



# DECISION

*Fair Work Act 2009*

s.789FC - Application for an order to stop bullying

**Trevor Yawirki Adamson**

(AB2016/662)

COMMISSIONER HAMPTON

SYDNEY, 19 MAY 2017

*Application for an FWC order to stop bullying – chairperson of statutory board – jurisdictional objections – whether applicant is a worker and eligible to apply – whether alleged conduct occurred whilst at work – whether application an abuse of process – whether loss of position in subsequent election means no relevant future risk – applicant potentially a worker as chairperson and if so, alleged conduct occurred whilst at work – original application not an abuse of process – applicant no longer a worker as a volunteer or otherwise – no relevant future risk given terms of the legislation – to proceed with application would become an abuse of process – application dismissed.*

## **1. Background and the issues to be determined**

[1] Mr Trevor Yawirki Adamson has made an application for a stop bullying order under s.789FC of the *Fair Work Act 2009* (the FW Act). Mr Adamson was at the time of making the application, the Chairperson of the Executive Board of the Anangu Pitjantjatjara Yankunytjatjara Inc (APY Inc). His application names two persons, Mr Richard King, General Manager and Mr Bernard Singer, who was at the time of the application, the Deputy Chairperson of the Executive Board and various allegations have been made about their conduct. APY Inc is named in the application and together with Mr King and Mr Singer form the respondent parties.

[2] The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) (APY Act) provides for the vesting of title to approximately 100,000 square kilometres of lands in Northern South Australia to the people known as Anangu Pitjantjatjara Yankunytjatjara. The APY Act establishes the Executive Board which consists of elected or appointed members, including a Chairperson and Deputy Chairperson. It also provides for the appointment, by the Executive Board, of a Director of Administration and General Manager. The APY Act also establishes APY Inc as a corporate entity with status, powers and functions. I have referred to the corporate entity as APY Inc to differentiate between that entity and the APY community.

[3] In the responses provided to the application, Mr Singer and Mr King have strongly rejected the allegations made by Mr Adamson and made a number of counter claims about Mr Adamson's conduct as Chairperson. They have also raised a number of "jurisdictional issues" concerning the capacity of the Commission to hear and determine the application under the anti-bullying provisions in Part 6-4B of the FW Act. These included that:

- Mr Adamson is not a “worker” as defined by the FW Act and the conduct complained of did not occur in the context of the applicant being “at work”; and
- the application is vexatious and an abuse of process.

[4] Following extensive efforts to conciliate the matter, including the issuing of comprehensive recommendations that all parties have accepted at various times, the Commission has resolved to deal with these jurisdictional issues.<sup>1</sup> During the process established to permit the parties to file written submissions and evidence on these jurisdictional issues, another development has occurred which has impacted upon this matter.

[5] On 12 April 2017, the Commission was advised by the respondent parties that an election under the APY Act had been conducted and that Mr Adamson had not been re-elected to the Executive Board. In that light, the respondent parties have applied to dismiss this application on the grounds that there is now no basis to make any order, even if jurisdiction was otherwise to be found. This “future risk” issue arises from the prerequisites for the making of an order under s.789FF of the FW Act, which include that the Commission must be satisfied that the applicant worker is at risk of future workplace bullying in that capacity.

[6] As will become clear, the future risk issue has ultimately become decisive in this matter. It is however necessary to deal with the other issues, at least in part, to set the context for that aspect.

[7] The parties have now filed written submissions and affidavit material, some of which is in dispute, concerning the two original jurisdictional issues and the future risk point. In terms of the factual disputes, it has not been necessary to deal with these due to the nature of the jurisdictional issues being determined at this point and the fact that those disputes fundamentally go to the substantive merit of the application and the responses that have been provided.

[8] Mr Adamson is an Anangu man and an elder of his community. I note that during the course of the earlier proceedings, and in the making of submissions leading to this decision, Mr Adamson was assisted by Mr Brouss Chambers, who strongly advocated on his behalf. I note also that submissions were advanced in this matter on behalf of the respondent parties by Mr Harbord of Johnston Withers.<sup>2</sup>

## **2. The operation of the Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)**

[9] Each of the issues to be determined in this decision require an understanding of the operation of the APY Act. This sets the relationships between the parties and the context for much of the application.

[10] The *Anangu Pitjantjatjara Yankunytjatjara Land Rights (Miscellaneous) Amendment Act 2016* (SA) (APY Amendment Act) came into effect on 1 January 2017 amending various provisions of the APY Act. Those amendments have been taken into account in this decision to the extent that they impact upon the immediate issues to be determined.

[11] Section 4 of the APY Act defines a traditional owner as an Aboriginal person who has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with and responsibilities for the lands or any part of them. Section 4 also defines Anangu as meaning "a person who is a member of the Pitjantjatjara, Yankunytjatjara or Ngaanyatjarra people; and ... a traditional owner of the lands or a part of them".

[12] The APY Act establishes the functions of APY Inc in the following terms:

**“6 Powers and functions of Anangu Pitjantjatjara Yankunytjatjara**

- (1) The functions of Anangu Pitjantjatjara Yankunytjatjara are as follows:
  - (a) to ascertain the wishes and opinions of traditional owners in relation to the management, use and control of the lands and to seek, where practicable, to give effect to those wishes and opinions; and
  - (b) to protect the interests of traditional owners in relation to the management, use and control of the lands; and
  - (c) to negotiate with persons desiring to use, occupy or gain access to any part of the lands; and
  - (d) to administer land vested in Anangu Pitjantjatjara Yankunytjatjara.”

[13] Various powers are established by s.6(2) of the APY Act. The Constitution (rules) of APY Inc is also set out within the APY Act.

[14] The role of the Executive Board is established by s.9B of the APY Act in the following terms:

**“9B Functions and powers of the Executive Board**

- (1) The Executive Board is the governing body of Anangu Pitjantjatjara Yankunytjatjara.
- (2) Subject to this Act, the Executive Board—
  - (a) is responsible for carrying out the functions of Anangu Pitjantjatjara Yankunytjatjara and the day-to-day business of Anangu Pitjantjatjara Yankunytjatjara; and
  - (b) may, in carrying out the functions of Anangu Pitjantjatjara Yankunytjatjara, exercise any power conferred on Anangu Pitjantjatjara Yankunytjatjara by or under this Act.
- (3) The Executive Board must, in carrying out its functions, endeavour to advance the interests of Anangu at all times.
- (4) The Executive Board must comply with a resolution of Anangu Pitjantjatjara Yankunytjatjara made at an annual or special general meeting held in accordance with this Act that directs the Executive Board to act, or to not act, in a specified manner.

- (5) An act of the Executive Board done in accordance with this Act is binding on Anangu Pitjantjatjara Yankunytjatjara.”

[15] Under s.9C of the APY Act, the Chairperson and Deputy Chairperson are elected by the Executive Board.

**“9C Chairperson and Deputy Chairperson**

- (1) Subject to this section, the Executive Board must elect 1 of its number to be the Chairperson, and 1 to be the Deputy Chairperson.
- (2) An election of a Chairperson or Deputy Chairperson—
- (a) must take place at the first meeting of the Executive Board following the office or offices of Chairperson or Deputy Chairperson (as the case requires) becoming vacant; and
  - (b) must, unless the election is uncontested, be by secret ballot.
- (3) The office of Chairperson or Deputy Chairperson—
- (a) becomes vacant on the day that an election is held under section 9; and
  - (b) becomes vacant when the Chairperson or Deputy Chairperson (as the case requires) resigns from that position by notice in writing given to—
    - (i) in the case of the resignation of the Chairperson—the Deputy Chairperson; or
    - (ii) in the case of the resignation of the Deputy Chairperson—the Chairperson; and
  - (c) becomes vacant when a casual vacancy occurs in the office of the member of the Executive Board who is the Chairperson or Deputy Chairperson (as the case requires); and
  - (d) becomes vacant when the casual vacancy referred to in paragraph (c) is filled in accordance with section 9D.
- (4) The Chairperson is, in addition to his or her remuneration, allowances and expenses as a member of the Executive Board, entitled to an allowance determined by the Executive Board and approved by the Minister.
- (5) The Minister must determine to approve, or not approve, the proposed allowance within 28 days after receiving the proposal, and may, in determining whether to approve the allowance, take into consideration any matter the Minister thinks fit.

... ..

**“9E Remuneration**

- (1) A member of the Executive Board is entitled to remuneration, allowances and expenses determined by the Executive Board and approved by the Minister.

- (2) The Minister must determine to approve, or not approve, the proposed remuneration, allowances and expenses within 28 days after receiving the proposal, and may, in determining whether to approve the proposal, take into consideration any matter the Minister thinks fit.”

[16] Accordingly, s.9C(4) provides that the Chairperson is, in addition to his or her remuneration, allowances and expenses as a member of the Executive Board, entitled to an allowance determined by the Executive Board and approved by the Minister. In the case of Mr Adamson, the allowance determined for the Chairperson position was \$920.15 gross per week plus a vehicle allowance of \$450 per week.<sup>3</sup>

[17] Section 9F of the APY Act provides the capacity for the Executive Board to delegate certain functions to the General Manager, and expressly excludes certain powers from that capacity. Any delegations must be in writing, may be absolute or conditional, do not derogate from (reduce) the power of the Executive Board to act in any matter; and are revocable at will by the Executive Board.

[18] The procedures for the Executive Board are established as follows:

**“10 Procedure of the Executive Board**

- (1) The Chairperson must call a meeting of the Executive Board for the transaction of business at least once in every 2 months.
- (2) A quorum of the Executive Board consists of one half the total number of its members (ignoring any fraction resulting from the division) plus 1.
- (3) A meeting will be chaired by the Chairperson or, in his or her absence, by the Deputy Chairperson and, in the absence of both the Chairperson and the Deputy Chairperson, the members present at a meeting must choose 1 of their number to preside at the meeting.
- (4) Each member present at a meeting has 1 vote on any question arising for decision.
- (5) A conference by means of telephone link (including a satellite link) between the members will, for the purposes of this section, be taken to be a meeting of the Executive Board at which the participating members are present if—
  - (a) notice of the conference is given to all members in the manner determined by the Executive Board for the purpose; and
  - (b) each participating member is capable of communicating with every other participating member during the conference.
- (6) A decision carried by a majority of votes cast by members at a meeting is a decision of the Executive Board.
- (7) The Executive Board must have accurate minutes kept of its meetings.

- (8) Any Anangu is entitled to inspect (without charge) the minutes at the places on the lands, and during the times, nominated by the Executive Board and approved by the Minister.
- (9) Any Anangu is entitled, on payment of the fee prescribed by the regulations, to a copy of the minutes.
- (10) Subject to subsection (11), a member of the Executive Board may, by written instrument, appoint another member of the Executive Board to act as his or her proxy at a meeting specified in the instrument of appointment.
- (11) A member of the Executive Board appointed to act as a proxy for another member at a specified meeting may only so act if he or she—
  - (a) is present at the specified meeting; and
  - (b) exercises the proxy vote at the meeting in accordance with any instructions of the appointing member in the instrument of appointment.
- (12) A member of the Executive Board is not entitled to additional remuneration for acting as a proxy.
- (13) To avoid doubt, a proxy vote that is exercised other than in accordance with subsection (11) is void and of no effect.
- (14) Subject to this Act and the constitution, the Executive Board may determine its own procedures.
- (15) No act or proceeding of the Executive Board is invalid by reason only of a vacancy in the office of a member of the Executive Board, or any defect in the election or appointment of a person to the Executive Board.”

**[19]** I observe that, amongst other matters, this means that:

- It is the Chairperson that calls the meetings;
- A meeting will be chaired by the Chairperson or, in his or her absence, by the Deputy Chairperson;
- A quorum of the Executive Board is constituted by one half of the total number of members plus one;
- Each member present at a meeting has one vote on any question arising for decision and there is no deciding vote for the Chairperson;
- A decision carried by a majority of votes cast by members at a meeting is a decision of the Executive Board. In that regard, I note that at the time of the events leading to the making of this application, the APY Act required that any motion have the support of the majority comprising not less than six votes;<sup>4</sup>
- Proxies and telephone attendance is permitted; and

- Provided that the procedure is not inconsistent with the APY Act or the Constitution, it is the Executive Board that determines the procedure of the meetings.

[20] In addition, the Executive Board must have accurate minutes kept of its meetings and any Anangu is entitled to inspect (without charge) the minutes at the places on the lands, and during the times, nominated by the Executive Board and approved by the Minister.

[21] Duties to act with care, diligence and honesty, and procedures to deal with direct or indirect personal or pecuniary interests in a matter are provided in ss.12B, 12C and 12D of the APY Act. Section 12F requires that a Code of Conduct be established and this code is to be observed by members of the Executive Board, the Director of Administration, the General Manager and any employees of the APY. A comprehensive Code has been issued and this includes a procedure to deal with complaints about alleged non-compliance.

[22] The APY Amendment Act varies certain subsections of s.13, including 13B, 13D, 13G and 13O. However, these amendments do not come into effect until 1 July 2017.<sup>5</sup> Section 13B of the APY Act creates the position of Director of Administration, which involves an appointment by the Executive Board. The functions of that position are provided in the following terms:

#### **“13C Functions of Director of Administration**

The functions of the Director of Administration are—

- (a) to oversee the implementation of resolutions of Anangu Pitjantjatjara Yankunytjatjara and the Executive Board; and
- (b) to carry out any other functions assigned to the Director of Administration—
  - (i) in the instrument of appointment; or
  - (ii) by the Minister after consultation with the Executive Board.”

[23] The role of General Manager is created by s.13D of the APY Act and involves a person also appointed by the Executive Board. The functions are as follows:

#### **“13E Functions of General Manager**

The functions of the General Manager are—

- (a) to implement the resolutions of the Executive Board in a timely and efficient manner; and
- (b) to undertake responsibility for the day-to-day operations and affairs of Anangu Pitjantjatjara Yankunytjatjara; and
- (c) to ensure that records required under this or another Act are properly kept and maintained; and
- (d) to discharge any duties under this or any other Act relating to financial and annual reports; and
- (e) to ensure that the assets and resources of Anangu Pitjantjatjara Yankunytjatjara are properly managed and maintained; and

- (f) to exercise, perform or discharge any other powers, functions or duties conferred on the General Manager by or under this or any other Act.”

**[24]** The General Manager and Director of Administration form the senior management of APY Inc. These positions also operate subject to various duties to act with care, diligence and honesty, and procedures to deal with direct or indirect personal or pecuniary interest in a matter are provided in ss.13H, 13I and 13J of the APY Act.

**“13G Termination of appointment of Director of Administration or General Manager by Executive Board**

- (1) The Executive Board may terminate the appointment of the Director of Administration or the General Manager if the Director of Administration or the General Manager (as the case requires)—
  - (a) becomes physically or mentally incapable of carrying out official duties satisfactorily; or
  - (b) fails, without reasonable excuse, to carry out official duties to the performance standards specified in the instrument of appointment; or
  - (c) fails to comply with a duty imposed under section 12F, 13H, 13I or 13J; or
  - (d) engages in serious misconduct; or
  - (e) in the case of the General Manager—
    - (i) is convicted of an indictable offence; or
    - (ii) becomes bankrupt or applies to take the benefit of a law for the relief of insolvent debtors.
- (2) The appointment of the Director of Administration or the General Manager may only be terminated by resolution passed by at least a two-thirds majority of the members of the Executive Board.
- (3) The office of Director of Administration or General Manager becomes vacant if the Director of Administration or General Manager (as the case requires)—
  - (a) dies; or
  - (b) completes a term of office and is not reappointed; or
  - (c) resigns by notice in writing addressed to the Executive Board; or
  - (d) is sentenced to imprisonment for an offence; or
  - (e) is disqualified from managing corporations under Chapter 2D Part 2D.6 of the Corporations Act 2001 of the Commonwealth; or
  - (f) is removed from the office by the Executive Board under subsection (1).
- (4) The Minister may direct the Executive Board to terminate the appointment of the Director of Administration or the General Manager if he or she—
  - (a) in the case of the General Manager—is convicted of an indictable offence; or

- (b) in any case—has failed to comply with a duty imposed under section 12F, 13H, 13I or 13J.
- (5) Subsections (1)(e)(i), (3)(d) and (4)(a) do not apply until the period for appealing against the conviction has expired or, if an appeal is lodged within that period, until the appeal is finalised.
- (6) If the Director of Administration or General Manager is temporarily absent, or temporarily unable to discharge his or her official duties, the Executive Board may appoint a person in accordance with this section to act in the position of Director of Administration or General Manager (as the case requires) during the period during which the Director of Administration or General Manager (as the case requires) is absent or unable to discharge his or her official duties.
- (7) If a casual vacancy occurs in the office of Director of Administration or General Manager, the Executive Board must, as soon as practicable after the vacancy occurs, appoint a person in accordance with this section to fill the vacancy.

... ..

**“13L—Appointment etc by General Manager**

- (1) Subject to this Act, the General Manager is responsible for appointing, managing, suspending and dismissing the employees of Anangu Pitjantjatjara Yankunytjatjara on behalf of Anangu Pitjantjatjara Yankunytjatjara.
- (2) The General Manager may only appoint an employee of Anangu Pitjantjatjara Yankunytjatjara—
  - (a) if the appointment is consistent with the approved budget for the financial year in which the appointment is to be made; or
  - (b) with the approval of the Executive Board and the Minister.
- (3) Subject to this Act, the remuneration and other conditions of service of an employee of Anangu Pitjantjatjara Yankunytjatjara will be as determined by the General Manager.
- (4) The General Manager must, in the exercise of powers under this section, comply with any relevant Act, award or industrial agreement.
- (5) Suspension of an employee by the General Manager does not affect a right to remuneration in respect of the period of suspension.
- (6) The Minister must determine to approve, or not approve, a proposed appointment under subsection (2)(b) within 28 days after receiving the proposal, and may, in determining whether to approve the appointment, take into consideration any matter the Minister thinks fit.”

[25] The obligation of the senior managers to comply with directions from the Executive Board is qualified in the following terms:

**“13M—Director of Administration, General Manager and employees of Anangu Pitjantjatjara Yankunytjatjara not subject to direction by member of Executive Board**

The Director of Administration, the General Manager and any employees of Anangu Pitjantjatjara Yankunytjatjara are not subject to direction by an individual member of the Executive Board unless the member of the Executive Board is acting in accordance with a resolution of the Executive Board.”

[26] The combination of these provisions means that the senior managers have duties to oversee the implementation of the decisions of the Executive Board, conduct the day to day operations of the APY, and to discharge the financial and record keeping duties under the APY Act. In addition, unless a member of the Executive Board, including the Chairperson and Deputy Chairperson, is acting with the authority of a resolution of the Board, the senior managers are not subject to their individual directions.

[27] Part 4 of the APY Act sets out the procedure for disputes. Section 35 provides that there will be a panel of conciliators for resolving disputes on the lands. Each panel member is appointed by the relevant Minister with the approval of the APY.<sup>6</sup>

[28] Section 35A(1) of the APY Act provides that an Anangu who is aggrieved by a decision or action of the Executive Board may apply to the Minister for conciliation. Section 36 of the APY Act also sets out a process for resolving such disputes.

### **3. The broader statutory context of the anti-bullying jurisdiction**

[29] I will shortly deal with the specific provisions of the FW Act that are most relevant to this matter. The scope and nature of the Commission’s Anti-bullying jurisdiction has been canvassed in a number of decisions.<sup>7</sup>

[30] Without detracting from those decisions or the detail of the FW Act itself, the *Fair Work Amendment Bill 2013 Revised Explanatory Memorandum* provided a useful general explanation of the provisions as follows:

**“New section 789FF – FWC may make orders to stop bullying**

119. New subsection 789FF(1) empowers the FWC to make any order it considers appropriate to prevent a worker from being bullied at work by an individual or group of individuals. Before an order can be made, a worker must have made an application to the FWC under new section 789FC and the FWC must be satisfied that the worker has been bullied at work by an individual or group of individuals. There must also be a risk that the worker will continue to be bullied at work by the individual or group. Orders will not necessarily be limited or apply only to the employer of the worker who is bullied, but could also apply to others, such as co-workers and visitors to the workplace. Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to work.

120. The power of the FWC to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling

normal working relationships to resume. The FWC cannot order reinstatement or the payment of compensation or a pecuniary amount.

121. Examples of the orders that the FWC may make include an order requiring:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer's workplace bullying policy;
- the provision of information and additional support and training to workers;
- review of the employer's workplace bullying policy.

122. New subsection 789FF(2) provides that, when considering the terms of the order, the FWC can take into account any factors that it considers relevant, but must have regard to the following (to the extent that the FWC is aware):

- any final or interim outcomes 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 from any procedures available to the worker for resolving grievances or disputes.

123. These factors may be used by the FWC to frame the order in a way that has regard to compliance action being taken by the employer or a health and safety regulator or another body, and to ensure consistency with those actions.”

**[31]** Having regard to the provisions of the FW Act, there are, amongst other matters, two prerequisites to the making of substantive orders in matters of this kind.<sup>8</sup> Firstly, a finding that the worker has been bullied at work by an individual or a group of individuals; and secondly, that there is a risk that the applicant worker will continue to be bullied at work by the individual or group concerned. I will return to this aspect when dealing with the future risk issue.

**[32]** For completeness, I note that where such a future risk is found, the Commission may make an order preventing the worker from being further bullied by that individual or group. This means that any orders must be directed towards the prevention of relevant future unreasonable conduct and be informed by, but not necessarily limited to, the prior unreasonable conduct as found. However, any substantive orders must deal with the actual future risk, based upon appropriate findings, and having regard to the considerations established by s.789FF(2) of the FW Act.

**[33]** Subject to the above, and the constraint that a substantive order cannot be made requiring payment of a pecuniary amount, the making of an order is a matter of discretion to be exercised judicially in the circumstances of each case.

**[34]** Accordingly, the power of the Commission to grant an order is limited to preventing the applicant worker from being (further) bullied at work, and the focus is on enabling normal working relationships to resume in a mutually safe and productive manner.

#### 4. Was Mr Adamson as Chairperson a “worker” under the FW Act?

[35] I leave aside for the moment, the impact of the recent election and the fact that Mr Adamson is no longer the Chairperson of the Executive Board.

##### 4.1 The meaning of a worker under the FW Act

[36] Section 789FC of the FW Act provides as follows:

###### “789FC Application for an FWC order to stop bullying

- (1) A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.
- (2) For the purposes of this Part, *worker* has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

- (3) The application must be accompanied by any fee prescribed by the regulations.
- (4) The regulations may prescribe:
  - (a) a fee for making an application to the FWC under this section; and
  - (b) a method for indexing the fee; and
  - (c) the circumstances in which all or part of the fee may be waived or refunded.”

[37] Section 789FD of the FW Act defines bullying conduct as follows:

###### “789FD When is a worker *bullied at work*?

- (1) A worker is **bullied at work** if:
  - (a) while the worker is at work in a constitutionally-covered business:
    - (i) an individual; or
    - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
  - (b) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.
- (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:

- (a) the person is:
  - (i) a constitutional corporation; or
  - (ii) the Commonwealth; or
  - (iii) a Commonwealth authority; or
  - (iv) a body corporate incorporated in a Territory; or
- (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a **constitutionally-covered business.**”

[38] I note that there is no suggestion that APY Inc is not a constitutional corporation, and thereby, a constitutionally-covered business.

[39] The term “worker” is defined in s.789FC of the Act and this indicates that “worker” has the same meaning as in the *Work Health and Safety Act 2011 (WHS Act)*, but does not include a member of the Defence Force.

[40] Section 7 of the WHS Act provides as follows:

“7 **Meaning of worker**

- (1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:
  - (a) an employee; or
  - (b) a contractor or subcontractor; or
  - (c) an employee of a contractor or subcontractor; or
  - (d) an employee of a labour hire company who has been assigned to work in the person’s business or undertaking; or
  - (e) an outworker; or
  - (f) an apprentice or trainee; or
  - (g) a student gaining work experience; or
  - (h) a volunteer; or
  - (i) a person of a prescribed class.
- (2) For the purposes of this Act, the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police or an AFP employee (all within the meaning of the Australian Federal Police Act 1979) is:
  - (a) a worker; and
  - (b) at work throughout the time when the person is on duty or lawfully performing the functions of the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police or an AFP employee, but not otherwise; and

- (c) carrying out work for a business or undertaking conducted by the Commonwealth when the person is on duty or lawfully performing the functions of the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police or an AFP employee, but not otherwise; and
  - (d) an employee of the Commonwealth.
- (2A) For the purposes of this Act, a member of the Defence Force is:
  - (a) a worker; and
  - (b) at work throughout the time when the person is lawfully performing the functions of a member of the Defence Force, but not otherwise; and
  - (c) carrying out work for a business or undertaking conducted by the Commonwealth when the person is lawfully performing those functions, but not otherwise; and
  - (d) an employee of the Commonwealth.
- (2B) For the purposes of this Act, a person who is the holder of, or acting in, an office established by a law of the Commonwealth or a law of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island) is:
  - (a) a worker; and
  - (b) at work throughout the time when the person is lawfully performing the functions of that office, but not otherwise; and
  - (c) carrying out work for a business or undertaking conducted by the Commonwealth when the person is lawfully performing those functions, but not otherwise; and
  - (d) an employee of the Commonwealth.
- (2C) For the purposes of this Act, a person who constitutes, or is acting as the person constituting, a public authority is:
  - (a) a worker; and
  - (b) at work throughout the time when the person is lawfully performing the functions of that authority, but not otherwise; and
  - (c) carrying out work for a business or undertaking conducted by the public authority when the person is lawfully performing those functions, but not otherwise; and
  - (d) an employee of the public authority.
- (2D) For the purposes of this Act, a person who is, or is acting as, a member or a deputy member of a public authority is:
  - (a) a worker; and
  - (b) at work throughout the time when the person is lawfully performing the functions of the public authority, but not otherwise; and

- (c) carrying out work for a business or undertaking conducted by the public authority when the person is lawfully performing those functions, but not otherwise; and
  - (d) an employee of the public authority.
- (2E) For the purposes of this Act, a person who is, or is acting as, a member or a deputy member of a body established by or under an Act establishing a public authority for a purpose associated with the performance of the functions of the public authority is:
- (a) a worker; and
  - (b) at work throughout the time when the person is lawfully performing the functions of the body, but not otherwise; and
  - (c) carrying out work for a business or undertaking conducted by the public authority when the person is lawfully performing those functions, but not otherwise; and
  - (d) an employee of the public authority.
- (2F) The Minister may, by instrument in writing, declare that a person of a class specified in the declaration is, for the purposes of this Act:
- (a) a worker; and
  - (b) at work throughout the time specified in the declaration; and
  - (c) carrying out work for a business or undertaking conducted by the Commonwealth, or a public authority specified in the declaration, when the person is performing functions of the kind specified in the declaration; and
  - (d) an employee of the Commonwealth, or a public authority specified in the declaration.
- (2G) A declaration under subsection (2F) may only be made in relation to a class of persons if persons of that class engage in activities or perform acts:
- (a) where the declaration specifies that persons of that class are carrying out work for a business or undertaking conducted by the Commonwealth, or are employees of the Commonwealth:
    - (i) at the request or direction of the Commonwealth; or
    - (ii) for the benefit of the Commonwealth; or
    - (iii) by or under a law of the Commonwealth or of a Territory (other than the Australian Capital Territory, the Northern Territory or Norfolk Island); or
  - (b) where the declaration specifies that persons of that class are carrying out work for a business or undertaking conducted by a public authority specified in the declaration, or are employees of a public authority specified in the declaration:
    - (i) at the request or direction of the public authority; or

(ii) for the benefit of the public authority.

(2H) A declaration under subsection (2F) has effect according to its terms.

(3) The person conducting the business or undertaking is also a worker if the person is an individual who carries out work in that business or undertaking.”

**[41]** 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, **including** any of the following:

- an employee;
- a contractor or subcontractor;
- an employee of a contractor or subcontractor;
- an employee of a labour hire company who has been assigned to work in the person’s business or undertaking;
- an outworker;
- an apprentice or trainee;
- a student gaining work experience; and
- a volunteer—except a person volunteering with a wholly ‘volunteer association’, in effect, with no employees.

**[42]** The concept of “a person conducting a business or undertaking” (PCBU) is provided by s.5 of the *WHS Act* in the following terms:

- “(1) For the purposes of this Act, a **person conducts a business or undertaking**:
- (a) whether the person conducts the business or undertaking alone or with others; and
  - (b) whether or not the business or undertaking is conducted for profit or gain.
- (2) A business or undertaking conducted by a person includes a business or undertaking conducted by a partnership or an unincorporated association.
- (3) If a business or undertaking is conducted by a partnership (other than an incorporated partnership), a reference in this Act to a person conducting the business or undertaking is to be read as a reference to each partner in the partnership.
- (4) A person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of, that business or undertaking.
- (5) An elected member of a local authority does not in that capacity conduct a business or undertaking.

- (6) The regulations may specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of this Act or any provision of this Act.
- (7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.
- (8) In this section, **volunteer association** means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.”

[43] Furthermore, s.4 of the WHS Act includes the following definition of “volunteer”:

“**“volunteer”** means a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses).”

[44] The *Workplace Health and Safety Regulations 2011* provide as follows:

“7(3) For subsection 5 (6) of the Act, an incorporated association may be taken not to be a person conducting a business or undertaking if the incorporated association consists of a group of volunteers working together for one or more community purposes where:

- (a) the incorporated association, either alone or jointly with any other similar incorporated association, does not employ any person to carry out work for the incorporated association; and
- (b) none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the incorporated association.”

[45] There is no suggestion that APY Inc is not a PCBU and it was not originally suggested that Mr Adamson in his capacity as the Chairperson, was a volunteer, at least within the meaning of the WHS Act.

## 4.2 The contentions of the respondent parties

[46] The respondent parties contend that Mr Adamson is not a "worker" within the meaning of the FW Act, and as a result, has no standing to bring this application. They do so on the following basis:

- The term “worker” is not generally applied to a director or member of a governing board of an organisation unless that person is also subject to a contract of employment. That is not the situation with Mr Adamson.
- Mr Adamson, in his capacity as an elected member of the Executive Board of APY and as the elected Chairperson of APY, does not fit within any of the specific categories referred to in section 7(1) of the WHS Act.
- It is important to note that the inclusive categories of “worker” a set out in s.7(1) of the WHS Act do not include a director of a company or a member of the governing board of an association or statutory body. If Parliament had intended to

substantially broaden the category of worker to include such persons, then it would have specifically done so in the definition of “worker” under the WHS Act.

[47] The respondent parties also contend that a distinction should be drawn between a company director (as part of the employer) and an employee.<sup>9</sup> That is, the governing body of a statutory authority such as APY is the decision making body of “the employer” not the worker. Each member of the governing body is one component of the collective Board. The Board is the body that enters into contracts on the part of “the employer” with a “worker” as defined in section 7(1) of the WHS Act. In that context, the respondent parties further submitted that:

- APY Inc has no control over the work of the Chairperson. The specific classes of persons referred to under section 7(1) of the WHS Act are all classes where the “employer” has some control over that class of person and can direct that class of person in certain respects. In the case of Mr Adamson however, as Chairperson of the governing body, he is only subject to direction of the Executive Board as a whole. Neither the General Manager nor the Director of Administration, Mr Tjami, can direct Mr Adamson in his statutory role as Chairperson of the Executive Board.
- Mr Adamson, as Chairperson and as an individual member of the Executive Board, is not responsible for carrying out the functions of the APY or the day to day business of APY Inc. Mr Adamson is simply fulfilling the functions of a statutory role as defined by the APY Act. He does not “work” for APY Inc.
- Rather, the Executive Board as a whole is responsible for the governing of APY Inc. The General Manager is responsible for the day to day operations and affairs of APY Inc.

[48] The respondent parties contend that the payments made to Mr Adamson in his capacity as Chairperson, including those that were subject to the pay as you go (PAYG) taxation deduction, do not mean that he was an employee of APY Inc, or a worker. Further, they contend that the fact that Mr Adamson was included on the schedule of those covered by APY Inc’s workers compensation coverage is also not relevant in this regard.

[49] The respondent parties further contend that their interpretation of s.7(1) of the WHS Act is confirmed by ss.7(2B), 7(2C) and 7(2E) of the WHS Act which specifically expand or add to the definition of “worker” in s.7(1). Section 7(2E) for example, specifically expands the definition of “worker” to include persons associated with a “public authority” as defined in s.4 of the WHS Act. They also contend that the APY is not a public authority under that Act.

[50] In that regard, the respondent parties submitted that Parliament would not have specifically added to the definition of “worker” in this manner if it had intended that the primary definition of “worker” in s.7(1) of the WHS Act included members of a governing body established by or under an Act of Parliament or statutory office holders. Further, there is a presumption therefore that the Commonwealth Parliament did not intend that a person such as Mr Adamson, who was carrying out his responsibilities as an elected member of a statutory body established by an act of State Parliament, is “a worker” under section 7(1) of the WHS Act.

[51] Accordingly, they contend that it follows that Mr Adamson is caught by neither s.7(1), nor by the expanded definition of worker in ss.7(2) to 7(2E). Consequently, he is not "a worker" for the purposes of s.789FC of the FW Act.

#### **4.3 The contentions of Mr Adamson**

[52] Mr Adamson contends that as Chairperson of the Executive Board he is (was) a worker for present purposes. This, he contends, follows from the meaning of the (WHS) Act and the respondent parties' submission is "alien to the normal notions of statutory interpretation i.e. the literal, mischief or purposive approach."<sup>10</sup>

[53] In particular, Mr Adamson contends that:

- Sub paragraphs (a) through (i) of s.7(1) of WHS Act describe categories that are 'included' in the definition of worker and those paragraphs are not exclusive. Accordingly, the test is not whether Mr Adamson falls within one of those categories, but whether Mr Adamson performs work in any capacity.
- Plainly, Mr Adamson's performance of his duties as Chairperson amounts to work in the literal approach.<sup>11</sup>
- There is no basis to suggest that exclusion of the chair of a statutory board was a mischief intended to be cured by any applicable (alternative) legislation.
- Applying the purposive approach, the objects of the WHS Act and the FW Act show a legislative intention to reform the workplace by improving the safety and quality of workplace life for people performing work.
- There is no basis for recourse to the extrinsic materials. Even if there were, those materials do not support the respondent parties. To the contrary, a construction where Mr Adamson is outside the legislative scheme, despite the regular periodic payments to perform the Chairperson's work, is an absurd construction and contrary to the literal meaning, plain legislative intent and a purposive approach.

[54] In relation to reference to a person engaged with a public authority, Mr Adamson contends that a public authority is one that carries on a function for a section of the public - as APY Inc does for Anangu. This is confirmed by the fact that all the state public sector legislation applies to APY and the (State) Minister has the ability to direct the board. Accordingly, APY Inc is a public authority, and is, and carries on, an undertaking.

[55] Mr Adamson also contends that payments he has received in his role of a Chairperson were the subject to PAYG taxation deductions and included for workers' compensation coverage purposes.

[56] Mr Adamson submits, in effect, that the distinction drawn between an employer and an employee for some purposes is not relevant here. Further, he is not in a position of control given the operation of s.13M of the APY Act, but rather, is a "worker".

#### **4.4 Conclusion on whether Mr Adamson as Chairperson was a "worker" for present purposes**

[57] The essential question is whether Mr Adamson as Chairperson is a person who carries out work in any capacity for APY Inc. I have for this purpose accepted that APY Inc is a

PCBU, and this would appear to be the case. This question requires consideration of the nature of Mr Adamson's role and activities as Chairperson, and the relationship between Mr Adamson and APY Inc, all in the context of the intended coverage of the definition of "worker" under the FW Act, and by reference, the WHS Act.

**[58]** It is appropriate to commence with the approach to the construction of the legislation.

**[59]** As a Full Bench<sup>12</sup> relatively recently stated, ascertaining the meaning of the provisions of the FW Act necessarily begins with the ordinary and grammatical meaning of the words used.<sup>13</sup> The words must be read in context by reference to the language of the Act as a whole and to the legislative purpose.<sup>14</sup> Section 578(a) of the FW Act also directs attention to the objects of the FW Act and s.15AA of the *Acts Interpretation Act 1901* requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the FW Act, and another does, the latter interpretation is to be preferred. Section 15AA requires the Commission to construe the FW Act, but not to rewrite it, in the light of its purpose.<sup>15</sup>

**[60]** The function of a legislative definition, as was pointed out by McHugh J in *Kelly v R*,<sup>16</sup> is not to enact substantive law, but to provide aid in construing the statute. A definition provision is therefore not to be interpreted in isolation and thereby given a meaning which negates the evident policy or purpose of a substantive enactment. Part 6-4B of the FW Act has the evident purpose of establishing a mechanism by which the bullying of workers at work may be stopped.<sup>17</sup>

**[61]** Further, Mason J affirmed in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*.<sup>18</sup>

"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."<sup>19</sup>

**[62]** There are no specific objects applicable only to Part 6-4B of the FW Act. There are however, objects in s.3 of the FW Act that should be taken into account. Section 3 provides as follows:

**"3. Object of this Act**

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.”

[63] I have set out the statements pertaining to the Anti-bullying jurisdiction made within the relevant Explanatory Memorandum<sup>20</sup> earlier in this decision.

[64] The objects of WHS Act are stated as follows:

**“3 Object**

- (1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:
  - (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work; and
  - (b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety; and
  - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
  - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and
  - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
  - (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and

- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and
  - (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
- (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work as is reasonably practicable.”

**[65]** The relevant explanatory memorandum<sup>21</sup> to what is now the WHS Act stated as follows in relation to s.7:

“Clause 7 – Meaning of worker

32. The Bill adopts a broad definition of ‘worker’ instead of ‘employee’ to recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers.

33. Clause 7 defines the term ‘worker’ as a person who carries out work in any capacity for a PCBU, including work in any of the capacities listed in the provision. The examples of workers in the provision are illustrative only and are not intended to be exhaustive. That means that there will be other kinds of workers covered under the Bill that are not specifically listed in this clause (e.g. students on clinical placement and bailee taxi drivers).

34. Subclause 7(2) deems the Commissioner of the AFP, a Deputy Commissioner of the AFP, or AFP employee to be employees of the Commonwealth for the purposes of the Act and is necessary because police officers have not traditionally been recognised as employees, but rather as independent office holders.

35. Subclauses 7(2A), 7(2B), 7(2C), 7(2D), 7(2E) and 7(2F) further extend the definition of ‘worker’ to include other persons who are currently deemed to be employees of the Commonwealth for the purposes of the OHS Act, namely:

- Members of the ADF;
- A holder of a Commonwealth statutory office (or acting office holder);
- A person who constitutes a Commonwealth public authority (eg the Australian Government Solicitor, CEO of Comcare and the Director of National Parks);
- Members or deputy members of a Commonwealth public authority or a body established by an Act establishing a public authority;

- Persons that engage in activities or perform acts at the request or direction of, or for the benefit of, the Commonwealth who are declared by the Minister to be workers for the purposes of the Act.

These persons are deemed to be employees of the Commonwealth for the purpose of OHS Regulation, and ‘at work’ when performing their respective functions.

In deeming a person to be a worker, the intention is not to exclude that person from also having duties as another class of duty holder, such as an officer (see clause 15).

36. Subclauses 7(2F), 7(2G) and 7(2H) provide for the Minister to declare certain classes of people to be workers. This is intended to ensure that people who should be owed duties and in turn owe duties as workers, are covered under the Bill.

37. Subclause 7(3) clarifies that a self-employed person may simultaneously be both a PCBU and a worker for purposes of the Bill.”

[66] Against that background, I turn now to the terms of s.7 of the WHS Act. APY Inc is not a public authority within the meaning of the WHS Act. That is, the legislation adopts a particular meaning. In that light, it is not appropriate for the Commission to adopt a broad or popularly understood meaning for the term. APY Inc is established under a law of the South Australian Parliament and is not established for a public purpose **by or under a law of the Commonwealth or a law of a Territory**, is not a Commonwealth company within the meaning of the *Commonwealth Authorities and Companies Act 1997*, and is not prescribed by the regulations to be a public authority for the purposes of the WHS Act.

[67] The fact that Parliament extended the definition of worker to include the category of public authority workers is a factor to be weighed in ascertaining the intended coverage of the WHS Act. However, the fact that the WHS Act is a Commonwealth Act, designed to operate in the context of State and Territory work health and safety laws that provide coverage for organisations and other businesses in the States and Territories, should also be considered when assessing the import of the definition.

[68] In terms of the nature of Mr Adamson’s role and functions, what emerges from the provisions of the APY Act is as follows:

- Mr Adamson (and any other Chairperson under the APY Act) involves a person, who has successfully stood for election to the Executive Board, then being appointed by the Board to the role;
- The role of Chairperson is to call and chair the meetings of the Executive Board but has no deliberative decision making role, other than as a member of the Board, and cannot give directions to staff or make public statements on behalf of the Board except as specifically authorised by the Board to do so;
- Mr Adamson also attends the Board and other APY Inc meetings and participates in the decision making and consultative processes of the Board;
- Where authorised by the Board, the Chairperson would be expected to represent it to the APY community and in other forums; and
- Mr Adamson is, in addition to his remuneration, allowances and expenses as a member of the Executive Board, entitled to an allowance determined by the

Executive Board and approved by the Minister. In the case of Mr Adamson, the allowance determined for the Chairperson position is \$920.15 gross per week plus a vehicle allowance of \$450 per week.

[69] Of significance in this regard, is that Mr Adamson as Chairperson had a specific role under the terms of the APY Act and was paid significant remuneration for doing so. This remuneration is well beyond the sitting fees for general members of the Executive Board and exceeds cost reimbursement. The fact that PAYG taxation was deducted is of some significance and I note that no superannuation was apparently paid on behalf of Mr Adamson. This later point would not be consistent with an employment relationship; however, it is not contended that Mr Adamson was an employee and such is not required in order to be treated as a worker.

[70] At least in the role of Chairperson, it is not directly suggested that Mr Adamson fits neatly into any of the categories listed in s.7 of the WHS Act. In that regard, I will return to the concept of “volunteer” later in this decision. However, as contended of his behalf, the fact that the role does not directly fit into one of the nominated categories is not decisive. Those categories are non-exhaustive examples of the capacity in which a worker may undertake work for a PCBU, which shed some light on the scope of the definition, but cannot be determinative of that scope. Indeed, as would be clear from the WHS Act and the explanatory memorandum, a very wide approach to the definition of a worker has been adopted given that the essential element to determining who is a worker is the undertaking of work for a PCBU. Further, a broad approach to the definition recognises that WHS hazards and risks do not discriminate based on legal relationships or whether a person is paid.

[71] It seems to me that the activities undertaken by Mr Adamson in attending to the duties of Chairperson of APY Inc represent work. This is true in both a literal and contextual sense.

[72] The more difficult question is whether that work is carried out in any capacity **for** APY Inc. The need to consider this aspect in determining the application of s.7 of the WHS Act was emphasised by Watson VP in *Balthazaar v Department of Human Services (Commonwealth)*.<sup>22</sup>

[73] As a general rule, I doubt that the FW Act and WHS Act intended that members of organisations participating in the activities of those organisations, would, absent other factors be treated as workers, at least for present purposes. There is of course express coverage in s.7 of the WHS Act for some of these activities, which are not directly relevant here. However, I consider that there are particular features of the role of the Chairperson of the APY and the context in which that position exists, which are potentially significant.

[74] Mr Adamson in his capacity as Chairperson is certainly not engaged by APY Inc, rather he is elected to the Executive Board and then nominated as its chair. He does (or did), however, serve the organisation, and the APY community, as the Chairperson of the Executive Board and I have found that he undertakes work in that capacity. The Executive Board can be directed by the AGM of the APY (s.9B(4) of the APY Act) and as Chairperson, he can be directed to act for and on behalf of the Executive Board provided that he is acting in accordance with a resolution of that Board (s.13M of the APY Act as an example). As outlined earlier, without such a resolution, Mr Adamson is unable to give directions to the staff of APY Inc or make or implement any decisions, other than the calling of meetings, and at least arguably, those associated with the conduct of the meetings themselves. Any other

work undertaken in his capacity as Chairperson would seem to be undertaken, as required, for the Executive Board of APY Inc.

[75] As outlined earlier, the fact that Mr Adamson receives relatively significant additional remuneration and expense payments as Chairperson, whilst not decisive, is more consistent with the notion that work is being undertaken for APY Inc.

[76] Mr Adamson may not be considered to be a “worker” in the traditional sense of the difference between a manager/employer and a worker. However, the context in which the expression is used here is different. This includes the purpose of the WHS Act and the notion under s.7(3) that a self-employed person may simultaneously be both a PCBU and a worker for the purposes of the WHS Act. I consider, on balance, that in light of the particular role and function of the Chairperson under the APY Act, that Mr Adamson could be said to undertake work in any capacity for APY Inc.

[77] Accordingly, although it is now not necessary to finally determine this issue given later findings, my provisional view would be that at the time of making the application (and for the period that he was the Chairperson of the APY Executive Board), Mr Adamson was a worker for present purposes and eligible to bring this application.

## **5. Would the alleged conduct be considered as having taken place whilst Mr Adamson was at work within the meaning of the FW Act?**

### **5.1 The relevance of the question and the approach taken by the Commission**

[78] This issues arises directly from the definition of being “bullied at work” in s.789FD(1) of the FW Act. That is, the bullying conduct must take place whilst the applicant worker was “at work”.

[79] In *Bowker and Others v DP World Melbourne Limited T/A DP World and Others*<sup>23</sup> (*DP World*) a Full Bench of the Commission determined:

“[31] It is important to appreciate that the definition of ‘bullied at work’ includes the requirement that an individual or group of individuals ‘repeatedly behaves unreasonably towards the worker [ie the applicant], or a group of workers of which the worker is a member’ (see s.789FD(a)(i) and (ii)). The individuals engaging in the unreasonable behaviour need not be workers, for example they could be customers of the business or undertaking in which the applicant works. Nor do the relevant statutory provisions contain any requirement for these individual(s) to be ‘at work’ at the time they engage in the unreasonable behaviour which the applicant contends constitutes bullying.

...

[48] We have concluded that the legal meaning of the expression ‘while the worker is at work’ certainly encompasses the circumstance in which the alleged bullying conduct (ie the repeated unreasonable behaviour) occurs at a time when the worker is ‘performing work’. Further, being ‘at work’ is not limited to the confines of a physical

workplace. A worker will be ‘at work’ at any time the worker performs work, regardless of his or her location or the time of day.

...

[49] While a worker performing work will be ‘at work’ that is not an exhaustive exposition of the circumstances in which a worker may be held to be at work within the meaning of s.789FD(1)(a). For example, it was common ground at the hearing of this matter that a worker will be ‘at work’ while on an authorised meal break at the workplace and we agree with that proposition. But while a worker is on such a meal break he or she is not performing work. Indeed by definition they are on a break from the performance of work. It is unnecessary for us to determine whether the provisions apply in circumstances where a meal break is taken outside the workplace.

[50] In our view an approach which equates the meaning of ‘at work’ to the performance of work is inapt to encompass the range of circumstances in which a worker may be said to be ‘at work’.

[51] It seems to us that the concept of being ‘at work’ encompasses both the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).

...

[53] In most instances the practical application of the definition of ‘bullied at work’ in s.789FD will present little difficulty. But there will undoubtedly be cases which will be more complex, some of which were canvassed during the course of oral argument. For example, a worker receives a phone call from their supervisor about work related matters, while at home and outside their usual working hours. Is the worker ‘at work’ when he or she engages in such a conversation? In most cases the answer will be yes, but it will depend on the context, including custom and practice, and the nature of the worker’s contract.”

## **5.2 The contentions of the parties**

[80] This aspect received little attention in the submissions of the parties. I suspect that it was considered to be a sub-set of the question as to whether Mr Adamson was a worker.

## **5.3 Conclusions on whether the alleged conduct took place whilst “at work”**

[81] The broad allegations outlined in the s.789FC application include:

- Refusing to deal with the Chairperson and disrespecting his wishes;
- Interfering with the Chairperson’s conduct of meetings of the Executive Board and preventing the exercise of his powers under the APY Act;
- Orchestrating events to prevent a quorum at meetings of the Executive Board;

- Preventing the Chairperson from accessing meeting minutes of the Executive Board; and
- “Defamation” of the Chairperson and other members of the Executive Board.

[82] Mr Adamson has also raised a complaint about certain practices associated with the minutes of the Executive Board and other related governance issues linked to the General Manager’s conduct and role. In addition, further concerns have been raised as a result of alleged conduct taking place since the application was lodged and these are broadly consistent with the nature of the above contentions.

[83] All of these allegations are strongly contested by the respondent parties and these parties have also made a number of counter allegations. I make no findings about the competing contentions at this point. It is unnecessary to do so given the nature of the present issues being determined by the Commission and none of the evidence or other factual contentions filed to date have been tested.

[84] Given the approach adopted in *DP World*, and subject to the provisional findings above, it is reasonably apparent, that some or all of the alleged conduct, if it occurred, took place whilst Mr Adamson was “at work”, in his capacity as Chairperson.

## **6. Is the application an abuse of process?**

### **6.1 The contentions of the respondent parties**

The respondent parties submitted that the application by Mr Adamson is an abuse of process in that:

- Mr Adamson had a clear statutory right and obligation to initiate a process under the Code of Conduct pursuant to s.12F of the APY Act but has failed to do so. He has given no reasons for his failure in this respect.
- Mr Adamson could have made an application to have a conciliator deal with the dispute under s.36 of the APY Act as it stood at that time. He has failed to do so and again has given no reason for his failure in this respect.
- Mr Adamson had the opportunity to agree to the recommendations made by the Commission following the Conciliation Conference on 8 and 9 December 2016 in Alice Springs. The respondent parties agreed to those recommendations, however Mr Adamson has refused to accept them and has provided no reasonable explanation for such a failure.
- Mr Adamson initiated these proceedings for the primary purpose of seeking to undermine the role of the General Manager, which is clearly set out in the APY Act.
- Mr Adamson brought this application to the Commission in an attempt to gain control of the day to day management of APY Inc, contrary to the provisions of the APY Act.
- Mr Adamson also brought this application in an attempt to subvert the proper role of the Executive Board as the governing body of APY Inc.

[85] It was also submitted that the proceedings are unjustifiably oppressive to the General Manager and to the Deputy Chairperson and that Mr Adamson is attempting to use the jurisdiction of the Commission for the illegitimate purpose of contravening and subverting the provisions of the APY Act.

[86] The respondent parties also noted that they had sought further and better particulars of the allegations made by Mr Adamson but to date these have not been provided.

## **6.2 The contentions of Mr Adamson**

[87] Mr Adamson contends that the suggestion of an 'abuse of process' is not arguable and should not have been submitted. Further, he contends that he has brought a proper bullying complaint that needs to be determined.

[88] He also contends that the alleged bullying has continued with weekly or daily "shocking episodes" and that the abuse of process argument itself is part of the bullying.

## **6.3 Conclusion on the abuse of process contention**

[89] An abuse of process can occur in a number of circumstances, however as cited by the respondent parties, has often been held<sup>24</sup> to arise in one of three established categories:

- The "court's" procedures are invoked for an illegitimate purpose;
- The use of the "court's" procedures is unjustifiably oppressive to one of the parties;  
or
- The use of the "court's" procedures would bring the administration of justice into disrepute.

[90] Some of the elements of Mr Adamson's allegations could be said to arise from a dispute about the proper application of the APY Act. I also accept the respondent parties' proposition that some of these matters could have been advanced in other jurisdictions, including those available under the APY Act itself, and those that deal with the proper administration of State legislation (such as the Supreme Court of South Australia).

[91] However, the Anti-bullying jurisdiction of the Commission has, in my view, been cast in a deliberately wide manner. It is also an additional jurisdiction and is not intended to be a substitute right. This is evident from the terms of the FW Act, including s.789FH which deals specifically with the preservation of the WHS Act and corresponding State and Territory laws.

[92] I also accept that this application may be confronting and difficult for the persons named. To some extent this flows from the personal nature of applications in this particular jurisdiction and the Commission in dealing with the application has been mindful of the interests and circumstances of all parties, including the respondent parties. Importantly for present purposes, I do not consider that the application was taken without a genuine belief on the part of Mr Adamson about the issues and I do not consider that the procedures associated with dealing with the application have been unjustifiably oppressive to the respondent parties.

[93] I also consider that although the provision of further and better particulars might be useful in the lead up to the determination of the substantive application, the nature of the

alleged conduct and Mr Adamson's views as to why he considers that conduct to be bullying, is sufficiently clear in the application and the supplementary material provided as part of the Commission's processes to deal with this application.

[94] The fact that the s.789FC application was not withdrawn following the issuing of the Commission's Statement and Recommendations is also not conclusive of an abuse of process. They were issued following a without prejudice conciliation process conducted by consent of the parties and the decision not to discontinue the application was based upon Mr Adamson's stated view that the respondent parties were not complying with what appeared to be mutually supported outcomes. Whether that is so, can only be tested by hearing evidence about the actual conduct and the risk, if any, of future unreasonable conduct.

[95] There are certain aspects of the s.789FC application that are problematic, including those that appear to arise from a misunderstanding about the operation of the APY Act and various disputes as to the status of earlier meetings and potential resolutions of the Executive Board. I have made no findings about the substantive merit of the application or the responses that have been provided. Indeed, some of the competing allegations and contentions about the operation of the APY Act and its implications for what might be reasonable conduct in that context, are clearly arguable. However, these matters could be considered and determined by the Commission to the extent that they relate to the issues arising from the s.789FC application. That is, even allowing for the broader disputes about the operation of the APY Act, the actual alleged conduct of the respondent parties, and Mr Adamson, would be relevant to potential findings falling within the scope of the Anti-bullying provisions of the FW Act.

[96] Accordingly, I do not consider that the s.789FC application as made and advanced was an abuse of process.

[97] The recent change in circumstances has, however, significantly altered the context in which the application was made. I will later deal with the no future risk issue that arises but I would observe in the present context that the continuation of the application in circumstances where Mr Adamson was no longer a member of the Executive Board (as is now the case), might well become an abuse of process. That is, without a context in which the Commission might consider making orders that impact upon him as Chairperson of the Executive Board, the application becomes a matter of determining whether the previous alleged conduct had occurred, without this Commission having a proper reason for doing so.

[98] Further, in the new context, the continuing issues that Mr Adamson wants to agitate fundamentally concern the proper operation of the Board under the APY Act and his dispute with Mr King. This would now not represent a proper purpose to continue with a s.789FC application given the apparent statutory purpose of the FW Act and the limits upon the circumstances in which orders may be made. To the extent that Mr Adamson seeks to continue the application to protect the interests of some remaining members of the Executive Board, for reasons outlined below, this is not a proper basis for that course of action in the absence of himself continuing to be a worker in the relevant workplace.

## 7. The Future Risk issue

[99] This issue arises from s.789FF of the FW Act, which provides as follows:

**“789FF FWC may make orders to stop bullying**

(1) If:

- (a) a worker has made an application under section 789FC; and
- (b) the FWC is satisfied that:
  - (i) the worker has been bullied at work by an individual or a group of individuals; and
  - (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an order, the FWC must take into account:

- (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
- (b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and
- (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
- (d) any matters that the FWC considers relevant.”

[100] In brief terms, the respondent parties contend that as a result of the APY Executive Board elections conducted on 12 April 2017, the following applies:

- Mr Adamson was not re-elected to the Executive Board and his position as Chairperson became vacant in accordance with s.9C(3) of the APY Act;
- A member of the new Executive Board was elected as Chairperson;
- Mr Adamson now holds no position or role with APY Inc or the Executive Board and he is not a party to any contract with that body;
- The next elections for the APY Executive Board will be held in or about April 2020, in accordance with s.9(6) of the APY Act;
- Mr Singer was re-elected to the Executive Board but will also need to stand for election again in 2020 if he seeks to continue at that time; and
- Mr King’s present contract runs until December 2018.

[101] In essence, the respondent parties contend that as Mr Adamson is no longer the Chairperson, or a member of the Executive Board, there is no basis upon which the Commission could find that there was a further risk of bullying conduct within the meaning of

the FW Act. In the absence of any power to consider the making of an order under s.789FF of the FW Act, the present s.789FC application should be dismissed.

[102] Mr Adamson contends that this application should proceed and be determined by the Commission. To the extent that his submissions are directed at the future risk issue, he contends that:

- He has considerable unfinished business which will involve him having further dealings with Mr King and Mr Singer;
- Mr Adamson has outside roles and issues associated with his duties as the (former) Chairperson including to certify the minutes of previous meetings and to discharge the statutory reporting obligations to the Office of Public Integrity;
- He has been requested to attend future Executive Board meetings by one of more of the members of that board and that a risk to himself and other members of the board remains; and
- He is eligible to attend Executive Board meetings and other meetings of the APY, to request (along with others) a special general meeting, and to otherwise act in his capacity as a member of the APY.

[103] Mr Adamson also contends that he will, based upon the above factors, be acting as a volunteer (and I infer – thereby still a “worker” under the FW Act) and that in any event, as the former Chairperson he needs be protected from “further bullying”.

[104] In relation to Mr Adamson’s contention that he “remains” a volunteer for present purposes, the respondent parties contends that a volunteer is simply a person who does work for a relevant person in an unpaid capacity and that Mr Adamson is not and will not be doing so. That is, the basis upon which Mr Adamson contends that he will be a worker in the future is not valid as his “rights” and roles are those of any Anangu. None of this means that Mr Adamson will be working for APY Inc in any capacity.

[105] The respondent parties also contend that if in the future Mr Adamson did take on the role of a genuine “volunteer” and was subject to bullying conduct in that capacity, he could make a further application at the relevant time.

[106] In *G.C.*<sup>25</sup>, I referred to a leading case and made the following observations in relation to a risk of further bullying and the capacity of the Commission to make an order in such circumstances:

“[165] In *Mitchell Shaw v Australia and New Zealand Banking Group Limited T/A ANZ Bank and Another (Shaw v ANZ)*, Gostencnik DP was dealing with an anti-bullying application where an applicant, Ms Shaw, had been dismissed by the employer. The Deputy President found as follows:

“[15] As s. 789FF(b) makes clear, I must be satisfied not only that Mr Shaw has been bullied at work by an individual or group of individuals but also that there is a risk that he will continue to be bullied at work by that individual or group of individuals. Therein lays the difficulty for Mr Shaw. It seems to me that I have no power to make an order to stop bullying unless I can be satisfied

relevantly that there is a risk that at work Mr Shaw will continue to be bullied by the individual or group of individuals identified in his application.

[16] It is clear that Mr Shaw is no longer employed by ANZ. The employment relationship has ended. That Mr Shaw is taking steps to seek a remedy in relation to his dismissal and that that may result in reinstatement at some point in the future does not have a bearing on the question that I must answer and is speculative and uncertain. It seems to me clear that there cannot be a risk that Mr Shaw will continue to be bullied at work by an individual or group of individuals identified in his application because Mr Shaw is no longer employed by ANZ and therefore is no longer at work.

[17] It necessarily follows that I do not have power to make an order to stop bullying and, as a consequence, I am satisfied that Mr Shaw's application has no reasonable prospect of success."

[166] With respect, I agree with the Deputy President that the import of s.789FF(1)(b)(ii) is that for an order to be made, the Commission must be satisfied that there is a risk that the **(applicant) worker** will continue to be bullied **at work** by the individual or group (found to have bullied the applicant). For my part, where an applicant will no longer be at work with the relevant individual or group, **and there is no reasonable prospect of that occurring in some capacity as a worker in the future**, in almost all cases it will not be possible for an applicant to demonstrate the future risk requirement. This requires a consideration of the particular circumstances of the parties including the potential to return to the workplace in some capacity as a worker.

[167] In this case, there is no suggestion that continuing risk of bullying at work will relevantly arise in the absence of an ongoing employment relationship between the parties. That is, there is no basis, in the absence of a continuing employment relationship between the parties, for the applicant to be in the relevant workplace as a worker. As I am not satisfied that there is any such future risk, even if I had concluded that bullying behaviour had occurred within the statutory meaning, there is no basis under the Act to issue any orders arising from this particular application." (original emphasis retained)

[107] In *Obatoki*<sup>26</sup> the Full Bench was dealing with an application where the applicant worker was no longer in the relevant employment relationship and the anti-bullying application had been dismissed by the Commission. The Full Bench concluded as follows:

"[16] We consider that the Deputy President correctly held that there were no reasonable prospects that the application could succeed. The Commission could not be satisfied that the second of the two jurisdictional prerequisites of s.789FF(1) could be met. There was no evidence before the Commission indicating that there would be a risk that the Appellant would continue to be bullied at work once he ceased to be engaged by Mallee Track and ceased working at its premises or providing services for it. It necessarily follows that no order pursuant to s.789FF(1) could be made and the application had no reasonable prospects of success."

[108] What is evident from the terms of the FW Act when applied in this case, is that the future risk must pertain to likelihood of future unreasonable conduct that might be directed towards Mr Adamson **in his capacity as a worker attending work along with the individuals named in the application**. That is, it is not sufficient that there be a future risk to others on the Board or a future risk to Mr Adamson in some other (non-worker) capacity. The focus of the legislation and the prerequisites for the making of any order are specific and relatively narrow in that respect.

[109] I have provisionally accepted that it is likely that Mr Adamson was a worker for present purposes in his capacity as the Chairperson. It is clear from the circumstances of this matter, that there is presently no risk that Mr Adamson will, in the foreseeable future, be bullied **at work** by the individual or group of individuals named in the application **in that capacity**. Mr Adamson is likely to still have dealings with the individuals named in the application, including by attending Board and community meetings as an Anangu man and elder, but he will not be doing so in the capacity of Chairperson. There is of course the prospect that Mr Adamson could be elected back to the Executive Board at some time in the future; however, it would be inappropriate for the Commission to proceed on the basis of that speculation. Further, and in any event, whether Mr Singer and Mr King were also involved with the Board at whatever time that might occur, and what the other circumstances might also be at that stage, is an exercise of further unhelpful speculation.

[110] This then leaves the notion that Mr Adamson should now be considered to be a volunteer. Volunteers may be “workers” under the WHS Act, depending upon the circumstances. I have earlier set out the terms of s.7 of the WHS Act and related provisions. APY Inc is not conducting a voluntary association in that it employs a number of employees including Mr King<sup>27</sup> and is likely to be a PCBU. This means that if Mr Adamson was considered to be a volunteer within the meaning of s.7 of the WHS Act, he would be a worker for present purposes.

[111] The concept of a volunteer is defined in s.4 of the WHS Act as meaning a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses). On face value, a volunteer would appear to comprehend a person who is performing work on a voluntary basis, that is without an obligation to do so and presumably, without being paid for that work, other than in the form of out-of-pocket expenses.

[112] The context in which Mr Adamson now contends he will have dealings with the Executive Board and APY Inc potentially include when attending Board and community meetings as an Anangu man and elder. It is also suggested that he has been invited by a continuing member of the Executive Board to attend board meetings as that member’s supporter and advisor. I have accepted for present purposes that this invitation has been made.

[113] It may be the case that Mr Adamson in attending Board meetings and assisting one of its members would be acting as a volunteer, at least in a very broad view of that concept. However, even if that is the case, Mr Adamson would not in that capacity be performing work **for APY Inc**. I have earlier referred to the importance of considering the definition of worker as a whole, including in relation to this aspect.<sup>28</sup>

[114] The other bases upon which Mr Adamson relies in relation to his volunteer proposition are also not relevant. These roles, even if considered in the present context, are roles and rights that apply to members of the APY more generally. Further, even if Mr Adamson has

some personal obligations arising from his position as the (now) former Chairperson, this does not mean that he will be doing so as a volunteer performing work for APY Inc.

[115] In my view, Mr Adamson is not now undertaking a role for the Board or the APY more generally. He is a member of the community with a role in that respect, but would not be performing work for APY Inc (as a PCBU) as contemplated by s.7 of the WHS Act. In that regard, I do not consider that it was the intention of the FW Act that members of an organisation (in this case the APY) would be considered to be workers in the circumstances now apparently facing Mr Adamson.

[116] Accordingly, there is no proper basis upon which the Commission could find that there is a risk that the Mr Adamson, **as a worker**, will continue to be bullied whilst **at work** by the individual or group concerned as required by s.789FF(b)(ii) of the FW Act. As a result, there is no basis to consider making an order arising from this application in the foreseeable future.

## 8. Conclusions and orders

[117] I have not made any findings in relation to the substantive merit of Mr Adamson's application or the counter claims advanced by the respondent parties. The jurisdiction for the Commission to do so only arises within the framework of the FW Act. For reasons set out above, there are limitations on the scope of the Commission's capacity to deal with a s.789FC application where the relationships between the parties that might give rise to the Commission's jurisdiction have ended or changed to remove the prospect of future risk in a relevant capacity. This arises from the particular manner in which the power to make orders has been expressed within the FW Act.

[118] In this case, there is no reliable basis upon which a further relevant risk of bullying conduct by the relevant respondent parties towards Mr Adamson as a worker might arise and none is evident from the circumstances. In the absence of that risk or a foreseeable basis for such a risk, no orders can be made as a result of the application even if bullying conduct was to be found. Accordingly, there are no reasonable prospects that the anti-bullying application can now relevantly succeed.

[119] The Commission is empowered by s.587(1)(c) of the FW Act to dismiss an application in such circumstances.

[120] The application of "no reasonable prospect of success" has been discussed in similar circumstances in *Shaw v ANZ*.<sup>29</sup> The Deputy President said (footnotes omitted):

"[8] Section 587 of the Act provides a discretion to dismiss an application if, inter alia, the application has no reasonable prospect of success. Let me first deal with the meaning and application of the phrase, "has no reasonable prospect of success". Without traversing in any great detail the authorities that have considered the proper application and meaning of the phrase, "no reasonable prospect of success," it is sufficient for me for present purposes to make the following observations. A conclusion that an application has no reasonable prospect of success should only be reached with extreme caution and in circumstances, for example, where an application is manifestly untenable or is groundless or is so lacking in merit or substance as to be

not reasonably arguable. But these examples do not provide an exhaustive description of when a particular application has no reasonable prospect of success.

[9] Secondly, I am mindful of that which the majority (Hayne, Crennan, Kiefel and Bell JJ) of the High Court of Australia in *Spencer v The Commonwealth of Australia* had to say when their Honours considered the meaning of the phrase, "no reasonable prospect," in the context of s. 31A of the *Federal Court of Australia Act 1976*. In that case their Honours said the following:

In many cases where a plaintiff has no reasonable prospect of prosecuting a proceeding, the proceeding could be described with or without the additional intensifying epithets like "clearly", "manifestly" or "obviously" as "frivolous", "untenable", "groundless" or "faulty" but none of these expressions alone or in combination should be understood as providing a sufficient chart of the metes and bounds of the powers given by section 31A nor can the content of the word "reasonable" in the phrase, "no reasonable prospect" be sufficiently, let alone completely illuminated by drawing some contrast with what would be a frivolous, untenable, groundless or faulty claim.

Rather, full weight must be given to the expression as a whole. The Federal Court may exercise power under section 31A if, and only if, satisfied that there is no reasonable prospect of success. Of course it may readily be accepted that the power to dismiss an action summarily is not to be exercised lightly but the elucidation of what amounts to no reasonable prospect can best proceed in the same way as content has been given through a succession of decided cases to other generally expressed statutory phrases such as "just and equitable" when it is used to identify the ground for winding up of a company. At this point in the development of the understanding of the expression and its application, it is sufficient but important to emphasise that the evident legislative power as revealed by the text of the provision would be defeated if its application is read as confined to cases of a kind which fell within the earlier different procedural regimes.

[10] In *Spencer* the High Court was saying that one should not make the mistake of only concluding that a proceeding has no reasonable prospect of success if it is frivolous, untenable, groundless or faulty and that full expression should be given to that phrase. It seems to me that the observations in *Spencer* are apt to apply to the construction and application of the phrase "has no reasonable prospect of success" as it appears in s. 587 of the Act.

[11] Thirdly, I would also observe that the answer to the question whether a particular application has no reasonable prospect of success in the context of s. 587 may differ depending on the time at which the question is asked. This, it seems to me, is evident from the word "has". So it is that an application at its inception may have some reasonable prospect of success but, as circumstances change during the course of dealing with an application, those changed circumstances might have the result that an application which once had some reasonable prospect of success no longer has a reasonable prospect of success."

[121] As would be clear from the earlier discussion, in the case of a finding that there is no risk of future bullying in a matter such as this, the issue concerns the Commission's capacity to make an order in the s.789FC application. This is directly relevant to the prospects of success for the application but does not by itself go to the original jurisdiction to hear the substantive application. Section 587(1) is also written in discretionary terms in that the Commission "may" dismiss the relevant application.

[122] Accordingly, the power to dismiss an application on that basis is discretionary but should be exercised in appropriate cases.<sup>30</sup> In this case, the recent election has fundamentally altered the context for this application and whilst future board elections could conceivably see the return of Mr Adamson to the Executive Board (and thereby potentially to become Chairperson again), this is a matter of pure speculation at this point and the circumstances that might be applicable at that time, are unknown.

[123] In all of the circumstances of this matter, including the view that I have taken about the continuation of the matter in the context of the changed context becoming an abuse of process, it is appropriate to dismiss the s.789FC application and **I so order.**

[124] I also note the capacity for Mr Adamson to bring a new s.789FC application in the event that he genuinely believes that bullying of him **as a worker** by any relevant individuals at the workplace actually arises in the future.<sup>31</sup>

  
  
COMMISSIONER

*Written submissions:*

2017:

APY Inc, Mr King and Mr Singer – 20 March, 12 and 24 April and 12 May.

Mr Adamson – 31 March, 5 and 8 May.

Printed by authority of the Commonwealth Government Printer

<Price code G, PR591688>

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<sup>1</sup> See *Adamson* [2017] FWC 1340 for some of this history.

<sup>2</sup> Permission was given for the respondent parties to be represented for earlier proceedings under s.596 of the FW Act. The parties did not need permission in connection with the filing of written submissions and materials given the operation of the *Fair Work Commission Rules 2013* – Rule 12(1)(b) and (c).

<sup>3</sup> Respondent parties' written submission of 20 March 2017.

<sup>4</sup> Varied by s.9 of the APY Amendment Act.

<sup>5</sup> APY Amendment Act s.2(2). The amendments with the later operative date do not directly impact upon the present jurisdictional matter.

<sup>6</sup> At the time of making this application, the APY Act provided for the appointment of a single conciliator.

<sup>7</sup> See GC [2015] FWC 6988 and *Amie Mac v Bank of Queensland Limited and others* [2015] FWC 744.

<sup>8</sup> I leave aside the capacity to make interim orders under s.589 of the FW Act.

<sup>9</sup> Relying upon *Lee v Kleen King Pty Ltd* [2013] FWC 6759.

<sup>10</sup> Submissions filed on behalf of Mr Adamson dated 5 April 2017.

<sup>11</sup> Consistent with the Macquarie on line dictionary.

<sup>12</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [14] and [15].

<sup>13</sup> *Australian Education Union v Department of Education and Children's Services* (2012) 285 ALR 27 at [26].

<sup>14</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

<sup>15</sup> *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J; *R v L* (1994) 49 FCR 534 at 538.

<sup>16</sup> (2004) 218 CLR 216 at [84] and [103].

<sup>17</sup> *Mac v Bank of Queensland Limited and Others* [2015] FWC 774 at [89].

<sup>18</sup> (1985) 60 ALR 509 at 514.

<sup>19</sup> Also see *Solution 6 Holdings Ltd v Industrial Relations Commission of NSW (2004)* 208 ALR 328 at 348 per Spigelmann CJ.

<sup>20</sup> Explanatory Memorandum to the Fair Work Amendment Bill 2013.

<sup>21</sup> Explanatory Memorandum to the Work Health and Safety Bill 2011.

<sup>22</sup> [2014] FWC 2076.

<sup>23</sup> [2014] FWCFB 9227.

<sup>24</sup> *Rogers v R* (1994) 181 CLR 251 at 286.

<sup>25</sup> [2014] FWC 6988.

<sup>26</sup> *Olusegun Victor Obatoki* [2014] FWC 8828.

<sup>27</sup> WHS Regulation 7.

<sup>28</sup> See: *Balthazaar v Department of Human Services (Commonwealth)* [2014] FWC 2076.

<sup>29</sup> [2014] FWC 3408.

<sup>30</sup> See *Atkinson v Killarney Properties Pty Ltd* [2015] FWCFB 6503.

<sup>31</sup> See *Obatoki* at [17]. See also *Bowker, Coombe and Zwarts v DP World and The Maritime Union of Australia* [2015] FWC 7312.