About this benchbook

This benchbook has been prepared by staff of the Fair Work Commission (the Commission) to assist parties lodging or responding to anti-bullying applications under the *Fair Work Act 2009* (Cth) (the Fair Work Act). Information is provided to parties to assist in the preparation of material for matters before the Commission.
Disclaimer

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

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

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

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

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

Case examples

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

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

Links to external websites

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

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Updated May 2015
Updated August 2016
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What does ‘at work’ mean?
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Part 1—How to use this benchbook

This part will provide information on:

- the Fair Work Commission
- the national workplace relations system
- referencing and case law in this benchbook, and
- common terms within a glossary.

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

To access the electronic version please visit: www.fwc.gov.au/resources/benchbooks

About the Commission

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

The Commission is responsible for applying provisions of the Fair Work Act 2009 (the Fair Work Act) and the Fair Work (Registered Organisations) Act 2009 (the Registered Organisations Act). The Commission has powers to make orders to stop workers being bullied at work.

Relationship between the Fair Work Commission and the Courts

See Fair Work Act ss.563–568.

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

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

Some matters lodged with the Commission are first conciliated at the Commission. If the matter does not settle there an applicant can then apply to start proceedings in the Federal Court or the Federal Circuit Court.
The Commission Structure

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

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

Appearing at the Commission

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

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

The Commission and all parties appearing before it, including representatives, have responsibilities to each other and in providing a fair hearing for all participants.
When coming to the Commission:

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

### Name of the Tribunal

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

<table>
<thead>
<tr>
<th>Name</th>
<th>Short title</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fair Work Commission</td>
<td>The Commission</td>
<td>1 January 2013‒ongoing</td>
</tr>
<tr>
<td>Fair Work Australia</td>
<td>FWA</td>
<td>1 July 2009‒31 December 2012</td>
</tr>
<tr>
<td>Australian Industrial Relations Commission</td>
<td>AIRC, the Commission</td>
<td>1989‒2009</td>
</tr>
<tr>
<td>Commonwealth Court of Conciliation and Arbitration</td>
<td></td>
<td>1904–1956</td>
</tr>
</tbody>
</table>
Workplace relations legislation, Regulations and Rules

In 2013, amendments to the Fair Work Act conferred power upon the Commission to make orders to stop bullying from 1 January 2014. Prior to 2013 there was no power for the Commission to deal with workplace bullying complaints.

Workplace bullying may be addressed through work health and safety laws. Since 2012, the Commonwealth and most states have adopted the national model work health and safety laws, in an effort to improve consistency between individual state systems. As a result, the work health and safety legislation in most jurisdictions is very similar. Anyone seeking to address workplace bullying via a work health and safety regulator should contact the relevant regulator for advice and assessment.

The following table identifies the more recent Commonwealth workplace relations legislation and the dates it came into operation. The current legislation governing the Commission’s powers to deal with applications regarding workplace bullying is the Fair Work Act.

<table>
<thead>
<tr>
<th>Name of legislation</th>
<th>Commencement dates</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Work Health and Safety Act 2011 (Cth)</strong></td>
<td>1 January 2012</td>
</tr>
<tr>
<td><strong>Fair Work Act 2009 (Cth)</strong></td>
<td>1 July 2009 and 1 January 2010 (Staged commencement)</td>
</tr>
<tr>
<td><strong>Workplace Relations Act 1996 (Cth) (Incorporating the Workplace Relations Amendment (Work Choices) Act 2005 (Cth))</strong></td>
<td>27 March 2006</td>
</tr>
<tr>
<td><strong>Workplace Relations Act 1996 (Cth)</strong></td>
<td>25 November 1996</td>
</tr>
<tr>
<td><strong>Industrial Relations Act 1988 (Cth)</strong></td>
<td>1 March 1989</td>
</tr>
<tr>
<td><strong>Fair Work Regulations 2009 (Cth)</strong></td>
<td>1 July 2009 and 1 January 2010 (Staged commencement)</td>
</tr>
<tr>
<td><strong>Fair Work Commission Rules 2013</strong></td>
<td>6 December 2013</td>
</tr>
</tbody>
</table>

Case law

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

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

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

References in this benchbook use the following formats.

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

Cases

43 ibid.

The name of the case will be in italics.

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

- ‘HCA’ for ‘High Court of Australia’
- ‘FCAFC’ for a ‘Full Court of the Federal Court of Australia’
- ‘FWCFB’ for a ‘Full Bench of the Fair Work Commission’
- ‘FWA’ for ‘Fair Work Australia’
- ‘IR’ for ‘Industrial Reports’
- ‘CLR’ for ‘Commonwealth Law Reports’

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

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

Where one case refers to another case, the term ‘citing’ is used.
Item | Example
--- | ---
Case names | *Elgammal v BlackRange Wealth Management Pty Ltd*  
*Visscher v The Honourable President Justice Giudice*

Link to case | [2011] FWAFB 4038 (Harrison SDP, Richards SDP, Williams C, 30 June 2007)  
[2009] HCA 34 (2 September 2009), [(2009) 239 CLR 361]

Page number | (1995) 185 CLR 410 at p. 427

Paragraph number | [2008] AIRCFB 1088 ... at para. 22.

43 ibid.


**Legislation and Regulations**

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

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

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

- ‘(Cth)’ is a Commonwealth law  
- ‘(ACT)’ is an Australian Capital Territory law  
- ‘(NSW)’ is a New South Wales law  
- ‘(NT)’ is a Northern Territory law  
- ‘(Qld)’ is a Queensland law  
- ‘(SA)’ is a South Australian law  
- ‘(Tas)’ is a Tasmanian law  
- ‘(Vic)’ is a Victorian law  
- ‘(WA)’ is a Western Australian law

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

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

- **Important information.**
- **Related information**—Links to information on related topics.
- **Helpful information.**
- **Links to sections of legislation.**
- **Links to forms.**
Glossary of terms

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

Naming conventions

The parties to workplace bullying matters have generally been referred to in this benchbook as ‘worker’ and ‘employer’ or ‘principal’.

After an application for a workplace bullying order is lodged the parties are referred to as:

- **Applicant** (usually the person who lodged the application – the worker),
- **Employer/principal** (the business or undertaking that employs or otherwise engages the worker making the application), and
- **Person named** (person who is accused of having engaged in bullying behaviour).

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

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

<table>
<thead>
<tr>
<th><strong>Adjournment</strong></th>
<th>To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or indefinitely.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appeal</strong></td>
<td>An application for a Full Bench of the Commission to review a decision of a single member of the Commission and determine if the decision was correct. A person must seek the permission of the Commission to appeal a decision.</td>
</tr>
<tr>
<td><strong>Applicant</strong></td>
<td>A person who makes an application to the Commission.</td>
</tr>
<tr>
<td><strong>Application</strong></td>
<td>The way of starting a case before the Commission. An application can only be made using a form prescribed by the <em>Fair Work Commission Rules 2013</em> (Cth).</td>
</tr>
<tr>
<td><strong>Arbitration</strong></td>
<td>The process by which a member of the Commission will hear evidence, consider submissions and then make a decision in a matter. Arbitration generally occurs in a formal hearing and generally involves the examination and cross-examination of witnesses.</td>
</tr>
<tr>
<td><strong>Balance of probabilities</strong></td>
<td>The comparison of disputed facts to determine what is more likely to have occurred. A fact is proved to be true on the balance of probabilities if its existence is more probable than not.</td>
</tr>
<tr>
<td><strong>Commission Member</strong></td>
<td>Someone appointed by the Governor-General as a Member of the Commission. A member may be a Commissioner, a Deputy President, a Vice President or the President.</td>
</tr>
<tr>
<td>-----------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Conciliation</strong></td>
<td>An informal method of resolving a dispute by helping the parties to reach a settlement, which may involve making observations and recommendations. An independent conciliator can help the parties explore options for a resolution without the need for a determinative conference or hearing before a member.</td>
</tr>
<tr>
<td><strong>Conference</strong></td>
<td>A proceeding conducted by a Commission Member which is generally held in private.</td>
</tr>
<tr>
<td><strong>Court</strong></td>
<td>In this benchbook, a reference to ‘Court’ generally means the Federal Court or Federal Circuit Court.</td>
</tr>
<tr>
<td><strong>Decision</strong></td>
<td>A determination made by a single member or Full Bench of the Commission(^1). A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.</td>
</tr>
<tr>
<td><strong>Discontinue</strong></td>
<td>To formally end a matter before the Commission. A discontinuance can be used during proceedings to stop the proceedings or after proceedings to help finalise a settlement. Once a matter has been discontinued it cannot be restarted.</td>
</tr>
<tr>
<td><strong>Employer or Principal</strong></td>
<td>Used interchangeably in the anti-bullying provisions. These terms are not defined in the <em>Fair Work Act 2009</em> other than to confirm that, for the purposes of the anti-bullying provisions, ‘employer’ has its ordinary meaning. An employer is the business entity that engages an employee to do work for them. A principal is the business entity that engages a contractor to do work for them.</td>
</tr>
<tr>
<td><strong>Error of law</strong></td>
<td>An error of law is a common ground for legal review. It occurs when a member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.</td>
</tr>
</tbody>
</table>

\(^1\) The General Manager of the Commission, or a member of staff delegated powers under ss.625 or 671 of the *Fair Work Act* may also make a decision.
**Evidence**

Information which tends to prove or disprove the existence of a particular belief, fact or proposition.

Certain evidence may or may not be accepted by the Commission, however the Commission is not bound by the rules of evidence.

Evidence is usually set out in an affidavit or given orally by a witness in a hearing.

**Explanatory Memorandum**

An Explanatory Memorandum is a document that provides additional information about how proposed legislation is expected to operate and details about individual sections and provisions of that legislation.

**Fair Work Act**

The *Fair Work Act 2009* (Cth) is Commonwealth legislation dealing with workplace relations in Australia.

**First instance**

A decision (or action) which can be considered the first decision (or action) to be made in relation to a matter.

**Full Bench**

A Full Bench of the Commission comprises at least three Commission members, one of whom must be a Deputy President. Full Benches are convened to hear appeals, matters of significant national interest and various other matters specifically provided for in the *Fair Work Act*.

A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members’ opinions differ.

**Hearing**

A proceeding or arbitration conducted before the Commission which is generally open to the public.

**Individual**

A natural person; in the context of anti-bullying matters, this could include another worker at the workplace, a visitor or client.

**Industrial association**

An association of employees or independent contractors, or both, (such as a Union) or an association of employers, that is registered or recognised under a workplace law (such as the *Fair Work Act*).

**Industrial instrument**

A generic term for a legally binding industrial document which details the rights and obligations of the parties bound by the document, such as an enterprise agreement or award.

**Jurisdiction**

The scope of the Commission’s power and what the Commission can and cannot do.

The power of the Commission to deal with matters is specified in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament.

**Lodge**

The act of delivering an application or other document to the Commission.

**Matter**

Cases at the Commission are referred to as matters.
| **Mediation** | A method of dispute resolution promoting the discussion and settlement of disputes facilitated by an independent mediator. |
| **Member** | See Commission Member |
| **Notice of Listing** | A formal notification sent by the Commission setting out the time, date and location for a matter to be heard. A Notice of Listing can also include specific directions or requirements. |
| **Order** | A formal direction of the Commission which gives effect to a decision and is legally enforceable. |
| **Outcome** | See resolution |
| **Party** | A person or organisation involved in a matter before the Commission. |
| **Pecuniary penalty** | An order to pay a sum of money which is made by a Court as a punishment. |
| **Person conducting a business or undertaking (PCBU)** | The legal entity running the business or undertaking, including incorporated entities, sole traders, partners of a partnership and certain senior ‘officers’ of an unincorporated association. |
| **Person named** | A person who is accused of having engaged in bullying behaviour. |
| **Principal** | See Employer or Principal |
| **Procedural fairness** | Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made.       
Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself.       
The terms ‘procedural fairness’ and ‘natural justice’ have similar meaning and can be used interchangeably. |
| **Quash** | To set aside or reject a decision or order, so that it has no legal effect. |
| **Representative** | A person who acts on a party’s behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else.       
Generally, a lawyer or paid agent can only represent a party before the Commission with permission of the Commission. |
| **Resolution (or outcome)** | An agreed resolution of a dispute. Generally, a negotiated outcome which all parties are satisfied with and bound by. |
**Respondent**  
A party responding to an application made to the Commission. In the case of an anti-bullying application this can be the:

- employer/principal (the business or undertaking that employs or otherwise engages the worker making the application), and
- person named (person who is accused of having engaged in bullying behaviour).

<table>
<thead>
<tr>
<th>Serving documents</th>
<th>See service</th>
</tr>
</thead>
</table>

**Service (Serve)**  
Service of a document means delivering the document to another party or their representative, usually within a specified period.  
Documents can be served in a number of ways. The acceptable ways in which documents can be served are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.

**Witness**  
A person who gives evidence in relation to a situation that they had some involvement in or saw happening. A witness is required to take an oath or affirmation before giving evidence at a formal hearing. The witness will be examined by the party that called them and may be cross examined by the opposing party to test their evidence.

**Worker**  
Definition prescribed in the *Work Health and Safety Act 2011* (Cth). Essentially, a broad definition of a person undertaking work who can make an application under the anti-bullying provisions. See also Definition of ‘Worker’ in Part 4 of this benchbook.
Part 2—Overview of benchbook

This benchbook has been arranged to reflect the process users would follow when applying for an order to stop bullying in the workplace. Issues that may arise at a certain point during the process will be addressed as they come up. As a result, this benchbook may not deal with these issues in the same order as the *Fair Work Act 2009* (the Fair Work Act).

**Who is covered by the anti-bullying laws?**

A person will be covered by the anti-bullying laws, and therefore eligible to make an application, if they:

- are a worker (as defined in the *Work Health and Safety Act 2011* (Cth))\(^2\)
- are not a member of the Defence Force\(^3\), and
- experience the bullying behaviour whilst at work in a constitutionally-covered business.\(^4\)

**When does workplace bullying occur?**

[^Fair Work Act s.789FD(1)]: See *Fair Work Act s.789FD(1)*

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

[^Related information Part 4—Who is covered by workplace bullying laws?]:

[^Related information Part 3—What is workplace bullying?]:

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\(^2\) *Fair Work Act s.789FC(2).*

\(^3\) *Fair Work Act s.789FC(2).*

\(^4\) *Fair Work Act s.789FD(1)(a).*
Anti-bullying process under the Fair Work Act

The role of the Fair Work Commission (the Commission), and the remedy, is preventative—not remedial, punitive or compensatory.

Note: The diagram below sets out the anti-bullying process as it applies in general terms.
Part 3—What is workplace bullying?

Definition of bullying

See Fair Work Act s.789FD(1)

Workplace bullying occurs when:

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

• the behaviour creates a **risk to health and safety**.\(^5\)

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.\(^6\)

**Related information**

• What does ‘Reasonable management action carried out in a reasonable manner’ mean?

Examples of bullying

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

• the making of vexatious allegations against a worker
• spreading rude and/or inaccurate rumours about an individual, and
• conducting an investigation in a grossly unfair manner.\(^7\)

In **Amie Mac v Bank of Queensland Limited and Others**\(^8\) the Commission indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were:

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

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

• aggressive and intimidating conduct\(^9\)
• belittling or humiliating comments\(^10\)

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\(^5\) Fair Work Act s.789FD(1).
\(^6\) Fair Work Act s.789FD(2).
\(^7\) **Re Ms SB [2014] FWC 2104** (Hampton C, 12 May 2014) at para. 105.
• victimisation
• spreading malicious rumours
• practical jokes or initiation
• exclusion from work-related events, and
• unreasonable work expectations.

Effects of bullying

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

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

• depression
• anxiety
• sleep disturbances
• nausea, and
• musculoskeletal complaints and muscle tension.

However under the anti-bullying laws proof of actual harm to health and safety is not necessary provided that a risk to health and safety created by bullying behaviour is demonstrated.

Related information

- Risk to health and safety

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16 House of Representatives Standing Committee on Education and Employment report, Workplace bullying “We just want it to stop”, at p. 12.
17 ibid.
Part 4—Who is covered by workplace bullying laws?

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

A person will be covered by the anti-bullying laws, and therefore eligible to make an application, if they:

- are a worker (as defined in the Work Health and Safety Act 2011 (Cth))\(^{19}\)
- are not a member of the Defence Force\(^ {20}\), and
- experienced repeated, unreasonable behaviour whilst at work in a constitutionally-covered business.\(^ {21}\)

Definition of ‘Worker’

Contains issues that may form the basis of a jurisdictional issue

The Work Health and Safety Act 2011 (Cth) (WHS Act) states that a worker is a person who carries out work in any capacity for a person conducting a business or undertaking, including any of the following:\(^ {22}\)

- an employee\(^ {23}\)
- a contractor or subcontractor\(^ {24}\)
- an employee of a contractor or subcontractor\(^ {25}\)
- an employee of a labour hire company who has been assigned to work in the person’s business or undertaking
- an outworker\(^ {26}\)
- an apprentice or trainee
- a student gaining work experience
- a volunteer—except a person volunteering with a wholly ‘volunteer association’ with no employees (whether incorporated or not).\(^ {27}\)

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\(^{19}\) Fair Work Act s.789FC(2).
\(^{20}\) Fair Work Act s.789FC(2).
\(^{21}\) Fair Work Act s.789FD(1)(a).
\(^{22}\) WHS Act s.7(1).
\(^{24}\) Ibid.
\(^{25}\) Ibid.
\(^{26}\) Fair Work Act s.12.
Others are also deemed to be workers including Australian Federal Police members (including the Commissioner and Deputy Commissioner) and Commonwealth statutory office holders. 28

If a person performs work, but does not do so for a person conducting a business or undertaking, the person is not a ‘worker’ for the purposes of the anti-bullying laws.

The Commission has determined, for example, that a carer for a disabled person who is in receipt of a carer’s payment under the Social Security Act 1991 (Cth) is not a ‘worker’ because, even though the carer performs work, he or she does not do so for any business or undertaking. The Department of Human Services which pays the carer’s payment is not such a business or undertaking because the carer’s work is not performed for the Department. 29

Case example: Recipient of carer’s payment—NOT found to be a worker

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

Facts

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

Outcome

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

Relevance

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

27 WHS Act s.5(8); see also Workplace Health and Safety Regulations 2011 (Cth), reg 7(3).
28 WHS Act s.7(2).
29 Balthazaar v Department of Human Services (Commonwealth) [2014] FWC 2076 (Watson VP, 2 April 2014).
Case example: Whether a Chairperson of a Board is also a worker


Facts

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

Outcome

The decision in this matter dealt with a number of jurisdiction issues. One of these was whether the applicant, Mr Adamson, was a ‘worker’ within the definition of the WHS Act.

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

Relevance

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

Exclusions

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

See Fair Work Regulations 2009 (Cth) reg 6.08(2)

A member of the Defence Force is excluded from the definition of ‘worker’.30

No civil contract of any kind is created with the Crown or the Commonwealth31 as a result of:

- the appointment of an officer, or
- the enlistment of an enlisted member.

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30 *Fair Work Act* s.789FC(2).
31 *Defence (Personnel) Regulations 2002* (Cth) reg 117.
Declarations that anti-bullying provisions do not apply

See Fair Work Act ss.789FJ–789FL

The following declarations may only be made with the approval of the Minister for Small and Family Business, the Workplace, and Deregulation.32

Declarations by the Chief of the Defence Force

The Chief of the Defence Force33 may, by legislative instrument, declare that all or specified provisions of the ‘Workers bullied at work’ provisions do not apply in relation to a specified activity.

Declarations by the Director-General of Security

The Director-General of Security34 may, by legislative instrument, declare that all or specified provisions of the ‘Workers bullied at work’ provisions do not apply in relation to a person carrying out work for them.

Declarations by the Director-General of ASIS

The Director-General of the Australia Secret Intelligence Service35 may, by legislative instrument, declare that all or specified provisions of the ‘Workers bullied at work’ provisions do not apply in relation to a person carrying out work for them.

Nothing in the ‘Workers bullied at work’ provisions requires or permits a person to consider any action which could be prejudicial to Australia’s defence or national security, or an existing or future covert or international operation of the AFP.36

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

32 Fair Work Act ss.789FJ–789FL.
33 See Defence Act 1903 (Cth) s.9.
34 See Australian Security Intelligence Organisation Act 1979 (Cth) s.7.
35 See Intelligence Services Act 2001 (Cth) s.17.
36 Fair Work Act s.789FI.
Definition of ‘constitutionally-covered business’

Contains issues that may form the basis of a jurisdictional issue

See Fair Work Act s.789FD(3)

Meaning of person

A person can be defined as a separate legal entity, recognised by the law as having rights and obligations.

There are two categories of person:

- a natural person (a human being), and
- an artificial person (an entity to which the law attributes a legal personality—such as a company registered under Corporations law).37

If a person conducts a business or undertaking (PCBU) (within the meaning of the Work Health and Safety Act 2011 (Cth)) and either:

- the person is:
  o a constitutional corporation
  o the Commonwealth
  o a Commonwealth authority
  o a body corporate incorporated in a Territory, or
- the business or undertaking is conducted principally in a Territory or Commonwealth place;

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

In order to be eligible to make an application for an order to stop bullying, the worker must be:

- ‘at work’ in a business or undertaking conducted by a person who is:
  o a constitutional corporation
  o the Commonwealth
  o a Commonwealth authority
  o a body corporate incorporated in a Territory, or
- ‘at work’ in a business or undertaking conducted principally in a Territory or Commonwealth place.

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

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

For the purposes of the anti-bullying provisions, a worker must be working in a constitutionally-covered business to be eligible to make an application. This means that not all PCBUs are covered by the anti-bullying provisions.

Public and private sector employers (including the self-employed) are the largest category of PCBU, but the term is broader and covers more than just employers – it includes principals that use contractors or subcontractors, franchisors and bailors.

A person (including a corporate entity)\(^{38}\) may conduct a business or undertaking alone or with others,\(^{39}\) and it is irrelevant whether the business or undertaking is conducted for profit or gain.\(^{40}\)

**Exclusions**

The following are examples of what do not constitute a business or undertaking:

- a person engaged solely as a worker in, or as an officer of, that business or undertaking
- an elected member of a local authority (acting in that capacity),\(^{41}\) or
- a wholly ‘volunteer association’ that does not employ anyone (whether incorporated or not).\(^{42}\)

**Volunteer associations**

Volunteer associations (whether incorporated or not) that do not employ anyone, do not conduct a business or undertaking\(^{43}\). The Commission does not have power to deal with workplace bullying claims made by persons who may be at work in a volunteer association.

\(\text{A volunteer association} \) is a group of volunteers which acts together for one or more community purposes where none of the volunteers, either alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.\(^{44}\)

‘Acting together for one or more community purposes’ includes ‘philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity’ and ‘sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations’.\(^{45}\)

If a person is employed to carry out work,\(^{46}\) the volunteer association may be considered a business or undertaking.

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\(^{38}\) See Acts Interpretation Act 1901 (Cth) s.2C. Note: This Act as in force on 25 June 2009 applies to the Fair Work Act (see Fair Work Act s.40A).

\(^{39}\) WHS Act s.5(1)(a).

\(^{40}\) WHS Act s.5(1)(b).

\(^{41}\) WHS Act s.5(5). It is however possible that an elected member could be an individual whose conduct could be relied upon as bullying behaviour under Fair Work Act s.789FD(1).

\(^{42}\) WHS Act s.5(7).

\(^{43}\) WHS Act s.5(7).

\(^{44}\) WHS Act s.5(8).


\(^{46}\) For a discussion on the difference between employees and contractors, see Hollis v Vabu Pty Ltd [2001] HCA 44 (9 August 2001) at paras 39–58, ([2001] 207 CLR 21]; Abdalla v Viewdaze Pty Ltd t/a Malta Travel PR927971 (AIRCFA, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, ([2003] 122 IR 215). See also On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3) [2011] FCA 366.
**Businesses** are usually enterprises operated with the aim of making a profit, and ‘have a degree of organisation, system and continuity’. 47

**Undertakings** usually have ‘elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature’. 48

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

**Case example:** A constitutionally-covered business—Where the worker was ‘at work’ in a business or undertaking conducted by a person who is a constitutional corporation—Worker was employee of own business

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

**Facts**

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

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

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

**Outcome**

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

**Relevance**

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


47 SafeWork Australia – *Interpretive Guidelines to model WHS Act* – The meaning of ‘person conducting a business or undertaking’, at p. 1.

48 Ibid.
Case example:  **State Government—NOT a constitutionally covered business**


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

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

**Relevance**
In order for the Commission to deal with conduct covered by the anti-bullying laws, the conduct must take place whilst the worker is at work in a constitutionally-covered business. Not all national system employers are constitutionally-covered businesses as the anti-bullying provisions do not rely on the referrals from the States that support the definitions of ‘national system employer’ and ‘national system employee’ in the Fair Work Act.
**Case example:** Foreign Government Ministry—NOT a constitutionally covered business


**Facts**

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

**Outcome**

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

The Ministry was located in Kiribati and did not fall within the scope of ss.789FD(3). As the applicant was not at work in a constitutionally-covered business when the alleged behaviour occurred, the application fell outside the jurisdiction of the anti-bullying provisions of the Fair Work Act. The Commission found there was no jurisdiction for the application to proceed and the application was dismissed.

Furthermore, the applicant would have been outside the geographic application of the Fair Work Act. While s.34(3) extends the operation of prescribed provisions of the Fair Work Act to Australian employers and Australian-based employees outside of Australia, the anti-bullying provisions are not so prescribed. Even if the anti-bullying provisions had been so prescribed, the applicant would have needed to be an Australian-based employee within the meaning of s.35 of the Fair Work Act. However, the applicant’s primary place of work was not in Australia and his attendance at pre-departure briefings in Australia was no more than an insubstantial part of his duties..

**Relevance**

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

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

**What is a Territory?**

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

**Mainland**

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

**External**

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

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

**What is a Commonwealth place?**

*Commonwealth place* means a place acquired by the Commonwealth for public purposes, other than the seat of government (Canberra).^49_

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

What is a constitutional corporation?

The Fair Work Act defines constitutional corporations as ‘a corporation to which paragraph 51(xx) of the Constitution applies’.^50_

The Australian Constitution defines constitutional corporations as ‘Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.^51_

This definition has two limbs that are ‘comprehensive alternatives’.^52_ This means that constitutional corporations are either ‘foreign corporations’ or ‘trading or financial corporations formed within the limits of the Commonwealth’. Therefore, a foreign corporation does not need to be formed within the limits of the Commonwealth or be a trading or financial corporation to be classified as a constitutional corporation.^53_

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^49_ Australian Constitution s.52(i); Fair Work Act s.12.

^50_ Fair Work Act s.12.

^51_ Australian Constitution s.51(xx).

^52_ The State of New South Wales v the Commonwealth of Australia [1990] HCA 2 (8 February 1990) at para. 3 (Deane J), [(1990) 169 CLR 482 at p. 504].

^53_ Ibid.
Many incorporated employers in the private sector who sell goods or provide services for a fee will easily satisfy the criteria of a trading or financial corporation.\(^{54}\)

The issue of whether an employer is a constitutional corporation usually arises where the employer is a not-for-profit organisation in industries such as health, education, local government and community services.\(^{55}\)

**Foreign corporations**

A foreign corporation is a corporation that has been formed outside of Australia.\(^{56}\)

A corporation which is formed outside of Australia, which employs an employee to work in its business in Australia, is likely to be a constitutional corporation and therefore fall within the jurisdiction of the Commission.\(^{57}\)

**Case example:** Foreign corporation—Employer company formed in New Zealand but applicant worked in Australia

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

**Facts**

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

**Outcome**

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

**Relevance**

In this case in the unfair dismissal jurisdiction, the Commissioner determined that the Commission has jurisdiction to deal with applications against foreign corporations in relation to employees employed to work in Australia.\(^{58}\)

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\(^{55}\) ibid., at p. 34.


\(^{57}\) See also *Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (Gooley C, 25 February 2010) at para. 24.

\(^{58}\) See, however, *Fair Work Ombudsman v Valuair Limited (No 2)* [2014] FCA 759 (24 July 2014) (Buchanan J) in relation to the employment of foreign-based cabin crew by foreign corporations where those crew spend a small and transient proportion of overall time on duty in Australia.
Trading or financial corporation formed within the limits of the Commonwealth

Trading denotes the activity of providing goods or services for payment. 59

The Commission will consider the nature of a corporation with reference to its activities, rather than the purpose for which it was formed. 60

It does not matter if trading activities are a corporation’s ‘dominant’ activity or whether they are merely an ‘incidental’ activity, or entered into in the course of pursuing other activities. 61

A corporation will be a trading corporation if the trading engaged in is ‘a sufficiently significant proportion of its overall activities’. 62

A corporation can be a trading corporation even if it was not originally formed to trade. 63

One factor that may be considered is the commercial nature of the activity. 64 When considering the commercial nature of a corporation’s activity, the Commission will look at a number of factors, including:

- whether it is involved in a commercial enterprise; that is, business activities carried on with a view to earning revenue
- what proportion of its income the corporation earns from its commercial enterprises
- whether the commercial enterprises are substantial or peripheral, and
- whether the activities of the corporation advance the trading interests of its members. 65

A financial corporation is one ‘which borrows and lends or otherwise deals in finance as its principal or characteristic activity...’. 66

The approach taken in deciding whether the activities of a corporation are such that the corporation should be considered to be a financial corporation is the same as the approach taken in deciding whether a corporation is a trading corporation. 67

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60 R v Federal Court of Australia; Ex parte WA National Football League [1979] HCA 6 (27 February 1979) at para. 53 (Barwick CJ), [(1979) 143 CLR 190 at p. 208].

61 ibid., at para. 10 (Murphy J), [(1979) 143 CLR 190 at p. 239].

62 ibid., at para. 31 (Mason J), [(1979) 143 CLR 190 at p. 233].


64 University of Western Australia v National Tertiary Education Industry Union Print P1962 (AIRC, O’Connor C, 20 June 1997) at para. 11; citing R v Federal Court of Australia; Ex parte WA National Football League [1979] HCA 6 (27 February 1979) at para. 57 (Barwick CJ), [(1979) 143 CLR 190 at p. 209].


Case example: Trading or financial corporations—Professional sporting organisation and club

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

**Facts**

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

**Outcome**

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

**Relevance**

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


Facts

The applicants were both corporations registered in Queensland. The applicants manufactured and sold electronic dog collars for the purpose of training dogs. The respondents have historically campaigned and claimed that the making of these products were cruel and instruments of torture. The applicants claimed the respondent’s representations of cruelty, illegality and the effectiveness of the products were false. They claim the respondent had, by making the representations, engaged in conduct, in trade or commerce that was misleading or deceptive or likely to mislead or deceive. The applicants claimed as a result of the respondent’s statements about their products, they sustained significant loss and damage.

Outcome

The Federal Court found the RSPCA (a charitable organisation) to be a trading corporation on the basis that it earned substantial income from trading activities.

Relevance

When determining whether an organisation is a trading corporation, it may not matter that the income from trading activities is used for charitable purposes or if the organisation has many functions that are non-trading or commercial in character.
Case example: **Building Society—Financial corporation**


**Facts**

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

**Outcome**

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

**Relevance**

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

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


**Facts**

The State Superannuation Board (the corporation) was a statutory corporation formed to provide superannuation benefits for state public servants. The corporation argued it was not a financial corporation and instead merely the trustee and administrator of the state public servants superannuation funds.

**Outcome**

The Court found that the corporation was a financial corporation because it engaged in financial activities on a very substantial scale.

Even if the Court confined its attention to such aspects of the corporation's investment activities that involved the making of commercial and housing loans, its business in this respect was very substantial and formed a significant part of its overall activities.

**Relevance**

In this case there was no doubt that the activities were all entered into for the end purpose of providing superannuation benefits to contributors, but this circumstance constituted no obstacle to the conclusion that the corporation was a financial corporation due to the activities in which it engaged.

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**Case example: Metropolitan Fire and Emergency Services Board—Trading corporation**


**Facts**

The principal activity of the Metropolitan Fire and Emergency Services Board (the Board), established as a statutory corporation, was to respond to fire and other emergencies, an activity which it undertook without charge to the public. The Board's Fire Equipment Services activities, which involved the commercial servicing of fire equipment for commerce, industry and the domestic market generated 5.11% of the Board's revenue.

**Outcome**

The Court found that the trading activities of the Board generated substantial income and were sufficient to constitute the Board as a trading corporation.

Even though the overwhelming majority of the funds received by the Board were derived from insurance companies, municipal councils and the State Government, the Board’s trading activities were nevertheless sufficient for the Board to be considered a trading corporation.

**Relevance**

In this case, the fact that trading activities generated only a small proportion of the Board’s overall revenue did not prevent the Board from being characterised as a trading corporation where the ‘trading activities formed a significant proportion of the Board’s overall activities’.
Case example: Community services organisation—Trading corporation


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

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

Relevance
In this case, the altruistic intent of the organisation’s activities did not prevent it being a trading corporation in circumstances where those activities were not insubstantial, trivial, insignificant, marginal, minor or incidental.
Case example: District or amateur sporting organisation—NOT a trading or financial corporation

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

Facts
The applicant was a professional cricketer who contended he was disqualified from district cricket consequent upon his participation in a South African cricket tour. The applicant’s disbarment from playing club cricket was said to be from the Cricket Council’s decision following several meetings. There was no provision in the original rule for disqualification following breach of the rule. The original rule was amended by resolution at Cricket Council meetings. Among other things, the applicant sought relief under the Trade Practices Act 1974 (Cth), which required that at least one of the parties to the relevant contract, arrangement or understanding to be a trading corporation.

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

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


Facts

The applicant sought interlocutory relief from the NSW Industrial Relations Commission restraining the Children’s Medical Research Institute (the Institute) from terminating her contract of employment. The applicant also sought relief declaring her contract was unfair, harsh or unconscionable. The Institute contended the NSW Industrial Relations Commission (the NSWIRC) did not have jurisdiction to grant the relief as the Institute was a constitutional corporation.

Outcome

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

Relevance

The trading and financial activities were not sufficiently substantial to render the medical research establishment a trading or financial corporation.
Case example: Community based organisation—NOT a trading or financial corporation


**Facts**

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

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

**Outcome**

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

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

**Relevance**

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

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**What is the Commonwealth?**

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

A *Commonwealth employee* is a person who holds an office or appointment in the Australian Public Service, or holds an administrative office, or is employed by a public authority of the Commonwealth.68

**What is a Commonwealth authority?**

A *Commonwealth authority* is a statutory authority, created by legislation, that is a separate legal entity from the Commonwealth and which has the power to hold money on its own account.

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There are approximately 150 Commonwealth authorities. Examples of Commonwealth authorities include:

- the Australian Tax Office (ATO)
- the Australian Postal Corporation (Australia Post)
- the Commonwealth Scientific and Industrial Research Organisation (CSIRO)
- the Australian Broadcasting Commission (ABC)
- the Australian Competition and Consumer Commission (ACCC).


What is a body corporate incorporated in a Territory?

The term **body corporate** refers to any artificial legal entity having a separate legal personality. These entities have perpetual succession; they also have the power to act, hold property, enter into legal contracts and sue and be sued in their own name, just as a natural person can.

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

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

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

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

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

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

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

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Part 5—When is a worker bullied at work?

See Fair Work Act s.789FD

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

Bullying can cover behaviours carried out by one or more people.

Repeated unreasonable behaviour

The concept of repeatedly behaving unreasonably refers to the existence of persistent unreasonable behaviour, and may include a range of behaviours over time. There is no specific number of incidents required for the behaviour to be ‘repeated’, provided there is more than one occurrence, nor does the same specific behaviour have to be repeated.70

Unreasonable behaviour is behaviour that a reasonable person, having regard to the circumstances, may see as unreasonable. In other words it is an objective test.71 This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.72

Risk to health and safety

A risk to health and safety means the possibility of danger to health and safety, and is not confined to actual danger to health and safety.73 The ordinary meaning of ‘risk’ is exposure to the chance of injury or loss.74 The risk must be real and not simply conceptual.75

The bullying behaviour must create the risk to health and safety. Therefore there must be a causal link between the behaviour and the risk. Cases on causation in other contexts suggest that the behaviour does not have to be the only cause of the risk, provided that it was a substantial cause of the risk viewed in a common sense and practical way.76

Reasonable management action carried out in a reasonable manner is NOT bullying.

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70 Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 41.
71 ibid., at para. 43.
72 House of Representatives Standing Committee on Education and Employment report, Workplace bullying “We just want it to stop”, at p. 15.
74 Macquarie Concise Dictionary definition; Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 45.
75 Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 45.
76 Newcastle Wallsend Coal Co Pty Ltd v Workcover Authority (NSW) (Inspector McMartin) [2006] NSWIRComm 339 (5 December 2006) at para. 301; Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 44.
Bullying—Case examples

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

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

Work health and safety regulators assess and investigate bullying complaints in accordance with their individual compliance and prosecution policies, which may take into account issues such as the immediate risk to health and safety, possible breaches of work health and safety legislation, evidence, likelihood of success and whether prosecution would be in the public interest. Furthermore, jurisdictions that utilise alternative dispute resolution practices may not keep or publish records of the outcomes in these matters.

For the Commission to make an order to stop bullying, an applicant will need to show that on the balance of probabilities, a worker, whilst at work, has been bullied, that the behaviour creates a risk to health and safety, and that there is a risk that the worker will continue to be bullied at work.
Case example: Examples of bullying behaviour—Repeated unreasonable behaviour

Lacey and Kandelaars v Murrays and Cullen [2017] FWC 3136 (Roe C, 8 June 2017).

Facts
The two applicants were bus drivers and each made an application for an order to stop bullying by their Manager. They alleged that the behaviour engaged in by their manager was unreasonable, including:

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

In total 12 bus drivers, including the applicants, gave evidence complaining about the Manager’s behaviour.

Outcome
The Commissioner found that the Manager had engaged in repeated, unreasonable behaviour and that behaviour created a risk to health and safety. The Manager had bullied the applicants. However, the Commissioner declined to issue an order to stop bullying. He considered that, as the employer had changed the reporting lines so that the applicants would not be directly managed by the Manager, they would not be at risk of bullying continuing. Further, he also considered that the finding of bullying itself would ‘be sufficient to protect Mr Lacey and Mr Kandelaars from the risk of further bullying’.

Relevance
In this matter the Commission was presented with evidence from both of the applicants, and also from other bus drivers working at the company. The evidence of the other drivers established a number of other incidents where the Manager swore at drivers or humiliated drivers or unnecessarily harassed drivers. This helped to show that the unreasonable behaviour was repeated, and that there was a risk that the drivers would continue to be bullied at work.
Case example: Examples of bullying behaviour

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

Facts

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

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

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

Outcome

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

Relevance

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

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

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

**Facts**

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

The alleged behaviour by the Property Manager included:

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

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

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

**Outcome**

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

**Relevance**

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

**Re Ms LP** [2015] FWC 6602 (Hampton C, 4 November 2015).

**Re Ms LP** [2016] FWC 763 (Hampton C, 12 February 2016).

**Facts**

The applicant was employed as a Food and Beverage Attendant at a family owned restaurant. She sought orders to stop certain alleged conduct by the group of individuals including orders for the employer to conduct management courses to be completed by the Supervisors at the restaurant and for all staff to attend training in relation to bullying conduct.

The applicant's complaints centred around incidents of aggressive and intimidating conduct as well as exclusion from staff meetings.

The employer contended that the alleged conduct was not bullying but rather was reasonable management action carried out in a reasonable manner.

**Outcome**

The Commission was satisfied, on fine balance, that there was sufficient relevant unreasonable behaviour towards the applicant and/or the group of workers to which she belonged whilst at work to constitute bullying. However, much of that behaviour occurred in a particular context that had now changed, with two of the persons involved no longer working at the restaurant.

In a separate decision the Commissioner declined to issue orders to stop bullying as positive measures had been taken by the employer and the Commissioner did not consider that the making of orders ‘would be conducive to the constructive resumption of working relationships’.

**Relevance**

Even where a finding of bullying and some future risk is made, the Commission must consider whether it is appropriate to make an order.
Case example: Examples of bullying behaviour—NOT reasonable management action conducted in a reasonable manner

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

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

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

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

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


Facts

A male labour hire employee succeeded in obtaining damages in negligence against his employer and the company for which he performed work on the basis that he was subjected to bullying behaviour from an individual at the workplace over five years including:

- physical and sexual assault
- threats such as ‘I will do you’
- grossly improper conduct, including racist and sexist vilification
- requirements to work unreasonable hours for up to 18 months while being underpaid
- being required to ask the bully for permission to go to the toilet, and
- being unreasonably refused carers’ leave.

Outcome

The Court found that the conduct perpetrated on the worker was prolonged, abusive, intimidating and physically threatening. It was bullying in an extreme form. The perpetrator’s conduct was ‘so brutal, demeaning and unrelenting that it was reasonably foreseeable that, if continued for a significant period of time ... it would be likely to cause significant, recognisable psychiatric injury’.

Relevance

Although this is not a decision of the Commission, it has been included as an example of extreme bullying occurring in the workplace. The damages/compensation awarded in this case are not available in the Commission as the Fair Work Act does not allow the payment of compensation or damages.
Case example: **Examples of bullying behaviour—Ostracism**


**Facts**

The bullying target, a police officer, alleged she was bullied after being moved into a new unit including by:

- conversations concerning the manner in which the target got the job and about her pregnancy
- the use of the ‘black widow’ epithet and other offensive conversations
- requirements to carry out alternative duties while pregnant which the target did not agree to
- exclusion from social club activities
- disadvantageous work station and rostering arrangements and requirements to ‘act as messenger’, and
- social ostracism.

The employer denied that many of the events detailed actually occurred.

**Outcome**

The jury found that the target did suffer injury as a result of the employer’s negligence. The target had suffered a serious mental disturbance caused by the respondent’s conduct. The decision was affirmed on appeal.

**Relevance**

Although this is not a decision of the Commission, it has been included as an example of bullying occurring in the workplace, including bullying by exclusion of the target from workplace activities. The damages/compensation awarded in this case are not available in the Commission as the Fair Work Act does not allow the payment of compensation or damages.
Case example: Examples of bullying behaviour—Bullying downwards


Facts
The bullying target made legitimate complaints about late pay, which culminated in her being dismissed from her employment as a legal secretary after six months. She sought relief under the victimisation provisions of the Industrial Relations Act 1996 (NSW), alleging bullying that involved:

- changing working hours with one working day’s notice and without explanation
- a telephone call to the worker’s in-laws, during which a partner at the firm initiated a discussion about her work performance
- a letter raising concerns about the target’s honesty in observing her hours of work, using the firm’s resources for personal use and not accepting instructions
- suggestions that the target resign after commencing victimisation proceedings
- raising an outstanding conveyancing account ‘as a lever’ to force resignation
- labelling the target ‘shameless’
- raising performance issues about clerical mistakes that ‘were so inconsequential as to be almost laughable’
- accusing the target of feigning headaches after being disciplined the day before and arguing with supervisors, and
- inconsistent disciplinary action when compared with others.

Outcome
The court found the respondent embarked on a deliberate, disgraceful and relentless campaign to force the applicant’s resignation’, accepting that the worker was subjected to ‘a pattern of victimisation’. The court granted relief including reinstatement to her former employment and compensation.

Relevance
Although this is not a decision of the Commission, it has been included as an example of bullying in the workplace following complaints made by the employee. The damages/compensation awarded in this case are not available in the Commission as the Fair Work Act does not allow the payment of compensation or damages.
Case example: Examples of bullying behaviour—Bullying upwards


**Facts**

The plaintiff claimed her employer was negligent in allowing her to be bullied for approximately two years after being promoted to a team leader position ahead of her former manager. In the worker’s new role she was required to ‘attack the workplace culture’ and assist in an organisational restructure.

The worker alleged she was subjected to victimisation, harassment, humiliation and abuse, including:

- lack of co-operation from the team
- rudeness, obstruction and a refusal to accept proper direction to cease inappropriate work practices
- treating the team leader in a demeaning and denigrating manner during meetings
- ‘day to day undercurrent of reluctant cooperation and at times open hostility’, and
- excluding the team leader from a meeting convened to document a list of grievances, including a list of ‘inappropriate behaviour by Team Leader’ signed by most of the attendees.

**Outcome**

The Court held that the worker’s employer had been negligent in failing to respond to her requests for assistance to deal with the team’s insubordination. The decision was affirmed on appeal.

**Relevance**

Bullying does not necessarily involve conduct of more senior employees towards more junior employees. A more senior employee may be bullied by employees that report to him or her.
Case example: Examples of bullying behaviour—Bullying downwards

Dillon v Arnotts Biscuits Limited Print P4843 (AIRC, Tolley C, 10 September 1997).

Facts
The applicant resigned from her employment as a packer on a production line, but subsequently sought reinstatement on the basis that her resignation had been forced by bullying including:

- ongoing bullying by her supervisor, ‘to the point of reducing her to tears’
- isolation following her return to work after a work-related illness, including being assigned to an isolated workstation by herself, facing a blank wall with her back to her fellow employees
- being singled out by a supervisor for ‘special treatment’ to ‘toughen her up’, and
- selective application of the employer’s return to work rehabilitation policy, to suit the supervisor.

Outcome
The Commission found that the applicant had been subject to ‘incessant bullying, abuse and harassment’ by her team leader and that the applicant did not receive the support she was entitled to ‘as a human being by any level of management at the company’. The applicant was reinstated and awarded all lost income at the rate of pay, including shift allowances she was receiving prior to her dismissal.

Relevance
Although this is a decision of the Commission prior to the introduction of the anti-bullying provisions, it has been included as an example of how bullying may be aggravated by a lack of support at any level of the organisation.
Case example: **NOT examples of bullying behaviour—Psychiatric injury not caused by bullying**


**Facts**

The applicant, who was employed at a racetrack, suffered a workplace injury and was away from work for two weeks on WorkCover. When he returned he alleged that he was bullied and required to perform tasks he had not performed before, or which he had to perform alone, including:

- collecting stones from the sand track
- collecting manure from the sand track and the Visco track, and
- mowing around the sand track alone.

The applicant claimed that the tasks were demeaning and humiliating for him and as a consequence, he became stressed. The employer denied allocating him these tasks.

The applicant also claimed that he was discriminated against and bullied when he was sent home for not wearing the prescribed uniform shirt.

**Outcome**

The Court did not accept the applicant’s evidence that he had been required to perform the tasks described. The Court further found that the direction to go home for not wearing the prescribed uniform shirt did not constitute bullying.

**Relevance**

Reasonable management action carried out in a reasonable manner does not constitute bullying. In this case the court was satisfied that the track manager was fair, but firm, with the employees who worked under him.
Case example: NOT examples of bullying behaviour—Behaviour did not fall within the scope of bullying

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

Facts

The applicant managed a team of employees. It was alleged that two of the employees, who reported to the applicant, started behaving unreasonably towards the applicant by harassing her on a daily basis and spreading rumours about her in the workplace.

One of the employees made bullying allegations against the applicant (immediately prior to the applicant lodging her application). An investigation by a legal firm was arranged by the employer which found that the allegations against the applicant were justified in part, whereas the complaints by the applicant were not substantiated.

The applicant did not rely upon the legal firm’s investigation as evidence of bullying conduct in its own right, but as support for her proposition that there was a risk of ongoing bullying conduct; principally on the basis that no action was being proposed in relation to the employee.

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

Outcome

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

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

Relevance

It is necessary to examine whether an individual or group of individuals have repeatedly behaved unreasonably towards the applicant, and whether such behaviour has created a risk to health and safety.
Case example: NOT examples of bullying behaviour—No repeated incidents of unreasonable behaviour


Facts

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

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

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

Outcome

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

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

Relevance

Unreasonable behaviour can include a range of behaviours over time or an unreasonable behaviour that is repeated. In this case a single incident, whilst clearly unreasonable and inappropriate, was not enough to provide the necessary jurisdiction for the Commission to determine this particular application.
Case example: **NOT examples of bullying behaviour—No repeated incidents of unreasonable behaviour**


**Facts**

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

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

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

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

**Outcome**

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

**Relevance**

For orders to be made, the Commission must find repeated instances of unreasonable behaviour that are not reasonable management action carried out in a reasonable manner.
What does ‘at work’ mean?

For a worker to be covered by the Commission’s anti-workplace bullying laws, the alleged bullying behaviour must occur while the worker is ‘at work’.  

The expression ‘at work’ is not defined in the legislation. The same expression is used in relation to the primary duty of care in s.19 of the WHS Act. The Explanatory Memorandum for that Act states that ‘the primary duty of care is tied to the work activities wherever they occur and is not limited to the confines of a physical workplace.’

Broadly speaking, a ‘worker’ is an individual who carries out work in any capacity for a person conducting a business or undertaking, including as an employee; a contractor or subcontractor; an outworker; an apprentice or trainee; a student gaining work experience, or a volunteer.

A worker may be ‘at work’ even if required to perform work at a place other than the employer’s premises, such as in the case of an employee of a labour hire business.

For the worker to be considered to be ‘at work’, the alleged bullying may not necessarily have to occur while the worker is actively engaged in work. The phrase has temporal connotations, and applies equally to all kinds of work, and includes entering, moving about and leaving a workplace.

It is a broader phrase than ‘at the employer’s place of work’.

In Bowker and Others v DP World Melbourne Limited T/A DP World and Others a Full Bench of the Commission determined:

[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.

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77 Fair Work Act s.789FD(1).
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.\(^{85}\)

...\(^{49}\)

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.\(^{86}\)

\(^{50}\) 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’.\(^{87}\)

\(^{51}\) 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).\(^{88}\)

...\(^{53}\)

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.\(^{89}\)
Use of social media

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

[54] The use of social media to engage in bullying behaviour creates particular challenges. Conceptually there is little doubt that using social media to repeatedly behave unreasonably towards a worker constitutes bullying behaviour. But how does the definition of ‘bullied at work’ apply to such behaviour? For example, say the bullying behaviour consisted of a series of facebook posts. There is no requirement for the person who made the posts (the alleged bully) to be ‘at work’ at the time the posts were made, but what about the worker to whom they are directed?91

[55] During the course of oral argument counsel for the MUA submitted that the worker would have to be ‘at work’ at the time the facebook posts were made. We reject this submission. The relevant behaviour is not limited to the point in time when the comments are first posted on facebook. The behaviour continues for as long as the comments remain on facebook. It follows that the worker need not be ‘at work’ at the time the comments are posted, it would suffice if they accessed the comments later while ‘at work’, subject to the comment we make at paragraph 51 above.92

[56] We acknowledge that the meaning we have ascribed to s.789FD may give rise to some arbitrary results. A worker may only access comments on social media which constitute unreasonable behaviour (with the meaning of s.789FD(1)(a)) at a time when they are not ‘at work’ and the behaviour will not fall within the scope of Part 6-4B. But it seems to us that such a consequence necessarily follows from the fact that the legislature has adopted a definition which is intended to confine the operation of the substantive provisions.93

Risk of continued bullying

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

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

Applying the dictionary definition, risk means exposure to the hazard or chance of continued bullying. Relevant considerations will be whether the worker is still working with the individual or group of individuals, and action that may have been taken by the PCBU or a work health and safety regulator to deal with the behaviour.

91 ibid.
92 ibid.
93 ibid.
Discrimination of employee

If an employee is dismissed after making an application, and before the matter is dealt with by the Commission, then there would not usually be a risk that the employee will continue to be bullied at work. If there is no such risk, the Commission has no power to make the order sought by the applicant, and accordingly the application has no reasonable prospect of success and must be dismissed for want of jurisdiction.94

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). 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, then in almost all cases it will not be possible for an applicant to demonstrate that there will be a future risk that they will be bullied at work.

However, the Commission has held that it will not always be appropriate to dismiss an application where a worker has been terminated from their employment.95 The decision to dismiss an application on this basis requires a consideration of the particular circumstances of the parties, including whether or not an individual will return to a workplace in some capacity as a worker. It may be appropriate for the Commission to consider holding an application in abeyance where there is an apparently related dismissal that is being actively contested. This is ultimately a matter of judgement in the particular circumstances of each case.96

If a dismissed employee is re-employed by the same employer at some future point, and the employee is concerned about the risk of further bullying, there is nothing to preclude the employee making another application under s.789FC subject to the jurisdictional facts being established in relation to that application.97 Allegations of past bullying can be relied upon in support of such a new application.98

Change in circumstances

If a PCBU introduces changes in the workplace to specifically address the issues around the alleged bullying behaviour, such changes may impact on the risk that the worker will continue to be bullied at work and the Commission may take this into consideration when considering whether to make an order.99

98 Dr Ravi v Baker IDI Heart and Diabetes Institute Holdings Limited T/A Baker IDI Heart and Diabetes Institute and Another [2014] FWC 7507 (Gostencnik DP, 28 October 2014) at para. 14.
99 See for e.g. Re Ms LP [2016] FWC 763 (Hampton C, 12 February 2016) at para. 32.
These changes could include:

- the relocation or dismissal of the person or persons named
- the introduction of a workplace anti-bullying policy
- the delivery of anti-bullying or other appropriate training
- changes to rosters, or
- changes to reporting requirements.

**What does ‘Reasonable management action carried out in a reasonable manner’ mean?**

Contains issues that may form the basis of a jurisdictional issue

See Fair Work Act s.789FD(2)

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

This qualification is comprised of three elements:

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

**Related information**

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

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100 Fair Work Act s.789FD(2).
What is management action?

The following are examples of what may constitute management action:

- performance appraisals\textsuperscript{101}
- ongoing meetings to address underperformance\textsuperscript{102}
- counselling or disciplining a worker for misconduct\textsuperscript{103}
- modifying a worker’s duties including by transferring or re-deploying the worker\textsuperscript{104}
- investigating alleged misconduct\textsuperscript{105}
- denying a worker a benefit in relation to their employment, or\textsuperscript{106}
- refusing an employee permission to return to work due to a medical condition.\textsuperscript{107}

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

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

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

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

This suggests that the legislature intended everyday actions to ‘effectively direct and control the way work is carried out’ to be covered by the term ‘management action’.\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item Thompson and Comcare \textsuperscript{[2012]} \textit{AATA 752} (31 October 2012).
\item Martinez and Comcare \textsuperscript{[2012]} \textit{AATA 795} (14 November 2012).
\item Truscott and Comcare \textsuperscript{[2012]} \textit{AATA 220} (17 April 2012).
\item Towns and Comcare \textsuperscript{[2011]} \textit{AATA 92} (14 February 2011).
\item State of Tasmania \textit{v} Clifford \textsuperscript{[2011]} \textit{TASSC 10} (24 February 2011).
\item Towns and Comcare \textsuperscript{[2011]} \textit{AATA 92} (14 February 2011).
\item Drenth \textit{v} Comcare \textsuperscript{[2012]} \textit{FCAFC 86} (21 May 2012), [(2012) 128 ALD 1].
\item Rutledge and Comcare \textsuperscript{[2011]} \textit{AATA 865} (7 December 2011), [(2011) 130 ALD 94].
\item Commonwealth Bank of Australia \textit{v} Reeve \textsuperscript{[2012]} \textit{FCAFC 21} (8 March 2012), [(2012) 217 IR 335].
\item Re Ms SB \textsuperscript{[2014]} \textit{FWC 2104} (Hampton C, 12 May 2014) at para. 48.
\end{enumerate}
\end{footnotesize}
Part 5—When is a worker bullied at work?
What is management action?

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

Case example: NOT considered management action—Workers’ compensation—General operational action


**Facts**

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

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

**Outcome**

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

**Relevance**

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

Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions to respond to poor performance, direct and control the way work is carried out or, if necessary, take disciplinary action.
Part 5—When is a worker bullied at work?

When is management action reasonable?

Case example:  NOT considered management action—Workers’ compensation—Regular meetings


Facts

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

Outcome

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

Relevance

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

When is management action reasonable?

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

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

This covers the specific ‘attributes and circumstances’112 of the situation including the emotional state and psychological health of the worker involved.113

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

- management actions do not need to be perfect or ideal to be considered reasonable
- a course of action may still be ‘reasonable action’ even if particular steps are not115

112 ibid.
113 ibid.
• any ‘unreasonableness’ must arise from the actual management action in question, rather than the worker’s perception of it\textsuperscript{116}, and

• consideration may be given as to whether the management action involved a significant departure from established policies or procedures and, if so, whether the departure was reasonable in the circumstances.\textsuperscript{117}

At the very least, to be considered reasonable, the action must be lawful\textsuperscript{118} and must not be ‘irrational, absurd or ridiculous’.\textsuperscript{119}

**What is a reasonable manner?**

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

As above, what is ‘reasonable’ is a question of fact and the test is an objective one.\textsuperscript{120}

Whether the management action was taken in a reasonable manner will depend on the action, the facts and circumstances giving rise to the requirement for action, the way in which the action impacts upon the worker and the circumstances in which the action was implemented and any other relevant matters.\textsuperscript{121}

This may include consideration of, for example:

• the particular circumstances of the individual involved

• whether anything should have prompted a simple inquiry to uncover further circumstances\textsuperscript{122}

• whether established policies or procedures were followed,\textsuperscript{123} and

• whether any investigations were carried out in a timely manner.\textsuperscript{124}

However the impact on the employee cannot by itself establish whether or not the management action was carried out in a reasonable manner, and some degree of humiliation may often be the consequence of a manager exercising his or her legitimate authority at work.\textsuperscript{125}

An employee must be able to demonstrate that the decision to take management action lacked any evident and intelligible justification such that it would be considered by a reasonable person to be unreasonable in all the circumstances.\textsuperscript{126}

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\textsuperscript{116} Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 51.

\textsuperscript{117} ibid.; Department of Education & Training v Sinclair [2005] NSWCA 465 (20 December 2005).

\textsuperscript{118} Von Stieglitz and Comcare [2010] AATA 263 (15 April 2010) at para. 67.

\textsuperscript{119} ibid.; Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 51.

\textsuperscript{120} Re Ms SB [2014] FWC 2104 (Hampton C, 12 May 2014) at para. 52.


\textsuperscript{124} Wei and Comcare [2010] AATA 894 (11 November 2010).

\textsuperscript{125} Comcare v Martinez (No 2) [2013] FCA 439 (17 May 2013) at paras 73, 76.

\textsuperscript{126} Amie Mac v Bank of Queensland Limited and Others [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 102.
Case example: Reasonable management action—Carried out in a reasonable manner—Discussions


Facts

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

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

Outcome

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

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

Relevance

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

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


Facts

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

Outcome

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

Relevance

What is reasonable is assessed objectively and relates to the specific conduct involved in light of the process overall. Reasonableness must be assessed against what is known at the time without the benefit of hindsight, taking into account the attributes and circumstances, including the emotional state, of the employee concerned.
Case example: **Reasonable management action—Carried out in a reasonable manner—Performance appraisal**


**Facts**

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

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

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

**Outcome**

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

**Relevance**

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


Facts

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

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

Outcome

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

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

Relevance

Where an applicant wishes to allege that the decision to implement a PIP amounted to bullying, such applicants must demonstrate that the decision to introduce the PIP lacked any evident and intelligible justification such that it would be considered by a reasonable person to be unreasonable in all the circumstances.
**Case example: Reasonable management action—Carried out in a reasonable manner—Perceived bullying and harassment**


**Facts**

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

**Outcome**

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

**Relevance**

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

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

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

**Facts**

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

**Outcome**

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

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

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

**Relevance**

It is important to keep records when dealing with performance or behaviour issues in the workplace. In this case it was in part the lack of evidence that the employer had complied with their own procedures and policies that saw the initial decision overturned.
Case example: **Reasonable management action—NOT carried out in a reasonable manner—Performance monitoring and mentoring**


**Facts**

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

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

**Outcome**

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

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

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

**Relevance**

The failure of the employer in this matter to comply with their own procedures and policies saw that whilst the management action was taken on reasonable grounds, it was not taken in a reasonable manner.
Part 6—Making an application

See Fair Work Act s.789FC

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

An application for an order to stop bullying made to the Commission must include a completed and signed application form [Form F72].

There is no timeframe for a worker lodging an application for an order to stop bullying.

Application fee

An anti-bullying application must be accompanied by payment of the prescribed fee (or an application to waive the prescribed fee)\textsuperscript{127}. Failure to pay the filing fee or apply for a waiver at the time of making the application, may result in the Commission finding that the application has not been validly made.\textsuperscript{128}

Making an application to the Commission for an order to stop bullying is a workplace right protected under the general protections provisions of the \textit{Fair Work Act 2009} (the Fair Work Act).

Links to application form

Form F72—Application for an order to stop bullying:


Links to waiver form

Form F80—Waiver of application fee:


\textsuperscript{127} Fair Work Act s.789FC(4).

\textsuperscript{128} \textit{Druett v State Rail Authority of NSW & Ors [2007] AIRC 805} and \textit{Atanaskovic Hartnell Corporate Services Pty Ltd t/o Atanaskovic Hartnell v Kelly [2017] FWCFB 763}
Part 6—Making an application

Responding to an application

Behaviour which occurred before 1 January 2014

Workplace bullying behaviour which took place before the commencement of Part 6-4B of the Fair Work Act on 1 January 2014 can be taken into consideration by the Commission. The anti-bullying provisions of the Fair Work Act envisage ‘future action on past events’, and cannot properly be characterised as retrospective. Applicants can rely upon pre 1 January 2014 conduct but need to demonstrate future risk.129

What is a reasonable belief?

An applicant under s.789FC must not only be a worker but must be one who ‘reasonably believes that he or she has been bullied at work’. The expression ‘reasonable belief’ and similar expressions are utilised in a wide variety of contexts by the statutory and common law. It is clear from cases decided in those differing contexts that not only must the requisite belief actually and genuinely be held by the relevant person, but in addition the belief must be reasonable in the sense that, objectively speaking, there must be something to support it or some other rational basis for the holding of the belief and it is not irrational or absurd.130

Responding to an application

Employer or principal

The person named as an employer or principal in an anti-bullying application must lodge with the Commission a response to the application within seven calendar days after the day on which the person was served with the application.131

Links to response form

Form F73—Response from an employer/principal to an application for an order to stop bullying:

- [www.fwc.gov.au/documents/forms/Form_F73.docx](http://www.fwc.gov.au/documents/forms/Form_F73.docx) (Microsoft Word)


Person named

If a person named in an anti-bullying application as allegedly engaging in bullying behaviour wants to lodge a response to the application, the person must lodge the response with the Commission within seven calendar days after the day on which the person was served with the application.132

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131 Fair Work Commission Rules 2013 r 23A(1).
132 Fair Work Commission Rules 2013 r 23A(3).
Service

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

The other parties are:

- the worker who has made the application (the applicant), and
- each person named in the application as an employer or principal, and
- each person named in the application as allegedly engaging in bullying behaviour.

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

**Concerns**

The Commission may issue a direction that requires the employer or principal, or a person named to serve a copy of the response on some but not all of the parties specified above.

If you have any concerns about serving your response (or any document forming part of the response) on any of the other parties please contact the Commission to discuss before lodging or serving the response.
What if the worker has been dismissed, or is no longer in the employment/contractual relationship?

An order in relation to workplace bullying may only be made by the Commission where it finds that there is a risk of the bullying continuing. In most circumstances this will mean that an order cannot be made where the worker is no longer in the relationship where the bullying has occurred.

If a person has been dismissed they may be eligible to make one of several different types of dismissal application to the Commission, they may also be eligible to make claims in other Federal or State jurisdictions instead.

Other benchbooks

The Commission has created other benchbooks which contain detailed information and links to cases setting out eligibility and the Commission process, including information on objections.

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

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

Legal advice

If you would like free legal advice or other advisory services there are Community Legal Centres in each state and territory who may be able to assist.

The law institute or law society in your state or territory may be able to refer you to a private solicitor who specialises in workplace law.

Employee and employer organisations may also be able to provide advice and assistance.
Part 7—Commission process–Hearings and conferences

Commission to deal with applications promptly

The Fair Work Commission (the Commission) must start to deal with an application for an order to stop bullying within 14 days after the application is made.\(^{133}\) The making of an application does not of itself stop any actions taking place at a workplace. This includes meetings in respect of performance, potential dismissal or investigations.

Powers of the Commission

The *Fair Work Act 2009* (the Fair Work Act) provides the Commission with flexibility to inform itself as it considers appropriate in relation to an application for an order to stop the bullying. This may include contacting the employer or other parties to the application, conducting a conference or holding a formal hearing.\(^{134}\)

The President may refer a matter to a work health and safety (WHS) regulator where it considers this necessary and appropriate.\(^{135}\) If such a referral is made, it does not necessarily mean that the Commission will defer dealing with an application before it. The Fair Work Act specifically provides that an applicant may have an action under a work health and safety law as well as an application before the Commission.\(^{136}\)

Role of the Commission

The Commission is required to consider the evidence and whether, assessed objectively, that evidence constitutes bullying behaviour and, in that context, whether it comprised reasonable management action carried out in a reasonable manner.\(^{137}\)

It is not necessary for the Commission to undertake a complete investigation of the background to the concerns raised and make findings about each of those occasions. The Commission is not required by the relevant provisions of the Fair Work Act to set out a point-by-point merits review of each aspect of the applicant’s claim.\(^{138}\)

The Commission does not have an investigatory role in relation to allegations of bullying at work. It is for the parties to present their own case and for the Commission to determine whether it is satisfied that a worker has been bullied at work and that there is a risk that the bullying will continue before an order can be made.

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\(^{133}\) *Fair Work Act* s.789FE(1).

\(^{134}\) *Fair Work Act* s.590.

\(^{135}\) Revised Explanatory Memorandum, *Fair Work Amendment Bill 2013* at para. 117.

\(^{136}\) *Fair Work Act* s789FH.


\(^{138}\) Ibid.
Prior to this determination being made, a Member is likely to hold a preliminary conference to consider how the matter will proceed and how the parties will conduct themselves during the course of proceedings. A matter may then be listed for a determinative conference or a hearing to determine whether or not to make an order to stop bullying.

**Hearings and conferences**

![See Fair Work Act ss.592–593](image)

**Conferences**

Any conference conducted by the Commission must be held in private unless the Commission specifically directs otherwise.\(^{139}\)

**In private** means that members of the public are excluded. Persons who are necessary for the Commission to perform its functions are permitted to be present.\(^{140}\)

In the course of dealing with a matter, the Commission may conduct mediation or conciliation, make a recommendation to the parties or express an opinion.\(^{141}\)

A Commission member takes account of particular circumstances of the parties in conducting the arbitration by determinative conference. In a matter where both parties are self-represented the matter will be listed for determinative conference unless the member decides otherwise.

While determinative conferences are held in private, the Commission will still publish its reasons for decision, including the names of the parties, on the Commission’s website (unless the Commission decides otherwise).

Determinative conferences may involve more informal procedures than in a hearing.

**Hearings**

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

The Commission can only conduct a hearing if it considers it appropriate to do so.\(^{142}\) In making this decision the Commission must take into account:

- the views of the parties, and
- whether a hearing is the most effective and efficient way to resolve the matter.\(^{143}\)

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\(^{139}\) Fair Work Act s.592(3).


\(^{141}\) Fair Work Act s.592(4).

\(^{142}\) Fair Work Act s.399(1).

\(^{143}\) Fair Work Act ss.399(1)(a) and (b).
Procedural issues

Confidentiality orders—De-identification of parties

See Fair Work Act ss.593–594

The Commission is generally required to perform its functions and exercise its powers in a manner that is open and transparent. However anti-bullying matters may involve disclosure of sensitive personal information (including medical information) and may have the potential for unwarranted damage to the reputation of individuals. The Commission has the power to make orders that all or part of an anti-bullying hearing be held in private, restricting the persons who may be present at a hearing, prohibiting or restricting the publication of the names and addresses of persons appearing at the hearing, and prohibiting or restricting the publication or disclosure of evidence given at the hearing, documents referred to in the proceedings, and the Commission’s decision or reasons in relation to the matter.

In relation to the anti-bullying jurisdiction established by Part 6-4B of the Fair Work Act, the purpose of the legislation, namely to ensure that workers can continue in their engagements at work free from the risk to health and safety caused by workplace bullying, would be defeated if the public disclosure of sensitive information during the course of anti-bullying proceedings would be likely to have the effect of rendering the relevant worker’s continuing engagement unviable. However, in accordance with the open justice principle, it is not sufficient to justify the making of a non-disclosure order merely because allegations have been made which are embarrassing, distressing or potentially damaging to reputations.

In an anti-bullying matter, as with other types of proceedings before the Commission such as unfair dismissal remedy applications, the findings of the Commission concerning allegations which have been made will usually appropriately resolve concerns about embarrassment, distress or damage to reputation. If findings are made that an applicant’s allegations of bullying behaviour are unfounded, then the position of persons alleged to be the perpetrators of such bullying will be vindicated and such an outcome may reflect adversely upon the applicant. However if allegations of bullying are found to be substantiated, then public identification of the perpetrators of that bullying is normally appropriate. In either case, the public scrutiny involved will have a deterrent effect that is in the public interest - in the former case against the making of unfounded allegations and in the latter case against engagement in bullying behaviour.

If a party applies for confidentiality orders on the basis that disclosure of sensitive information is likely to endanger the viability of a continuing working engagement, then that party will need to positively satisfy the Commission that this is the case. It is not sufficient for this simply to be asserted.

144 Fair Work Act s.577(c).
145 Fair Work Act ss.593–594.
147 ibid.
148 ibid., at para. 10.
Case example: **Application for de-identification of parties approved**

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

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

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

**Facts**

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

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

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

**Outcome**

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

**Relevance**

The capacity of a person to effectively participate in a proceeding before the Commission may be affected, for example, by a well-founded or reasonable concern held by the person that the disclosure and publication of that person’s name or address might result in some form of retribution, harassment or intimidation. In this case the applicants were concerned that if they were identified as applicants there might be an escalation in the conduct about which they had complained directed towards them.
Case example: Application for de-identification of parties approved

H v Centre and Others [2014] FWC 6128 (Wilson C, 4 September 2014).

Facts

An application was made by ‘H’ to the Commission for an order to stop bullying which is alleged to have taken place in a workplace conducted by an employer, referred to as the ‘Centre’, which was a corporate entity providing services to the community. The allegations of bullying extended to two named individuals, ‘T’ (a co-worker) and ‘I’ (the Centre’s Director).

Each of the parties had a preference for the proceeding to be dealt with as confidentially as was possible.

Outcome

While there was no automatic entitlement to the hearing being conducted in that way, the Commission was satisfied that it was appropriate to do so on this occasion, taking into account the personal situation both of the applicant and the two individual respondents, ‘I’ and ‘T’.

The Commission did not consider that the preferences of the Centre itself were a sufficient reason to consider confidentiality; nothing special or private arose in that regard in relation to a corporate entity, albeit one that is a community service, so far as these proceedings were concerned.

Consistent with this, the Commission considered it would be appropriate to make an order for confidentiality pursuant to the provisions of s.593(3) of the Fair Work Act, with that order extending to all material and evidence provided in relation to this matter.

Relevance

When determining if a confidentiality order should be issued, the Commission will take into account the personal situation of the party (or parties), however the party (or parties) will need to be able to satisfy the Commission that there is a need for confidentiality orders, it is not enough to simply assert there is a need.
Case example: **Application for de-identification of parties approved**


**Facts**

G.C. (the applicant) made an application to the Commission for an order to stop bullying. The application alleged bullying conduct by Mr E.S., who was the Managing Director of S.I. Pty Ltd (the employer).

The application was subject to a hearing, which was conducted in private as permitted by s.593(3)(a) of the Fair Work Act. All proceedings conducted to that point were also undertaken in private. At the conclusion of the hearing, all parties supported a position advanced by the employer that the names of all involved should be de-identified from any public decision issued by the Commission.

**Outcome**

Given the nature of some of the matters and circumstances discussed in this decision, the Commission accepted the joint request of the parties, noting that the genuine public interest in the operation of the Fair Work Act, and this jurisdiction in particular, was still satisfied by the publication of the de-identified decision.

**Relevance**

Anti-bullying matters may involve disclosure of sensitive personal information (including medical information) and may have the potential for unwarranted damage to the reputation of individuals. When determining if the names of the parties involved should be de-identified from this decision, the Commission considered the principles of open justice and the scheme of the Fair Work Act balanced against the facts of the matter as presented.
Case example: **Application for de-identification of parties NOT approved**


**Facts**

The Commission received an application for anti-bullying orders from Mr Justin Corfield (the applicant).

The respondents (the named individual and the employer) made an application that the parties in the matter be de-identified pursuant to s.593(3)(c) of the Fair Work Act. The respondents submitted that the publication of the name of the applicant and respondents in what was essentially a private and confidential matter would not be conducive to good governance of the respondent employer. The respondents submitted that their performance management system (to which the application does, in part, relate) should not be subject to public scrutiny. They argued that the performance management system of the organisation is robust and should continue and if the application for orders was not successful, the integrity of the system may well be compromised and confidence in the organisation adversely affected.

The applicant opposed the application. He said that the names of the parties had already been identified in the daily hearing lists of the Commission on the two days when the matter was previously listed. The applicant said that an application involving allegations of one staff member against another is not unique or unusual in Commission proceedings and that, of itself, did not warrant de-identification. The applicant submitted that the matter was not ‘essentially a private matter’, and that the respondent had not shown that de-identification was necessary ‘in the interests of justice.’

**Outcome**

Whilst recognising that the Commission had the power to grant the application the Commission was not satisfied that there were sufficient grounds to warrant the application being granted at that time.

**Relevance**

It is likely that many parties in matters before the Commission would prefer that their details not be made public. The preference of the parties, or that there may be some unwanted scrutiny, is not a basis to conclude that the parties should be de-identified. Embarrassment, distress or damage by publicity is not a sufficient basis to grant an application for de-identification.
Case example: Application for de-identification of parties NOT approved


**Facts**

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

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

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

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

**Outcome**

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

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

**Relevance**

The risk of embarrassment or a risk of some future prejudice, which is common to many applications that proceed before the Commission, do not outweigh the desirability for open justice.
Case example: **Application for de-identification of parties NOT approved**


**Facts**

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

The respondents applied for an order prohibiting the publication of the names of the applicant and the five persons it was alleged had engaged in bullying behaviour.

The respondents submitted that de-identification was appropriate because it would:

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

**Outcome**

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

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

**Relevance**

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

See Fair Work Act ss.589 and 789FF

In some circumstances, parties to anti-bullying matters may seek to have certain preliminary issues dealt with prior to the substantive matters of issuing an order to stop bullying being determined. The range of matters that these types of orders can address will vary, depending on the issues at hand in a particular case. Decisions in respect of interim orders have addressed issues such as:

- stopping recruitment processes which would otherwise render the applicant worker without ongoing employment and therefore an ongoing risk to their health and safety
- stopping performance management processes where the applicant is unable to participate due to ill health, and
- stopping certain behaviours at a workplace.

Case example: Application for an interim order to suspend a disciplinary process—Interim order granted

**Application by Bayly** [2017] FWC 1886 (Hampton C, 5 April 2017).

**Facts**

In this matter the Commission considered whether to issue an interim order to halt a disciplinary process which may have resulted in the applicant’s employment being terminated. The applicant had evidence to show that on medical grounds she was unable to participate in or provide a response to the disciplinary process which had a real prospect of resulting in her dismissal.

**Outcome**

The Commissioner issued the interim order sought, noting:

‘I would also observe that given the scheme of the Act, interim orders of the nature being considered here would not be issued lightly. The direct intervention of the Commission at such an early stage of proceedings should be exercised with considerable caution. Further, the mere indication that a disciplinary process was involved in the complaints of workplace bullying, without much more, is unlikely to trigger the balance of convenience necessary for such action. Of course, each application must be considered in its own right and circumstances.’

**Relevance**

In this case the Commission was satisfied that the anti-bullying application had *prima facie* merit. There was a sufficient likelihood of success to justify the interim order to suspend a disciplinary process which may have resulted in the applicant’s dismissal. If the applicant was dismissed then her anti-bullying application would have to fail as there would be no risk of further workplace bullying.

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151 Application by Worker A, Worker B, Worker C, Worker D and Worker E (interim orders dealing with behaviour at workplace) PR584404, (Gostencnik DP, 18 August 2017).
Case example: **Application for an interim order to delay recruitment process—Interim order NOT granted**


**Facts**

In this matter, the Commission considered a request for an interim order to prevent the employer from finalising a recruitment process in which the applicant had participated. The process would have guaranteed that the applicant would have employment with the employer past 31 December 2017. The applicant contended that the process was:

- flawed, as the recruitment panel had two participants who were aware of an inquiry being conducted about the applicant, which formed the substantive part of his anti-bullying application, and
- the applicant’s anti-bullying application would be ‘extinguished’ after 31 December 2017 as he would not have ongoing employment with the employer and would, therefore, no longer be at risk of bullying behaviour continuing.

**Outcome**

The Commission did not issue the interim order sought, noting that the process for recruiting the new role that the applicant had applied for appeared sound, and that the status quo would not be preserved as the applicant would still be engaged at the workplace when the substantive matter was heard.

**Relevance**

An interim order preventing the employer from offering the disputed role to another person would result in a severe and unnecessary restriction on the employer without affecting the applicant’s rights relevant to the anti-bullying application.
Consent Orders

Some parties, during the process of dealing with the anti-bullying application, may come to an agreement about how they will work together in a workplace. Providing the parties also agree that the circumstances required by the Fair Work Act for making such an order have been met, an order giving effect to this agreement may be made by the Commission, called a consent order.

**Case example:** Consent order issued—Setting out parameters for behaviour

*Application by Kypuros* [2017] FWC 3082 (Wilson C, 6 June 2017).

**Facts**

The applicant in this matter had alleged workplace bullying directed towards him within his workplace. The alleged bullying, largely repeated verbal abuse, was said to be from his uncle who was a co-owner of the business with the applicant’s father.

CCTV footage submitted, untested in evidence, appeared to show at least two acts of violence by the applicant directed at his uncle. The applicant also provided video footage to the Commission, again untested in evidence, of another physical altercation.

An interim intervention order was sought by the uncle and the Magistrates’ Court issued the order against the applicant. The intervention order appeared to be ineffectual in keeping the two men apart and maintaining workplace civility, with altercations between the two men occurring after the intervention order was made.

**Outcome**

The Commission issued consent orders, which had been developed in a conciliation conference. The Commission detailed the events leading up to the applicant making an application for an order to stop bullying, which found that both the applicant and his uncle appeared to be engaging in verbal and physical abuse.

The Commission considered that the conduct engaged in by the uncle against the applicant could fall within the definition of workplace bullying. Likewise, the Commission also considered the same could be said of the conduct alleged by the uncle to have been directed toward him by the applicant.

**Relevance**

The decision to issue consent orders reflected the need to formalise a process so that the parties involved could work together in an appropriate manner and provide a professional working environment for all of the employees. The consent order set out parameters for interaction between the applicant, his uncle and his father within the workplace, whether directly or through other workers.
Representation by lawyers and paid agents

See Fair Work Act ss.12 and 596, Fair Work Commission Rules 2013 r 11–12

Permission

A lawyer or paid agent must seek the permission of the Commission to represent a person in a matter before the Commission.152

Only a Commission Member can give permission to a lawyer or paid agent to represent a party.153 Unless acting under delegation, employees of the Commission, such as conciliators, cannot give or refuse permission for a person to be represented.154

However, unless the Commission otherwise orders, the Fair Work Commission Rules grant a person permission to be represented in a conciliation or mediation process conducted by a member of the staff of the Commission, whether or not under delegation, in relation to an application for an order to stop bullying made under section 789FC of the Fair Work Act.155 For other exceptions to the requirement to seek permission, please see Exceptions–Representation below.

Notification

A person who commences (or ceases) to act as a lawyer or paid agent of a party to a matter that is before the Commission must lodge a notice with the Commission.156

Lawyer

A lawyer is a person who is admitted to the legal profession by a Supreme Court of a state or territory.157

Paid agent

A paid agent is a person who charges or receives a fee to represent a person in the matter before the Commission.158

In house counsel, union representatives and employer association representatives

The following representatives are not required to seek permission to appear:

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

152 Fair Work Act s.596(1).
154 ibid.
156 Fair Work Commission Rules 2013 r 11.
157 Fair Work Act s.12.
158 Fair Work Act s.12.
Part 7—Commission process—Hearings and conferences

Procedural issues

In these circumstances a person is not considered to be represented by a lawyer or paid agent.\(^{160}\)

**Others**

In circumstances where the person seeking to represent a person or organisation is **not** a lawyer or paid agent as defined in the Fair Work Act, permission to represent is not required.\(^{161}\)

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**Links to form**

**Form F53**—Notice of representative commencing to act:


All forms available on the Commission’s ‘Forms’ webpage:

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**Links to form**

**Form F54**—Notice of representative ceasing to act:


All forms available on the Commission’s ‘Forms’ webpage:

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**What is representation?**

A Full Bench of the Commission found that the term ‘representation’ is concerned with more than just advocacy at a hearing. A lawyer can be said to ‘represent’ their client when they engage in a wide range of activities connected with litigation, not just advocacy.\(^{162}\)

Rule 15 of the Australian Bar Association’s Barristers’ Conduct Rules\(^{163}\), describes the work of a barrister in the following way:

’15. Barristers’ work consists of:

(a) appearing as an advocate;

(b) preparing to appear as an advocate;

(c) negotiating for a client with an opponent to compromise a case;\(^{163}\)

159 Fair Work Act s.596(4).

160 Fair Work Act s.596(4).


(d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
(e) giving legal advice;
(f) preparing or advising on documents to be used by a client or by others in relation to the client’s case or other affairs;
(g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
(h) such other work as is from time to time commonly carried out by barristers.’

This work is no different with respect to a solicitor. Outside of legal representation, a paid agent involved in proceedings before the Commission will typically engage in non-legal equivalents of most of the above categories of work, and would be regarded as ‘representing’ their client in doing so.164

Section 596(1) and (2) refer to a person being represented ‘in a matter’ before the Commission. The word ‘matter’ describes more than just a hearing, in a legal context it usually describes the whole situation that is brought before a court or tribunal.165

Section 596(1) also expressly provides that representation in a matter includes ‘making an application or submission to the FWC on behalf of the person’.166

Exceptions—Representation

Rule 12(1) provides that a person may be represented in a matter before the Commission by a lawyer or paid agent for the following purposes (without seeking the permission of the Commission):

- preparing a written application or written submission for the person in relation to the matter
- lodging a written application, written submission or other document with the Commission, on behalf of the person in relation to the matter
- corresponding with the Commission on behalf of the person in relation to the matter, or
- participating in a conciliation or mediation process conducted by a member of the staff of the Commission, whether or not under delegation, in relation to an application for an order to stop bullying.167

However, this permission to be represented for the above purposes is subject to any contrary order made by the Commission.168

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165 Ibid., at para. 36.
166 Ibid., at para. 37.
167 Fair Work Commission Rules 2013 r 12(1).
168 Fair Work Commission Rules 2013 r 12(2).
When will permission be granted?

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

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

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

In practice the Commission is likely to grant permission in formal proceedings, however, where a party raises an objection, the discretion afforded to the Commission will be exercised on the facts and circumstances of the particular case.

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

The ‘normal position’ of the Fair Work Act is that ‘a party “in a matter before FWA” must normally appear on his own behalf. That normal position may only be departed from where an application for permission has been made and resolved in accordance with law ...’

A party might be required to represent themselves if the Commission is not satisfied permission should be granted for a lawyer or paid agent to appear for a client on the grounds of complexity, effectiveness or fairness.

If a party has not made submissions objecting to representation, it is still the case that representation requires permission of the Commission.

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

Permission to be represented has been granted where the employer’s Human Resources Manager was a witness for the employer. The Commission was satisfied it is reasonable for the employer not to want the Human Resources Manager to conduct the case as well as be a witness.

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169 Fair Work Act s.596(2).
172 Warrell v Fair Work Australia [2013] FCA 291 (4 April 2013) at para. 27 (Note: Title corrected from Warrell v Walton, Flick J, 10 April 2013).
173 ibid., at para. 24.
175 Blair v Kim Bainbridge Legal Service Pty Ltd T/A Garden & Green [2011] FWA 2720 (Gooley C, 10 May 2011) at para. 6.
176 O'Grady v Royal Flying Doctor Service of Australia (South Eastern Section) [2010] FWA 1143 (Leary DP, 17 February 2010) at para. 31.
Complexity

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

Where a party raises a jurisdictional issue, permission for representation will usually be granted.  

Jurisdictional issues by their nature are often complex and may require expertise in case law.  

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

However, even if there is a jurisdictional issue which needs to be resolved, permission may still be refused or limited to specific parts of a hearing.

Effectiveness

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

The Commission will generally grant permission for representation where the person is unable to represent themselves in a manner that creates a ‘striking impression’, or which has an ‘impressive’ effect or which is ‘powerful in effect’.  

However, what might be of ‘striking impression’ or ‘impressive’ or ‘powerful in effect’ is a matter of assessment by the Commission.

Example

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


**Fairness**

Permission may be granted if it would be unfair to refuse permission taking into account the fairness between the parties to the matter.\(^{190}\)

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### Example

*A circumstance where a person may be given permission to be represented is where one party to the matter is a small business with no human resources staff and the other is represented by a union.*\(^{191}\)

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**Case example:** **Permission granted for representation—Complexity**


**Facts**

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

**Outcome**

The Commission was satisfied that there was a level of complexity in the matter, given that the range of issues raised by the applicant would ‘require a level of unpacking of a number of incidents and assimilation of asserted facts and supporting evidence’. The Commission granted the employer permission to be represented, however noted that this was not a jurisdictional objection in the strictest sense.

**Relevance**

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

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\(^{190}\) Fair Work Act s.596(2)(c).

\(^{191}\) Fair Work Act, Note (b) to s.596(2).
Case example:  **Permission granted for representation—Complexity**

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

**Facts**

The employer objected to the employee’s application for an unfair dismissal remedy on the basis that the dismissal was a case of genuine redundancy. The employer sought permission to be legally represented. The employee opposed legal representation.

**Outcome**

It was held that the determination of jurisdiction was a legal issue. Legal representation would allow the matter to be dealt with more efficiently. Permission for legal representation was granted to both parties while dealing with the issue of jurisdiction.

**Relevance**

There were complex issues to be considered and the employer was a not for profit organisation without a person experienced in workplace relations advocacy. This was not a ‘simple factual contest’ but a contest about jurisdiction which might raise issues not previously considered.

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Case example:  **Permission granted for representation—Complexity—Fairness**

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

**Facts**

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

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

**Outcome**

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

**Relevance**

The union advocate had over 20 years’ experience across a wide range of industrial issues, including unfair dismissal proceedings within the coal industry. The Commission found it would not have been fair for the employer to be unrepresented given the complexity of the matter.
Case example: Permission granted for representation—Complexity—Fairness

**Wesslink v Walker Australia Pty Ltd T/as Tenneco** [2011] FWA 2267 (Hampton C, 21 April 2011).

**Facts**

The employee was dismissed on the grounds of serious misconduct while under a modified work regime pursuant to workers’ compensation legislation. The employee was represented by the union who ‘vigorously’ opposed permission for the employer to be legally represented.

**Outcome**

The Commission held that, among other factors, the matter had some complexity given the interaction with the workers’ compensation legislation, and that the applicant was represented by an experienced and legally qualified union advocate. Permission for legal representation was granted.

**Relevance**

Having regard to the complexity of the case, and fairness in terms of effective representation and the comparative level of representation, it was appropriate for the employer to be represented in this matter.

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Case example: Permission granted for representation—Complexity


**Facts**

The employee appealed against the decision in her unfair dismissal application. The employer had been refused permission to be represented in the unfair dismissal proceedings. On the second day of hearings the applicant sought representation, which was not opposed by the employer, and permission to appear was granted.

The employer sought permission to be represented by a legal representative in the appeal proceedings. The employee objected to the employer having legal representation.

**Outcome**

The Full Bench concluded that the appeal proceedings were likely to involve a greater degree of complexity than proceedings at first instance. Permitting representation would enable the matter to be dealt with more efficiently. Permission for the employer to have legal representation was granted.

**Relevance**

In light of the issues involved in the appeal it was considered that it would be unfair not to allow the parties to be represented if they so wish on the ground that they are unable to represent themselves effectively.
Case example: **Permission granted for representation—Efficiency**


**Facts**
The employee opposed permission for the employer to be legally represented because the employee was unrepresented and the employer could be represented by its Human Resources Officer. However, the employee had obtained a restraining order against the Human Resources Officer, and the human resources officer was going to be a witness in the matter. The employer had no-one else capable of presenting its case.

The employee was represented by a very experienced HR professional experienced in advocacy who had represented the applicant in other matters.

**Outcome**
Permission for legal representation was granted to both parties. The Commission was satisfied that the respondent did not have a person able to present its case, and even if the Human Resources Officer was capable, it would be difficult for her to be both advocate and witness.

**Relevance**
In this matter the employee did not wish to participate in a conciliation conference and wished to proceed directly to hearing, accordingly the hearing would be the first time any issues related to the substantive claim would be addressed. Legal representation would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter.

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Case example: **Permission granted for representation—Fairness**


**Facts**
The employer was a medium-size business with some specialist human resources staff, but with no-one of experience as an industrial advocate. The applicant was represented by a legally qualified, skilled and experienced advocate from a union.

**Outcome**
The Commission was not convinced that the matter was genuinely of sufficient complexity to require assistance by legal representatives, however permission was granted for the employer to be represented by a lawyer or paid agent on the basis of fairness. The Commission considered that unfairness would result from what, at least in perception, would be the more advantageous representation of the applicant as opposed to that to which the employer had been restricted, being an unqualified and presumably inexperienced human resources or other manager.

**Relevance**
Although the matter was not a complex one, unfairness would arise from an imbalance of representation if permission for legal representation was not granted.
Case example: Permission NOT granted for representation—Employer of a considerable size with adequate HR support


Facts

This matter involved an anti-bullying application against two persons named who were alleged to have bullied the applicant at work. Both the applicant and the two persons named are employed by the same employer. The employer advised that it was representing itself and the two persons named in the matter.

After the Commission dismissed an application by the employer to dismiss anti-bullying matter, the employer advised it was intending to seek leave to be legally represented.

The applicant submitted that she was relying on the support of her daughter, who, like herself, did not have any legal, human resources, industrial relations or university qualifications. She submitted she would be at a significant disadvantage if legal representation was granted for the employer and the two persons named.

Outcome

The employer appeared in the matter and relied on its internal human resources staff, utilising their expertise to support the two persons named in refuting the applicant’s allegations. The Commission concluded that it would not be unfair to refuse the application by the employer and the two persons named to be represented, taking into account fairness between the parties. The application for legal representation was refused.

Relevance

The persons named in this matter received the support of the employer’s human resources staff and as a result were at somewhat of an advantage over the applicant. To grant the employer and the persons named legal representation would lead to a further imbalance between the parties.
Case example: **Permission NOT granted for representation—Employer a member of employer association**


**Facts**

The employer in this matter was a large employer who was a member of an employer association. They sought to be represented by a private lawyer (not the employer association). The employee was self-represented.

**Outcome**

The Commission found that there were no particularly complex jurisdictional or substantive issues. Effective representation from experience legally qualified persons was available from within the employer’s employer association. Permission was refused.

**Relevance**

Having regard to the relative capacity of the employee, who was employed as a zookeeper, and the employer, which was more significantly resourced and who was a member of an employer association, the Commission concluded that there would be no unfairness if the employer was not granted permission to be represented by a lawyer.

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Case example: **Permission NOT granted for representation—Complexity**


**Facts**

The employee was represented by his union. The employee opposed the employer being represented by a lawyer. The employer argued that the complexity of the issues meant that the matter would be more efficiently dealt with by a lawyer.

**Outcome**

The Commission was of the opinion that this was not a matter which required forensic cross-examination or was of a complex nature, so permission for the employer to be legally represented was refused.

**Relevance**

The Commission determined that, because the employee admitted to engaging in the behaviour which led to his dismissal, the matter was a relatively simple factual contest.
Case example: Permission NOT granted for representation—Complexity

*Hamilton v Carter Holt Harvey Wood Products Australia Pty Ltd* [2012] FWA 5219 (Bartel DP, 19 June 2012).


**Facts**

The employee in this matter was represented by his union. The employer sought to be represented by a lawyer. The employer was a large employer with in-house counsel. The employer argued that their in-house counsel was inexperienced in arbitrations of unfair dismissal matters compared to the applicant’s union advocate.

**Outcome**

It was held that the matter, while not straightforward, did not involve complex jurisdictional issues or technicalities, and that no unfairness would arise if permission was refused. The Commission was not persuaded that the matter was sufficiently complex to warrant outside legal representation. Permission for legal representation was refused.

**Relevance**

The Commission found that representation by in-house lawyers, experienced or otherwise would enable the matter to be dealt with efficiently, especially given the size and resources available to the respondent. The Commission was satisfied that the respondent would be able to represent itself effectively.

Case example: Permission NOT granted for representation—Complexity

*Bowley v Trimatic Management Services Pty Ltd T/A TSA Telco Group* [2013] FWC 1320 (Steel C, 1 March 2013).

**Facts**

The employee in this matter was self-represented. The employer sought to be represented by a lawyer. The employee opposed permission for the employer to be legally represented.

**Outcome**

It was found that the matter appeared to be a performance-based termination and did not involve any complex facts, and that the employer company, with 1180 employees and a dedicated human resources department, did have the ability to represent itself. Permission for legal representation was refused.

**Relevance**

The Commission could not identify an unfairness to the employer in not being represented, though it may have been inconvenient to them and not their preference. In determining permission the Commission must have regard to considerations of efficiency and fairness.
Case example: Permission NOT granted for representation—Complexity

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


Facts

The employee appealed the decision granting permission for the employer to be represented by a lawyer or paid agent.

The employer had sought permission to be represented on the basis that the employee had made the matter more complex by his own actions in supplying volumes of documents and multiple legal issues that did not go to the central question in an unfair dismissal hearing. The employee objected to permission being granted on the basis that the issues raised were not unduly complex.

Outcome

Permission to appeal was granted and the appeal was upheld in full. The Full Bench found that the matter could not be characterised as complex as Commission Members routinely deal with applications that are ‘voluminous in size and riddled with materials extraneous to the application. This commonplace occurrence does not constitute legal or factual complexity’.

Relevance

In this matter the onus was on the employer to show that it was unable to represent itself. There was no evidence before the Commission that the well-resourced employer enterprise was unable to represent itself in the substantive proceedings.
Part 8—Evidence

Procedural issues

See Fair Work Act ss. 590 and 591

Section 590 of the Fair Work Act 2009 (the Fair Work Act) outlines the ways in which the Fair Work Commission (the Commission) may inform itself including by:

- requiring a person to attend the Commission
- requiring written and oral submissions
- requiring a person to provide copies of documents
- taking evidence under oath or affirmation
- conducting inquiries or undertaking research, or
- holding a conference or a hearing.

Section 591 of the Fair Work Act states that the Commission is not bound by the rules of evidence and procedure (whether or not the Commission holds a hearing).

Although the Commission is not bound by the rules of evidence, they are relevant and cannot be ignored where it would cause unfairness between the parties.\(^{192}\)

The rules of evidence ‘provide general guidance as to the manner in which the Commission chooses to inform itself’.\(^{193}\)

Commission members are expected to act judicially and in accordance with ‘notions of procedural fairness and impartiality’.\(^{194}\)

Commission members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.\(^{195}\)

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\(^{192}\) Re Construction, Forestry, Mining and Energy Union PR935310 (AIRC, Ross VP, 25 July 2003) at para. 36.


\(^{195}\) ibid.
Case example: Following rules of evidence—Employer used illegally obtained evidence for allegation of theft

*Walker v Mittagong Sands Pty Ltd T/A Cowra Quartz* [2010] FWA 9440 (Thatcher C, 8 December 2010).

**Facts**

The employee was accused of stealing oil from the employer. After becoming suspicious that the theft had occurred, the employer searched for and took samples of oil from the employee’s vehicle without the employee’s authority in order to have it tested.

**Outcome**

It was held that the evidence of the sample was unlawfully obtained and that the evidence should not be admitted.

**Relevance**

Privacy in the workplace is an important issue. Security checks of bags, parcels, lockers and the like (including containers in personal vehicles) should not take place unless the employee concerned is present, or alternatively, that the employee has given permission for such a search to take place in his or her absence. An employee should be able to have a union delegate or another nominated employee of the employee’s choice present during the search.
Self incrimination

A person may be required by the Commission to attend before the Commission and answer a question or produce specific documents. Where a person refuses or fails to answer the question or produce the documents they commit an offence with a penalty of imprisonment.196

Where a person has a reasonable excuse not to answer the question or provide the document, they are not required to do so.197

A person, including a witness, has a privilege against self incrimination and this could provide a reasonable excuse. That is, a person is not required to answer a question or provide a document if they believe that the evidence they will provide will tend to incriminate them. This means that if they believe on reasonable grounds that their evidence will tend to prove that they have committed an offence, they are not required to answer that question where there is a ‘real and appreciable danger of conviction’.198 The same may apply in respect to a risk of exposure to a civil penalty.199 The Commission will not draw an adverse inference from the failure to provide that evidence. This means that the Commission cannot assume that the witness did not provide the evidence or the document solely on the basis that it would have harmed their case before the Commission.

However, the Commission will need to determine the application based upon the evidence that is before it. This means that a determination will be made in the matter without the evidence the witness would otherwise be providing if they had not relied on the privilege against self incrimination.

Whether a matter before the Commission will be adjourned or otherwise delayed because one or more witnesses may assert a privilege against self incrimination was considered by a Full Bench of the Commission in Visy Board Pty Ltd T/A Visy Board v Rustemovski and Ahmadyar.200 The Full Bench confirmed that McMahon v Gould201 sets down non-exhaustive guidelines and that it is necessary for the Commission to determine what justice requires in the circumstances.202

A corporate entity does not have a privilege against self incrimination.

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196 Fair Work Act s.677(3).
197 Fair Work Act s.677(4).
Part 9—What are the outcomes?

Orders to stop bullying

See Fair Work Act s.789FF

The Fair Work Commission (the Commission) can make any order it considers appropriate (other than an order requiring a financial payment) 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 for an order to stop bullying and the Commission must be satisfied that:

- the worker has been bullied at work by an individual or group of individuals, and
- there is a risk that the worker will continue to be bullied at work by the individual or group.203

Where a finding of bullying conduct is made and there is some future risk, preventative orders would be expected to follow. Such orders would, in appropriate cases, establish the appropriate basis for future mutually safe and constructive relationships.204

Who can an order be made against?

Section 789FF of the Fair Work Act 2009 (the Fair Work Act) does not expressly state the entities that can be included in any order. However, it is likely that the provision empowers the Commission to make orders directed to applicants, the individuals whose behaviour has led to the application and their respective employer(s)/principal(s).

The orders are directed at the conduct leading to the finding of bullying behaviour and this would mean that the applicant and the individuals concerned could be subject to such an order.

The anti-bullying measures are primarily underpinned by the corporations power (s.789FD(3)). On the basis of the Work Choices Case205 and previous case law on the corporations power, that power will support regulation of the activities of a corporation and the imposition of obligations upon it, regulation of the conduct of its employees and regulation of others whose conduct is capable of affecting its activities.206

The broad scope of the orders is also supported by the fact that a finding of risk to the applicant’s health and safety is required in any finding of bullying and the Explanatory Memorandum clearly contemplates orders being made against the relevant employer/principal(s).

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

203 Fair Work Act s.789FF(1).
204 Re Ms LP [2016] FWC 763 (Hampton C, 12 February 2016) at para. 50.
206 ibid., at para. 178.
What can be ordered

The power of the Commission 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.207

The power to make orders is relatively broad and the Commission can made any orders that it considers appropriate (other than an order requiring the payment of a pecuniary amount) to prevent the workers from being bullied. In circumstances where an applicant worker is suffering from a medical condition that prevents a return to the workplace without some appropriate modifications, the Commission would consider including such measures within an order.208

The range of orders that the Commission may make (as contemplated by the Explanatory Memorandum) include orders requiring:

- the individuals or group to stop the specified behaviour
- regular monitoring of behaviours by an employer
- compliance with an employer’s anti-bullying policy
- the provision of information and additional support and training to workers, and
- a review of the employer’s workplace bullying policy.209

Orders will not necessarily be limited or apply only to the employer, but could also apply to others involved. Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to work.210

Orders that might be considered by the Commission in an anti-bullying application could deal with specific future conduct of relevant individuals, including the applicant. In addition, orders might be considered that go to the broader conduct within, and culture of, a workplace. These could include the establishment and implementation of appropriate anti-bullying policies, procedures and training, which would include confirming appropriate future conduct and behaviour.211

The Commission is given wide powers to make preventative orders it considers appropriate. These powers must be informed by, but not necessarily limited to, the prior unreasonable conduct as found. However, any orders must be directed towards the prevention of the worker being bullied at work in the future by the individual or group concerned, be based upon appropriate findings, and have regard to the considerations established by s.789FF(2) of the Fair Work Act.212

Matters dealt with in orders of the Commission have included:

- orders that individual parties:
  - not make contact with each other
  - only make contact via email during specific times
  - not attend certain premises

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207 Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 120.
209 Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 121.
210 Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 119.
211 Re Ms LP [2015] FWC 6602 (Hampton C, 4 November 2015) at para. 194; see also CF and NW [2015] FWC 5272 (Hampton C, 5 August 2015) at paras 31–34.
Part 9—What are the outcomes?

Orders to stop bullying

- not denigrate or humiliate one another and behave in a way that is reasonable and professional
- not deliberately or unreasonably delay the performance of work
- maintain the confidentiality of the parties and their association with the terms of the Order, or
- refrain from making written and/or oral statements to each other or others that are abusive, offensive, or disparaging;

- orders for companies:
  - to provide all staff with anti-bullying training
  - to conduct training for all employees on appropriate standards of behaviour in the workplace, including a recommendation that the training be conducted by, for example, the Anti-Discrimination Commission
  - to ensure they have in place updated anti-bullying policies and complaints handling procedures
  - to commission specific training for management personnel who will be investigating complaints about workplace bullying
  - to implement, and actively monitor, the effectiveness of control measures identified in risk assessments, or
  - to arrange for a Work Safe inspector to attend meetings with parties.  

What cannot be ordered

The Commission cannot order reinstatement or the payment of compensation or a pecuniary amount.  

An order for payment of a pecuniary amount may be one that requires a financial sum to be paid by one party to another. This can include fines and compensation.

If the worker who makes the application is no longer working at the work site where the bullying conduct occurred, and there is no longer a risk that the worker who made the application will be bullied, the Commission will not be able to make an order under the anti-bullying provisions.

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213 For examples see Applicant v Company A Pty Ltd; Company B Pty Ltd; and Third Respondent PR555521 (Williams C, 15 September 2014); CF and NW PR569997 (Hampton C, 30 July 2015); Roberts v VIEW Launceston Pty Ltd as trustee for the VIEW Launceston Unit Trust T/A View Launceston and Others PR573139 (Wells DP, 23 October 2015); Bowker and Others v DP World Melbourne Limited T/A DP World and Others PR574247 (Gostencnik DP, 26 November 2015).

214 Fair Work Act s.789FF(1).
Considerations

When deciding what should be contained in an order to prevent further bullying behaviour, the Commission must, to the extent that it is aware, take into account:

- any outcomes arising from an investigation into the matter by another person or body (whether that investigation is complete or not)
- any procedures available to the worker to resolve grievances or disputes, and any outcomes arising from those procedures, and
- any matters that the Commission considers relevant.215

By taking into account these factors, the Commission can seek to ensure consistency with any action being taken by other bodies (such as WHS state regulators).216

Outcomes arising from investigations by another person or body

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

A worker who has made an application to the Commission for an order to stop bullying can also seek intervention by a WHS regulator under the WHS Act or the corresponding state or territory work health and safety laws.217

WHS regulators may respond to complaints in a number of ways consistent with their own internal policies. Regulators may send inspectors to workplaces to investigate incidents, issuing prohibition or improvement notices, seeking enforceable undertakings or prosecuting alleged offences against work health and safety laws.

Workplace bullying which involves criminal behaviour may also be the subject of a complaint to and investigation by the police.

Any outcomes arising from an investigation by such a person or body, that the Commission is aware of, must be taken into account by the Commission when making orders.218

215 Fair Work Act s.789FF(2).
216 Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 123.
217 Fair Work Act s.789FH.
218 Fair Work Act s.789FF(2)(a).
Case example: Outcome arising from an investigation by another person or body considered

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

Facts

The applicant managed a team of employees. It was alleged that two of the employees, who reported to the applicant, started behaving unreasonably towards the applicant by harassing her on a daily basis and spreading rumours about her in the workplace.

One of the employees made bullying allegations against the applicant (immediately prior to the applicant lodging this application). An investigation by a legal firm was arranged by the employer which found that the allegations against the applicant were justified in part, whereas the complaints by the applicant were not substantiated.

The applicant did not rely upon the legal firm’s investigation as evidence of bullying conduct in its own right, but as support for her proposition that there was a risk of ongoing bullying conduct; principally on the basis that no action was being proposed in relation to the employee.

Outcome

The Commission noted that, although the results of the investigation have been provided to the applicant and the Commission, the full report and evidence about how the investigation was conducted were not. The employer relied upon legal professional privilege in that regard. The Commission placed no weight upon the outcomes of the investigation as the apparent findings were at odds with certain findings made by the Commission from the evidence in relation to the applicant’s motives.

The Commission found that some of the behaviour was bordering upon unreasonable but not enough to fall within the scope of bullying behaviour as defined. As a result the Commission was not satisfied that the applicant had been bullied at work.

Relevance

The Commission found that the engagement of an external person to investigate both competing allegations was not unreasonable. There was also nothing unreasonable about the apparent general approach to the investigation adopted by the legal firm.
Procedures available to the worker to resolve grievances or disputes

This refers to any internal complaint mechanisms that may be available to the worker to resolve their grievance at the workplace level, without the Commission’s involvement; such as under a work health and safety law or an enterprise agreement or award.

Some workplaces will have policies which contain specific provisions on workplace bullying, such as how it is to be prevented and what action should be taken if it occurs. These may be contained within an enterprise agreement or a code of conduct.

The availability of alternative procedures does not necessarily mean that an application for orders to stop bullying cannot proceed. The new provisions were introduced to address the difficulty many workers face in trying to find a quick way to stop bullying so they do not suffer further harm or injury. The individual right of recourse has been provided for persons who are bullied at work to help resolve the matter quickly and inexpensively.²¹⁹

Any matters the Commission considers relevant

If there are any other matters that the Commission considers to be relevant to the application, these must also be taken into account. This allows for other issues not specifically contemplated by the legislature to be taken into account where necessary, even though they don’t fall into one of the specific categories listed above.

This may include factors including:

- the applicant being on leave from the workplace
- that the individual(s) involved in the bullying behaviour are no longer in the workplace
- that the bullying behaviour occurred or was otherwise set in a particular earlier context that no longer operates
- positive initiatives put in place by the employer such as policies and procedures which have the effect of reducing whatever risk is otherwise present, or
- any other developments in the workplace.²²⁰

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²¹⁹ Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 at para. 88.
Considerations

Case example: **Orders NOT made—Positive steps by employer**

*Re Ms LP* [2015] FWC 6602 (Hampton C, 4 November 2015).

*Re Ms LP* [2016] FWC 763 (Hampton C, 12 February 2016).

**Facts**

The applicant was employed as a Food and Beverage Attendant at a family owned restaurant. She sought orders to stop certain alleged conduct by the group of individuals including orders for the employer to conduct management courses to be completed by the supervisors at the restaurant and for all staff to attend training in relation to bullying conduct.

The employer contended that the alleged conduct was not bullying but rather was reasonable management action carried out in a reasonable manner. The employer further contended that the Commission had no jurisdiction to consider the conduct of the former Head Chef and former Supervisor as they ceased working for the employer and there was no risk that the applicant would continue to be bullied by these individuals at work.

The employer submitted that, since some of the incidents had occurred, it had worked to develop a comprehensive set of policies about workplace bullying and appropriate workplace behaviour, and provided training in relation to these matters.

**Outcome**

The Commission was satisfied, on fine balance, that there was sufficient relevant unreasonable behaviour towards the applicant and/or the group of workers to which she belonged whilst at work to constitute bullying. However, much of that behaviour occurred in a particular context that had since changed and this would have an impact upon the appropriateness of any orders that might be considered in this matter.

The Commission was not persuaded that it could, or should, make orders in this matter, and sought further submissions from the parties on this issue.

In the subsequent decision the Commission determined that, given the history of the matter, the extent of positive measures that the employer has subsequently put into place as a result of the applications, and an understanding of the workplace and the relationships that had developed from hearing this matter, the Commission did not consider that the making of orders at this time would be conducive to the constructive resumption of working relationships. No orders were made.

**Relevance**

Where a finding of bullying conduct is made and there is some future risk, preventative orders would be expected to follow. Such orders would establish the appropriate basis for future mutually safe and constructive relationships.

In this case the Commission determined that making orders may not be beneficial in this situation, given the history of this particular matter and the extent of positive measures that the employer had subsequently put into place as a result of the applications.
When can the Commission dismiss an application?

General power to dismiss

The Commission can dismiss an application under s.587(1) on its own motion or upon application.221

The Commission can dismiss an application on the following grounds:

• the application is not made in accordance with the Act, or
• the application is frivolous or vexatious, or
• the application has no reasonable prospects of success.222

Frivolous or vexatious

An application will be considered frivolous or vexatious where the application:

• is so obviously untenable that it cannot possibly succeed
• is manifestly groundless
• is so manifestly faulty that it does not admit of argument
• discloses a case which the Commission is satisfied cannot succeed, or
• does not disclose a cause of action.223

No reasonable prospect of success

Generally, for an application to have no reasonable prospect of success, it must be manifestly untenable and groundless.224

The party raising the objection does not need to prove that the other party’s case is hopeless or unarguable.

The Commission must use a critical eye to identify whether the evidence of the party responding to the objection has sufficient quality or weight to succeed.

The party responding to the objection does not need to present their entire case, but must present a sufficient outline to enable the Commission to reach a preliminary view on the merits of their case.

The real question is not whether there is any issue that could arguably be heard, but whether there is any issue that should be permitted to be heard.225

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221 Fair Work Act s.587(3).
222 Fair Work Act s.587(1).
224 Wright v Australian Customs Services PR926115 (AIRCFB, Giudice J, Williams SDP, Foggo C, 23 December 2002) at para. 23.
An application can be dismissed on the basis that it has no reasonable prospects of success after the Commission has heard the applicant’s case but before the respondent has started to present its case. However, if a respondent applies at that point for the applicant’s case to be dismissed, it may be required to elect not to call any evidence.\footnote{226 \textit{Townsley v State of Victoria (Department of Education & Early Childhood Development) [2013] FWCFB 5834} (Hatcher VP, Hamilton DP, Wilson C, 20 September 2013) at paras 17–24.}

\begin{quote}
\textbf{Note:} The following case examples relating to the dismissal of applications on the basis that they were frivolous, vexatious and/or had no reasonable prospects of success are mainly unfair dismissal cases, with anti-bullying cases included where possible.
\end{quote}

\textbf{Case example: Application dismissed—Frivolous or vexatious}

\textit{West v Hi-Trans Express t/as NSW Logistics Pty Ltd} PR974807 (AIRC, Hamberger SDP, 4 December 2006).

\textbf{Facts}
The employee who made the application admitted to negligently driving a forklift into a building support column.

\textbf{Outcome}
The application was dismissed as being frivolous, vexatious or lacking in substance.

\textbf{Relevance}
The admissions of the applicant in this case meant that there was no real question to be determined by the Commission and as a result the application was dismissed.

\textbf{Case example: Application dismissed—Frivolous or vexatious}

\textit{Taminiau and Thomson v Austin Group Limited} PR974223 (AIRC, Harrison C, 5 October 2006).

\textbf{Facts}
The employees were dismissed for using their employer’s trademarks for an improper purpose.

\textbf{Outcome}
It was found that the employees’ actions in using the employer’s trademarks for improper potential gain was a clear breach of good faith, fiduciary duty and was an indication of a conflict of interest which could not have any place in a direct employment relationship. The applications were not arguable in fact or law. The applications were dismissed as being frivolous and vexatious.

\textbf{Relevance}
In the circumstances of this matter, particularly having regard to the allegations of the employer and the admissions of the employees, there was no real question to be determined in any prospective proceedings before the Commission.
Case example: **Application dismissed—No reasonable prospects of success**


**Facts**

An employee was dismissed for taking sick leave on New Year’s Eve. The employee supported his application for sick leave with a medical certificate. The employer refuted the assertion of genuine illness and provided a photograph from a Facebook page showing the employee participating in New Year’s Eve celebrations.

**Outcome**

It was found that the employee had failed to put any case to meet the assertion of misleading conduct, to explain the inconsistency of his actions, or to refute the evidence of the employer. The application was dismissed as one which had no reasonable prospect of success.

**Relevance**

It is important to be able to provide evidence to support a case before the Commission; without evidence the Commission cannot deal with the matter.

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Case example: **Application dismissed—No reasonable prospects of success**

**Applicant v Respondent** [2010] FWA 1765 (McCarthy SDP, 4 March 2010).

**Facts**

The applicant made an application for unfair dismissal after he was dismissed for sexual harassment and victimisation of other employees.

**Outcome**

The Commission found the applicant to be unconvincing in his complaints about the process and importantly unconvincing about his denial of or response to allegations about his conduct and behaviours with other employees. The applicant could provide no evidence of sufficient quality or weight to be able to succeed with his claim.

**Relevance**

It is important to be able to provide evidence to support a case before the Commission; without evidence the Commission cannot deal with the matter.
Case example: Application dismissed—No reasonable prospects of success

Shaw v Australia and New Zealand Banking Group Limited t/A ANZ Bank [2014] FWC 3408
(Gostencnik DP, 26 May 2014).

Facts

An application was made by Mr Mitchell Shaw under s.789FC of the Fair Work Act for an order to stop bullying. Before the matter could be heard, Mr Shaw was dismissed from his employment with ANZ.

ANZ applied pursuant to s.587(3) of the Fair Work Act for an order under s.587(1) dismissing Mr Shaw’s application because, since Mr Shaw’s dismissal, there ceased to be a risk that Mr Shaw would continue to be bullied at work by any individual or group.

Outcome

The Commission found that, as the employment relationship had ended, there was no power to make an order to stop bullying and, as a consequence, was satisfied that Mr Shaw’s application had no reasonable prospect of success. The application was dismissed.

Relevance

A key consideration for the making of an anti-bullying order is that there is a risk that the worker will continue to be bullied at work. Once the employee has been dismissed then there would not usually be a risk that the employee will continue to be bullied at work.
When can the Commission dismiss an application?

Case example: **Application dismissed—No reasonable prospects of success**


**Facts**

An application was made under s.789FC of the Fair Work Act for an order to stop bullying (the AB application) and an application for an alleged breach of the General Protections was made at the same time. The AB application contained a collection of documents to support the applicant’s case, including a termination letter from the employer.

The employer’s position regarding the AB application was that there was ‘no case to pursue’ since the applicant no longer worked for it. The employer sought that the AB application be dismissed.

Section 587 provides a discretion to dismiss an application. However the context of s.587 may differ depending on the time at which the question is asked such that, as circumstances change, an application which once had some reasonable prospect of success no longer has a reasonable prospect of success.

**Outcome**

The Commission found that there was no reasonable prospect of an order being made given the absence of a discernible future risk of relevant bullying conduct. This means that there was no reasonable prospect of success given the particular powers of the Commission to make Orders in this jurisdiction.

**Relevance**

A key consideration for the making of an anti-bullying order is that there is a risk that the worker will continue to be bullied at work. Once the employee has been dismissed then there would not usually be a risk that the employee will continue to be bullied at work.

Case example: **Application NOT dismissed—Frivolous or vexatious—Dispute over deed of release**

*Kalloor v SGS Australia Pty Ltd [2009] AIRC 682* (Harrison C, 10 July 2009).

**Facts**

The employee alleged he was coerced into signing a Deed of Settlement releasing the employer from any claims arising from his employment and dismissal. The employer denied the allegation and asserted that, contrary to being placed under duress, the employee freely negotiated a resignation package.

**Outcome**

The Commission found that there were major factual differences in the case and that evidence needed to be properly given and tested. The application was not dismissed and was listed for hearing.

**Relevance**

Parties have a right to be heard and the merits of an application for relief should be fully tested against a submission that the application is ‘frivolous, vexatious or lacking in substance’.
Part 9—What are the outcomes?
When can the Commission dismiss an application?

Case example: Application NOT dismissed—Frivolous, vexatious or lacking in substance—Facts in dispute

Perrella v ITW Australia Pty Ltd T/A Hobart Food Equipment Service and Sales [2009] AIRC 107
(Williams C, 3 February 2009).

Facts
The employee was dismissed for poor performance. There were fundamental disagreements between the parties on the facts of the matter.

Outcome
The employer made the motion to dismiss and therefore it was the employer who must prove to the Commission that the employee’s case was so untenable that it could not possibly succeed. The Commission was not able to decide which of the two conflicting versions was correct based on the parties written submissions alone. To resolve the conflicting views the Commission would need to have all the relevant witnesses called to give evidence under oath and be subject to cross-examination and to then hear argument from both parties regarding that evidence.

The Commission was not satisfied that the application was frivolous, vexatious or lacking in substance such that it should be dismissed without any further hearing.

Relevance
The respondent could not satisfy the Commission that the application was frivolous or vexatious or lacking in substance, as a result the matter was listed for hearing so that the evidence in the matter could be heard.

Defence, Security and Australian Federal Police (AFP) Operations

The Commission may dismiss an application for an order to stop bullying if the Commission considers that the application might involve matters that relate to:

- Australia’s defence
- Australia’s national security, or
- An existing or future covert operation, or international operation; of the Australian Federal Police (AFP). 227

A covert operation is a ‘function’ or ‘service’ of the AFP 228 where knowledge of the operation by an unauthorised person may:

- reduce the effectiveness of the performance of the function or service, or
- expose a person to the danger of physical harm or death arising from the actions of another person’. 229

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227 Fair Work Act s.789FE(2).
228 Australian Federal Police Act 1979 (Cth) s.8.
229 WHS Act s.12E(2).
A covert operation might, for example, include an undercover operation to identify those involved in drug trafficking, but would not include general duties policing.230

An international operation is an ‘operation to maintain order in a foreign country’ where:

- it would not be reasonably practicable to eliminate risks to the health and safety of the AFP appointee involved in the operation because of the environment in which the operation is undertaken, and
- the Commissioner of the AFP has taken all steps reasonably practicable to minimise any risks to the health and safety of the AFP appointee.231

Contravening an order of the Commission

A person to whom an order to stop bullying applies must not contravene a term of the order.232

The requirement to abide by an order to stop bullying is a civil remedy provision.233

A civil remedy provision is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

An application regarding a breach of a civil remedy provision is made to the Federal Court, the Federal Circuit Court or an eligible State or Territory court. This application may be made by the person affected by the contravention, an industrial association or a Fair Work inspector.234 To seek the assistance of a Fair Work inspector in relation to the enforcement of an order, a party should contact the Fair Work Ombudsman.

An application regarding a breach of a civil remedy provision must be made within six years of the alleged contravention.235

Related information

- Role of the Court

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230 Note to WHS Act s.8.
231 WHS Act s.12E(2).
232 Fair Work Act s.789FG.
233 Fair Work Act, s.539(1) (see item 38 of the table at s.539(2)) .
234 Fair Work Act s.539(2).
235 Fair Work Act s.544.
Part 10—Associated applications

Costs

See Fair Work Act s.611

People who incur legal costs in a matter before the Fair Work Commission (the Commission) generally pay their own costs.\(^{236}\)

The Commission has the discretion to order one party to pay the other party’s legal costs.\(^{237}\)

This is called a ‘costs order’ and it will only be granted in certain situations.

What are costs?

Costs are the amounts a party has paid to a lawyer or paid agent for advice and representation in a matter before a court or tribunal.

If a party is ordered to pay another party’s legal costs it will not usually be for the whole amount of legal costs incurred.

The Commission may order that only a proportion of the costs be paid. Costs may be ordered either on a party-party basis or on an indemnity basis.

Party–party costs

Party–party costs are the legal costs that are deemed necessary and reasonable.\(^{238}\)

The Commission will look at whether the legal work done was necessary and will decide what a fair and reasonable amount is for that work.\(^{239}\)

Indemnity costs

Indemnity costs are also known as solicitor–client costs.

Indemnity costs are all costs including fees, charges, disbursements, expenses and remuneration as long as they have not been unreasonably incurred.\(^{240}\)

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

They may be ordered when there has been an element of misconduct or delinquency on the part of the party being ordered to pay costs.\(^{241}\)

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236 Fair Work Act s.611(1).
237 Fair Work Act s.611(2).
239 ibid.
Party–party costs are the costs that one side pays to the other side in legal proceedings. They are the result of the Commission ordering that one party pay costs to the other party.

Indemnity costs are the costs that you pay to your solicitor for the work that they perform for your matter. The basis of these costs is a costs agreement between you and your solicitor.

Applying for costs

An application for costs must be made within 14 days after the Commission finishes dealing with the dispute. 242

What costs may be recovered?

The Fair Work Regulations include a ‘schedule of costs’ which sets out appropriate rates for common legal services. The schedule provides the Commission with guidance when exercising its jurisdiction to make an order for costs. 243

The Commission is not limited to the items in the schedule of costs, but cannot exceed the rates or amounts in the schedule if an item is relevant to the matter. 244

When are costs ordered?

See Fair Work Act s.611

Section 611 of the Fair Work Act 2009 (the Fair Work Act) sets out the general provision for when the Commission may order costs. The Commission may order a person to pay the other party’s costs if it is satisfied:

- that the person’s application or response to an application was made vexatiously or without reasonable cause, or
- it should have been reasonably apparent that the person’s application or response to an application had no reasonable prospect of success.

The power to award costs is discretionary. It is a two stage process:

- decide whether there is power to award costs, and
- if there is power, consider whether the discretion to award costs is appropriate. 245

242 Fair Work Act s.377.
243 Fair Work Regulations reg 3.04; sch 3.1.
244 Fair Work Regulations reg 3.04; sch 3.1.
Vexatiously

Vexatious means that:

- the main purpose of an application (or response) is to harass, annoy or embarrass the other party,\(^ {246} \) or
- there is another purpose for the action other than the settlement of the issues arising in the application (or response).\(^ {247} \)

Without reasonable cause

The test for ‘without reasonable cause’ is that the application (or response):

- is ‘so obviously untenable that it cannot possibly succeed’
- is ‘manifestly groundless’
- is ‘so manifestly faulty that it does not admit of argument’
- ‘discloses a case which the Court is satisfied cannot succeed’, or
- ‘under no possibility can there be a good cause of action’.\(^ {248} \)

The Commission may also consider whether, at the time the application (or response) was made, there was a ‘substantial prospect of success.’\(^ {249} \) It is inappropriate to find that an application (or response) was without reasonable cause if success depends on the resolution of an arguable point of law.\(^ {250} \)

An application (or response) is not without reasonable cause just because the court rejects a person’s arguments.\(^ {251} \)

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\(^ {247} \) ibid.


\(^ {250} \) ibid.

No reasonable prospect of success

Whether it should have been reasonably apparent that an application (or response) had no reasonable prospect of success is an objective test.\textsuperscript{252}

A finding that an application (or response) has no reasonable prospect of success should be reached with extreme caution and should only be reached when an application (or response) is ‘manifestly untenable or groundless’.\textsuperscript{253}

\textbf{An objective test} considers the view of a reasonable person. In this case it looks at whether it would have been apparent to a reasonable person that an application or response had no reasonable prospect of success. This is the appropriate test.

\textbf{A subjective test} would look at the view of the person themselves. A subjective test would look at whether it would be reasonably apparent to the person that their application or response had no reasonable prospect of success. This is not the appropriate test as the person has a vested interest in the matter being decided in their favour, which can influence how the person will look at the issues.

\textsuperscript{252} \textit{Baker v Salver Resources Pty Ltd} \cite{Baker Salver Resources Pty Ltd} [2012] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing \textit{Wodonga Rural City Council v Lewis} PR956243 (AIRCFB, Watson SDP, Lloyd SDP, Gay C, 4 March 2005) at para. 6, [(2005) 142 IR 188).

\textsuperscript{253} \textit{Baker v Salver Resources Pty Ltd} \cite{Baker Salver Resources Pty Ltd} [2012] FWAFB 4014 (Watson SDP, Drake SDP, Harrison C, 27 June 2011) at para. 10; citing \textit{Deane v Paper Australia Pty Ltd} PR932454 (AIRCFB, Giudice J, Williams SDP, Simmonds C, 6 June 2003) at para. 7.
Case example: **Costs ordered—Vindictive and frivolous**

**Hill v L E Stewart Investments Pty Ltd T/A Southern Highlands Taxis and Coaches and Others**  


**Facts**

An application was made by Mr Paul Hill under s.789FC(1) of the Fair Work Act for an order to stop bullying. This application was dismissed on the basis of two findings: firstly, that Mr Hill had failed to prosecute his application since 19 June 2014, and secondly, that Mr Hill’s application had no reasonable prospect of success. At the hearing of Mr Hill’s anti-bullying application, which he did not attend, the respondents (the employer and persons named) foreshadowed an intention to apply for costs.

The respondents claimed the costs on the grounds of inconvenience and disruption, evidenced by the time they spent preparing for and participating in the listed telephone conferences and attending the hearing in Wollongong. The respondents supported the claim for costs on the ground that Mr Hill’s anti-bullying application was ‘vindictive and frivolous’. Mr Hill did not file any submission on the question of costs.

**Outcome**

The Commission was satisfied that it should have been reasonably apparent to Mr Hill that his application had no reasonable prospect of success. Mr Hill’s working relationship with the respondents came to an end on 11 March 2014, six days before Mr Hill filed his application, with there being no reasonable prospect of the working relationship re-commencing at some future time, there was no further risk of Mr Hill continuing to be bullied by the respondents at work. The legislative scheme is directed to preventing potential future conduct, not punishing or compensating for past conduct. Costs were ordered with respect to the hearing in Wollongong on 10 July 2014.

**Relevance**

Mr Hill’s unreasonable behaviour in not attending the hearing of his application, not advising that he would not attend, not responding to the Commission’s prior inquiries as to whether he would attend, and his failure to provide any reasonable explanation for this conduct, justified the awarding of the respondents’ costs.
Case example: **Costs NOT ordered—Not reasonably apparent there was no reasonable prospects of success**

*Re Ms S.W.* [2014] FWC 4476 (Hampton C, 2 June 2014).

**Facts**

An application was made by Ms S.W. under s.789FC(1) of the Fair Work Act for an order to stop bullying. This application was dismissed on the basis that the applicant was not at work in a constitutionally-covered business. The applicant was a teacher employed in a public school by the Western Australian Department of Education (WA Department).

The WA Department sought that costs be awarded against Ms S.W. as it should have been reasonably open to the applicant that her claim had no prospect of success.

The identity of an applicant’s employer may not always be decisive; rather it is a question as to who was conducting the workplace concerned and whether it is a constitutionally-covered workplace. The fact that the WA Department operated with an ABN was a consideration.

**Outcome**

Though no findings were made, the Commission held that the substantive allegations appeared to be capable of being considered as unreasonable conduct for the purposes of this jurisdiction.

The Commission was not persuaded that it should have been reasonably apparent to Ms S.W. that her application had no reasonable prospects of success. The costs application was dismissed.

**Relevance**

This matter actually required consideration as to the corporate or other status of the applicant’s workplace. This type of issue can make a matter more complex than it might initially appear. As a result it would not have been reasonably apparent to the applicant that there was no reasonable prospect of success.
Appeals

See Fair Work Act s.604

The following information is limited to providing general guidance for appeals against an order to stop bullying or a decision to refuse to grant such an order.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal Proceedings Practice Note.

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

Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.254

A person who is aggrieved is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as a union.

Time limit

An appeal must be lodged with the Commission within 21 days after the date the decision being appealed was issued.255 If an appeal is lodged late, an application can be made for an extension to the time limit.256

Considerations

In each appeal, a Full Bench of the Commission needs to determine two issues:

- whether permission to appeal should be granted, and
- whether there has been an error in the original decision.

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254 Fair Work Act s.604(1).
255 Fair Work Commission Rules 2013 r 56(2)(a)–(b).
256 Fair Work Commission Rules 2013 r 56(2)(c).
Permission to appeal

The Fair Work Act provides that the Commission must grant permission to appeal if it is satisfied that it is in the public interest to do so.  

Public interest

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

Some considerations that the Commission may take into account in assessing whether there is a public interest element include:

- where a matter raises issues of importance and general application
- where there is a diversity of decisions so that guidance from an appellate court is required
- where the original decision manifests an injustice or the result is counter intuitive, or
- that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.  

The public interest test is not satisfied simply by the identification of error or a preference for a different result.  

Grounds for appeal

Error of law

An error of law of law may be a jurisdictional error, which means an error concerning the Commission’s power to do something, or it may be a non-jurisdictional error concerning any question of law which arises for decision in a matter.  

In cases involving an error of law, the Commission is concerned with the correctness of the conclusion reached in the original decision, not whether that conclusion was reasonably open.  

Error of fact

An error of fact can exist where the Commission makes a decision that is ‘contrary to the overwhelming weight of the evidence...”  

In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts.  

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257 Fair Work Act s.604(2).
258 Coal and Allied Mining Services Pty Ltd v Lawler [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].
264 House v The King [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499].
It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker. The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.

Case example: **Permission to appeal granted—Jurisdiction of the Commission**


Decision at first instance [2014] FWC 8828 and order PR558708 (Kovacic DP, 5 December 2014).

**Facts**

The Deputy President dismissed the appellant’s application at first instance on the basis that the application had no reasonable prospects of success. Mallee Track had terminated the contract with Dove Investments and Dr Obatoki was no longer working at the Mallee Track Medical Clinic.

**Outcome**

Permission to appeal was granted because the Full Bench was satisfied that the matter raised issues of importance and general application and thus enlivened the public interest. The proper approach to the application of s.789FF of the Fair Work Act in circumstances where the employment relationship has ceased is an issue that has previously only been considered by single member authorities. The Full Bench were of the view that this was particularly warranted given that the application of this provision went to issues of the Commission’s jurisdiction.

The Full Bench found 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. The Full Bench found no error in the decision of the Deputy President and accordingly the appeal was dismissed.

**Relevance**

The issue raised by this appeal had not been considered by a Full Bench of the Commission. Given that it related to issues around the jurisdiction of the Commission and would provide future guidance, permission to appeal was given.

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265 ibid.
266 ibid.
Appeals Considerations

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Case example: Permission to appeal granted—Duty of the Commission to provide adequate reasons for decisions


Decision at first instance [2010] FWA 7358 (Bissett C, 24 September 2010).

**Facts**

The appellant argued that there were a number of significant errors of fact in the original decision.

**Outcome**

The Full Bench found that there were no errors in the decision-making process on unfair dismissal warranting review on appeal. However, in failing to give adequate reasons for the decision with respect to remedy, there was error such that it was in the public interest to grant permission to appeal. The appeal was allowed and the decision as to remedy was quashed and remitted to the first instance decision-maker.

**Relevance**

There are established principles on the duty to give adequate reasons for a decision. In particular, the reasons for decision must be sufficient to allow the parties to exercise such rights of appeal as may be available and to enable an appeal bench to determine whether or not error has occurred in relation to a decision. By not providing these reasons the Commission fell into error.

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Case example: Misapplication of statutory test—Permission to appeal granted

**Aperio Group (Australia) Pty Ltd (T/a Aperio Finewrap) v Sulemanovski** [2011] FWAFB 1436 (Watson SDP, McCarthy SDP, Deegan C, 4 March 2011), [(2011) 203 IR 18].

Decision at first instance [2010] FWA 9958 and order PR505584 (Ryan C, 30 December 2010).

**Facts**

This decision involved an appeal against a decision of the Commission reinstating an employee on the basis that the employee’s dismissal was without valid reason, and therefore harsh, unjust or unreasonable.

**Outcome**

The Full Bench determined that there had been a failure to properly consider whether there was a valid reason for termination in accordance with s.387(a). This misapplication of the statutory test was significant and productive of a plainly unjust result. The appeal was allowed, the order quashed, and the original application dismissed on rehearing.

**Relevance**

The Full Bench determined that the preservation of public confidence in the administration of justice was a matter of public interest and could be undermined by decisions that were manifestly unjust.
Case example: **Interpretation of provisions of the Fair Work Act—Permission to appeal granted**


Decision at first instance [2010] FWA 4817 (Raffaelli C, 12 July 2010).

**Facts**
These were two appeals against a decision determining whether certain dismissals were the result of genuine redundancies.

**Outcome**
The Full Bench concluded that the Commission’s decision was open on the evidence and other material before it and did not involve any error in interpretation of the section.

**Relevance**
These appeals concerned the interpretation of the redeployment exclusion set out in s.389(2) of the Fair Work Act. This provision of the Fair Work Act had not been considered by a Full Bench before, therefore the Full Bench determined that it was in the public interest to grant permission to appeal.

Case example: **Permission to appeal refused—Significant error of fact established but not in public interest to grant permission to appeal**


**Facts**
These were appeals from a decision that there was no valid reason for the employee’s dismissal, that the dismissal was unfair and that the employee be reinstated.

**Outcome**
The Full Bench found that the Commission was in error in failing to find that the employer had a valid reason to dismiss the employee. However, permission to appeal was not granted, because the matter turned on its particular facts, and raised no wider issue of principle or of general importance, and no issue of jurisdiction or law.

**Relevance**
In this matter the Full Bench found that, even though there was an error, no substantial injustice would result if permission to appeal was refused. No public interest considerations were established by the submitted grounds of appeal.
Role of the Court

Enforcement of Commission orders

If a person does not comply with an order to stop bullying, a person affected by the contravention, an industrial association or an inspector may seek enforcement of the Commission’s order through civil remedy proceedings in:

- the Fair Work Division of the Federal Circuit Court of Australia
- the Fair Work Division of the Federal Court of Australia, or
- an eligible State or Territory Court.\(^{267}\)

Failure to comply with an order to stop bullying may result in the Court imposing a pecuniary penalty or making other orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.

Related information
- Orders to stop bullying

Types of order made by the Court

See Fair Work Act ss.545, 546 and 570

The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision (such as section 789FG, which prohibits a person contravening an order to stop bullying).

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

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest).

\(^{267}\) Fair Work Act s.539, table item 38.
Pecuniary penalty orders

The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in section 539 of the Fair Work Act.

In the case of a body corporate, the maximum penalty is five times the maximum for an individual.

A penalty unit is used to define the amount payable for pecuniary penalties.

The maximum number of penalty units for contravening section 789FG of the Fair Work Act (which prohibits a person contravening an order to stop bullying) is 60 penalty units.

From 1 July 2017 a penalty unit was $210.268

- for an individual—60 penalty units = $12,600
- for a body corporate—5 x 60 penalty units = $63,000

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

Costs orders

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party’s unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.

268 Crimes Act 1914 (Cth) s.4AA.