP, Cross DP, Lee C, 2 July 2021) at para. 27.
[334] *Rail Commissioner v Craig Rogers* [2021] FWCFB 371 (Hatcher VP, Masson DP, Wilson C, 27 January 2021) at para. 61.
[335] *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].
[336] *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.
[337] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].
[338] *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.
[339] *House v The King* [1936] HCA 40 (17 August 1936), at pp.504-505, [(1936) 55 CLR 499].
[340] ibid. at p.505.
[341] ibid.

- acted upon a wrong principle
- was guided by irrelevant factors
- mistook the facts, or
- failed to take some material consideration into account.[342]

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[343] or 'contrary to the overwhelming weight of the evidence'.[344] 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.[345]

Link to application form

Form F7 - Notice of Appeal

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

[342] 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].
[343] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499 at p.505.
[344] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, at pp. 155–156.
[345] *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**[346]

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.

[346] 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) (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).

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 by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate, until a decision in relation to the appeal or review is made, or 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.

Role of the Court

Enforcement of Commission orders

If a person does not comply with an order to stop bullying at work 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.[347]

Failure to comply with an order to stop bullying at work 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

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 under Part 6-4B for orders to stop bullying at work 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

[347] Fair Work Act s.539, table item 38.

employment relationship has ended)

- commitments by the employer or principal to:
  - investigate a complaint or engage an external investigator
  - provide training for staff on bullying, workplace safety, 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 bullying at work

Types of order made by the Court

See Fair Work Act ss.545, 546 and 570

The Federal Court or the Federal Circuit and Family Court 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 section 789FG, which prohibits a person contravening an order to stop bullying).

Orders the Federal Court or Federal Circuit and Family Court may make include the following:

- 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 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 section 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 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:[348]

- 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.

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. [349]

[348] *Crimes Act 1914* (Cth) s.4AA.
[349] Fair Work Act s.570.