The Anti-Bullying Jurisdiction of the Fair Work Commission

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Law Week 2016
### Caveats

- Assume a working knowledge of the AB provisions of the FW Act
- The demographic and outcome statistics used in this paper are unaudited, preliminary figures and should be taken to be indicative only
- The formal statistics on the anti-bullying jurisdiction are issued by the General Manager as part of the quarterly and annual reporting process
- Nothing in this presentation should be taken to be advice or the formal position of the Commission on any matter
- Not commenting upon policy – this is a matter for the Legislature
Synopsis

- The AB jurisdiction involves a unique combination of parties, context, issues, focus and remedy – to be determined by a quasi-judicial tribunal
- This necessitated a unique case management model
- Detailed and extensive consultation and public information
- Extensive and continuing training for Members and staff
- Case Management Model:
  - Early and direct engagement with parties
  - Triage and streaming of matters
  - Preserve the relationships
  - Handle appropriate to the circumstances (inquisitorial)
Synopsis (cont.)

- 700 to 800 applications a year
- Relatively high settlement and withdrawal rates
- Limited orders – not necessarily typical of applications filed or indicative of the impact of the jurisdiction
- Developing case law including on the meaning of bullying and concept of being “at work”
- Challenges exist – continual review and developments in case management model and practice
Key elements of the anti-bullying jurisdiction

- Applications from workers
  - Applications rather than complaints
  - Broad definition of ‘worker’
  - No time limit
- Definition of bullying behaviour involves:
  - Bullying behaviour must occur whilst ‘at work’
  - Bullying behaviour can be engaged in by an ‘individual’ or ‘group of individuals’ (need not be workers)
  - Bullying behaviour must be repeated, unreasonable behaviour that creates a risk to health and safety and must not be reasonable management action taken in a reasonable manner
Key elements (cont.)

- Broad coverage of behaviour in **workplaces**:
  - Applies to **constitutionally-covered business**:
    - A person conducts a **business or undertaking (PCBU)** within the meaning of the **WHS Act 2011** and is either:
      - A constitutional **corporation** (trading or financial);
      - The Commonwealth or a Commonwealth authority;
      - A body corporate incorporated in a Territory;
      - The business of undertaking is conducted principally in a Territory or a Commonwealth place.
  - ADF and AFP etc exclusions (S.789FI etc)
  - Multiple legal and practical relationships and parties
Key elements (cont.)

Focus of any order is on stopping the conduct and enabling safe and productive working relationships to resume.

The power of the Commission is essentially preventative.

The type of orders the Commission may consider:

- Stop specified behaviour
- Employer to regularly monitor behaviours
- Comply with bullying policy
- Provide information and additional support and training to workers
- Review employer’s workplace bullying policy
- Interpersonal mediation/counselling

To make an order – there must be a risk of further bullying of the applicant by the individual(s) concerned and the Commission must consider workplace processes and any outcomes.
Key Parties in an AB matter

Applicant worker in a constitutionally-covered business

Employer / Principal of applicant worker

- Person named – Co-worker (incl. Colleague, Manager)
- Person named – Worker at another business
- Person named – Visitor to the workplace (incl. Customer, Client)

A Worker includes an employee, a contractor, a subcontractor, an outworker, an apprentice, trainee, student on work experience or a volunteer (but not a member of the ADF)
FWC case management model – principles

- Statutory Tribunal with determinative powers and natural justice obligations
- High levels of information
- Early and prompt assessment of the applications
- Some initial engagement with parties
- Case by case approach – mediation/conciliation only where appropriate - streaming and prioritisation
- Early assignment of matters that are proceeding to Members
- Matters for determination – deal with as Member sees fit using discretion and powers under the Act
- Take account of nature of parties, relationships and alleged behaviour
- Promote cooperative and productive workplaces
How the jurisdiction operates

The Process

Application is lodged with the Fair Work Commission

Application is allocated to the Anti-Bullying Team for review

Application is served by the Fair Work Commission

Report is prepared

Panel Head assigns the matter

Mediation

Assigned to a Member for Preliminary Conference/ Directions

Hearing/Conference

Resolved and discontinued

Unresolved Matter further allocated by Panel Head

Orders to prevent bullying issued

Application dismissed

Resolution

Appeal by leave of Full Bench
The FWC case management model

- Application lodged
- Service upon “employers” and then individuals named after contact has been made
- Responses sought
- “Triage” and information gathering
  - Confirm information on application and desire to proceed
  - Identify obvious jurisdictional problems
  - Information on process to all parties
  - Gain information for a preliminary administrative report made – provided to Panel Head who will assess and allocate
The FWC case management model (cont.)

- Panel Head to decide to how and when to be dealt with:
  - **Mediation** (only where appropriate - by Members or specifically trained mediators on staff) not promoting $ settlements
  - **Assigned to Member** to hear as they see fit:
    - Preliminary conference (likely in most cases)
    - Conciliation
    - Urgent hearing for interim or other orders
    - Jurisdictional determination
    - Merit and remedy hearing (appropriate to the circumstances)

- **Orders** – subject to enforcement through the Federal Court
- **Appeals** – normal rules (by leave)
- Reference to WHS authorities – alternative or additional option
Nature of applications for an order to stop bullying (2 years)

- 1398 applications for an order to stop bullying
- All matters started to be dealt with in 14 day period
- Approx. 1254 have been finalised with a result (March 2016)
- Working relationship of parties – predominately Employees v Manager
- Majority of workers from businesses with more than 50 staff
- Industries – health and welfare services, clerical, educational services, retail, hospitality
Enquiries and Lodgements January 2014 - December 2015

Total lodgements: 1396

2014 Lodgments: 702
2015 Lodgments: 694 (-1.13%)

AB unique website hits: 340,251
Helpline calls answered: 13,104
Demographics – the worker

**Age of worker**
- Aged 30 to 45: 467
- Aged 46 to 59: 163
- Aged 20 to 29: 286
- Aged 60 and over: 400
- Aged 15 to 19: 61
- Unknown: 19

**Gender**
- Female: 778
- Male: 616
- Unknown/unclear: 2
Demographics – the worker cont’d

Length of service

- >12 months
- Unclear in application
- >12 months <5 years*
- >6 and <12 months
- <6 months
- >5 years <10 years*
- >10 years*

Applicant actively at work on lodgment

- Yes
- No
- Unknown/unclear
- No - leave - short term*
- No - leave - long term*
- Unclear in application
- No - app no longer working for EP*
- No - Holidays*

*Applications that were lodged after 1 July 2015
Demographics – the worker cont’d

Type of worker

- Employee: 1297
- Contractor or subcontractor: 30
- Unknown/unclear: 31
- Volunteer: 19
- Apprentice or trainee: 12
- Employee of a labour hire company: 4
- Employer of contractor/subcontractor: 2
- Work experience student: 1

*Type of worker*
Demographics – Top 15 Industry

Industry

- Clerical industry
- Retail industry
- Health and welfare services
- Social, community, home care and disability services
- Educational services
- Hospitality industry
- Manufacturing and associated industries
- Banking finance and insurance industry
- Aged care industry
  - Building, metal and civil construction industries
  - Commonwealth employment
- Road transport industry
- Children’s services
- Indigenous organisations and services
- Commercial sales
Demographic – employer

Location of employer

- Metropolitan employer: 292
- Non-metropolitan employer: 19
- Unclear: 1085

Number of employees

- 100+ employees: 738
- 15 to 50 employees: 142
- 51 to 100 employees: 109
- Unknown/unclear: 234
- less than 15: 19
Demographics – policy and reporting

**Behaviour reported**
- Yes: 869
- No: 204
- Yes - Written*: 141
- Yes - Verbal*: 107
- Unknown/unclear: 51
- Unclear in application: 24

**Bullying policy or DRP policy or procedure**
- Yes: 342
- No: 863
- Unknown/unclear: 191

*Applications that were lodged after 1 July 2015*
Demographics – individual cited

Nature of individual cited

- Bullying by manager: 962
- Bullying by other worker: 208
- Bullying by group of workers: 167
- Bullying by managers (1+): 83
- Unknown/unclear: 76
- Bullying by other individual: 47
- Bullying from below: 21
- Unclear in application: 21
- Bullying from Board: 7
Notifications to authorities

Complaints made externally to the Commission

- No: 947
- Yes - WHS Regulator: 46
- Yes - Workers Compensation: 90
- Unknown/unclear: 146
- Yes - Other Tribunal: 202
- Yes - Police: 41
Demographics – representation (@application 2014)

**Applicant Represented**
- 155 No
- 30 Family/Friend
- 26 Registered Organisation
- 39 Lawyer/Paid Agent

**Employer Represented**
- 151 No
- 12 In house counsel
- 15 Lawyer/Paid Agent
- 71 Registered Organisation
Commence to deal with matters

Commenced Inquiries January 2014 - December 2015

Commenced Inquiries

- Commenced 1 day after lodgment: 527
- Commenced same day as lodgment: 503
- Commenced 2 day after lodgment: 133
- Commenced 3 day after lodgment: 114
- Commenced 4 day after lodgment: 78
- Commenced 5 day after lodgment: 31
- Commenced 6 - 14 days after lodgment: 10
- Commenced after 14 days: 0

Commenced Inquiries
Overall timeliness

Results

- **Withdrawn prior to conference/hearing or mediation**: 15
- **Withdrawn following conference/hearing (prior to decision/order)**: 15
- **Resolved by agreement between parties**: 81
- **Resolved through mediation/conciliation**: 302
- **Applications withdrawn early in case management process**: 175
- **Jurisdictional objection upheld by Commission member**: 177
- **Applications granted by Commission Member**: 198
- **Dismissed by Commission Member**: 291

- Withdrawn as part of triage process – 14%
- Resolved by formal agreement – 30%
- Withdrawn after service but before “formal” proceedings – 24%
- Informally resolved or discontinued after proceedings – 23%
- Determined by the Commission – 9%
Matters falling out early in the process

- During initial triage:
  - A: Applicant left workplace and not intending to return
  - B: Not comfortable with service of the application on employer and/or individual named
  - C: Misunderstanding of the Commission’s powers

- Before Panel Head
  - A and C
  - Satisfied with the response – taken seriously and investigation to be conducted
Matters dealt with by Members (including Panel Head)

2014 - 2015

- Dismissed – non-application, jurisdiction or merit – 15%
- Formally Resolved – 34% (conservative estimate)
- Closed without formal agreement (including discontinuances where applicant satisfied with the response) – 51%
- Orders have been made in 7 matters
Mediation results

9% of matters referred to Mediation
62% matters resolved at Mediation

- Resolved by Commission staff member: 71
- Not Resolved: 19
- Withdraw prior to mediation: 16
- withdrawn after mediation: 4
- couldn’t take place: 6
Meaning of Bullying Conduct – s.789FD(1)

  - Persistent unreasonable behaviour but might refer to a range of behaviours over time.
  - More than one occurrence, not necessarily the same specific behaviour.

- "Unreasonable behaviour" should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable. That is, the assessment of the behaviour is an **objective test having regard to all the relevant circumstances applying at the time**.

- Must be a **causal link between the behaviour and the risk to health and safety**. 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.

- 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. The ordinary meaning of ‘**risk**’ is **exposure to the chance of injury or loss**. In the sense used in this provision, the risk must also be real and not simply conceptual.
Reasonable management action taken in a reasonable manner – s.789FD(2)


- S.789FD(2) is not so much an "exclusion" but a **qualification** which reinforces that bullying conduct must of itself be unreasonable. It also emphasises the right of management to take reasonable management action in the workplace. The provision comprises three elements:
  - the behaviour (being relied upon as bullying conduct) must be management action;
  - it must be reasonable for the management action to have been taken; and
  - the management action must have been carried out in a manner that is 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.**
At work

• Full Bench on meaning of “at work” - Bowker, Coombe and Zwarts v DP World and The Maritime Union of Australia [2014] FWCFB 9227

• Issue – whether alleged unreasonable conduct occurred whilst at work; use of social media as a part of alleged conduct.

• Decision - The Full Bench said:
  - Requires temporal connection between the conduct and the worker being at work
  - “at work” means performing work or engaging in employer-authorised or permitted work activities
  - being “at work” is not limited to the confines of a physical workplace
  - individuals who engage in unreasonable behaviour towards a worker need not be “at work” at the time they engage in that behaviour

• Note – matters remitted to single Member to hear evidence and determine – [2015] FWC 7312
Future risk of bullying – s.789FF(1)(b)(ii)


- 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)

- May require consideration of whether an applicant will no longer be at work with the relevant individual or group and whether there is a reasonable prospect of that occurring in some capacity as a worker in the future

- Not always appropriate for the FWC to dismiss a s.789FC application where an employee is dismissed from their employment. Depending on the circumstances in each case there may be a number of relevant considerations, including the prospect of reinstatement through other proceedings, which could warrant the FWC dealing with a s.789FC application notwithstanding the dismissal of the employee.
Orders – why so few?

- Applicant must be in the relationship when apply and when orders made
- Serious matters are often dealt with by employers directly upon receipt of application and often before any proceedings
- Not all claims have substantive merit
- Relatively high proportion of formal or informal settlements
- Must be a future risk – prevention measures developed and/or individual party no longer relevant
- Balance between the impact of determinative proceedings and the goal of preserving relationships and changing attitude and behaviours
  - Genuinely consensual resolutions may be more enduring in some cases
  - Cultural change and management commitment are difficult to prescribe
  - Adversarial proceedings may put further pressure upon working relationships
- Some applicants are unable to stay the course – even in the context of the facilitative process and inquisitorial nature of determinative procedures
Orders – what might be included

- *CF and NW [2015] FWC 5272*

- S.789FF(1) ..... may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

- S.789FF(2) – take into account:
  - any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body;
  - any procedure available to the worker to resolve grievances or disputes;
  - any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes; and
  - any matters that the FWC considers relevant.
Orders – what might be included (cont)

- Who may be subject to an order?
  - Applicant workers
  - Individuals named
  - Employer/principals(s) of applicants and individuals named

- What included in CF and NW - [2015] FWC 5272
  - Not make contact and not attend other workplace
  - Confirm reporting arrangements
  - Establish proper standards of conduct
  - Establish complaints procedure
  - Provide training for all (including Directors)
  - Confidentiality (not normal)
Orders – what might be included (cont)

• *Bowker and others v DP World and MUA* – [2015] FWC 7312 contemplated:
  
  • Risk assessment and RTW plans to be organised
  • Implementation of measures from risk assessment
  • Active monitoring of control measures and conduct
  • Training of management personnel about workplace bullying and dealing with complaints
  • Develop and deploy workplace investigation manual
  • Review and amend employee handbook
  • Consideration of orders against individuals depending upon undertakings about conduct and training that had been offered during proceedings
Observations and challenges of the jurisdiction

- The jurisdiction is not appropriate for all cases of workplace bullying
- The Commission must conduct the process having regards to the circumstances of all the parties (applicant worker, workplace and individual named) and its statutory function
- Time between lodgement and first conference – early action is highly desirable
- Applicants/individuals named with mental health issues
- Applicants absent from workplace prior to application
- Dismissal of applicants during the process
Observations and challenges of the jurisdiction (cont’d)

- Relatively low number of Orders likely but objectives may be achieved though the jurisdiction and process
- Tension between determinative proceedings and the desire to achieve a long-term workplace resolution
- The jurisdiction is still new and some case law is still being developed
- Significant community awareness and actions taken by the business community
- Need to be more collaborative with return to work schemes
- Deal with the broader causes and proper management of workplace bullying
Analysis and Review

• Commission Review conducted 2015:
  • Revision of forms
  • Understanding of and support for parties with mental health issues
  • Adoption and use of common terms for steps in CM process
  • Consideration of early preliminary conference with Panel Head or other Member in every case
• Surveys of parties being implemented
• Analyse and publish details of resolutions
• Office of Best Practice Regulation Review
Further information

  - AB Benchbook
  - AB Case Management Model
  - AB Guide
  - Rules and forms
  - Quarterly reports
Panel Discussion