



# FACT SHEET

## Workplace Bullying

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### BACKGROUND

A worker who reasonably believes that he or she has been bullied at work has had, since 1 January 2014, the ability to apply to the Fair Work Commission ('FWC') for an order to stop the bullying. The FWC has the power to hear anti-bullying matters to help resolve alleged bullying matters quickly and inexpensively. This avenue for employees who believe they are being bullied is in addition to pre-existing avenues, which are:

- Making a workers' compensation claim;
- A complaint to Work Health and Safety (Queensland Government Department).

There are no express limits on a person making a claim under multiple avenues. This means that a person who is eligible to make an anti-bullying application to the FWC may also have a simultaneous workers' compensation claim and/or a complaint made to Work Health and Safety.

### WHO IS COVERED BY THE FAIR WORK ACT ANTI-BULLYING LAWS?

A person is covered by the anti-bullying laws if they:

- Are a 'worker' (as defined); and
- Are not a member of the defence force; and
- Work in a constitutionally covered business.

#### **Who is a 'Worker' for the Purposes of the Anti-Bullying Laws?**

Employers should be aware that the definition of a 'worker' for the purposes of the *Fair Work Act* covers more than just a standard employee. Section 789FC of the *Fair Work Act* states that a worker has the meaning provided in the *Health and Safety Act 2011* (Cth), but does not include a member of the defence force.

Section 7 of the *Health and Safety Act 2011* (Cth) defines a person as a 'worker' if the person carries out work in any capacity for a 'person conducting a business or undertaking' ('PCBU'), including work as:

- an employee; or
- a contractor or subcontractor; or an employee of a contractor or subcontractor; or
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or
- an outworker, an apprentice or trainee; or
- a student gaining work experience; or a volunteer; or
- a person of a prescribed class.

#### **What is a 'Constitutionally Covered Business' for the Purposes of the Anti-Bullying Laws?**

In order for a 'worker' to make a FWC claim they must be bullied while at work in a constitutionally-covered business.

A constitutionally-covered business is a PCBU that either is a:

- constitutionally covered 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.

A PCBU is a person conducting a business or undertaking, and is a legal entity including incorporated entities, sole traders, partners of a partnership and certain 'senior' officers of an unincorporated association.

However, when read in conjunction with the above definition of a constitutionally-covered business, a worker has to be working in a business that is a constitutional corporation and a PCBU. This means that employers who are sole traders, or the partners in a partnership are sole traders, are unlikely to be covered by the anti-bullying provisions, despite being a PCBU.

### **What is Bullying at Work?**

For the purposes of the *Fair Work Act*, bullying 'at work' occurs when:

- a person or a group of people repeatedly behaves unreasonably towards a worker or a group of workers at work; AND
- the behaviour creates a risk to health and safety.

However, the *Fair Work Act* provides that bullying **does not include** reasonable management action carried out in a reasonable manner.

### **What Kind of Behaviour Could Constitute Bullying?**

The FWC's Guide to anti-bullying provisions states that bullying behaviour may involve any of the following types of behaviour:

- aggressive or intimidating conduct or belittling or humiliating comments;
- spreading malicious rumours;
- teasing, practical jokes or 'initiation ceremonies';
- exclusion from work-related events;
- unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level;
- displaying offensive material and
- pressure to behave in an inappropriate manner.

However, this behaviour must be repeated and unreasonable and must create a risk to health and safety in order for it to be bullying. This is not an exclusive list, and other types of conduct could potentially be considered as bullying behaviour.

### **What Does 'Risk to Health and Safety' Mean?**

Commissioner Hampton in the decision of *Ms SB* [2014] FWC 2104 noted that for bullying behaviour to create a 'risk to health and safety' for the purposes of the anti-bullying legislation, there needs to be a *possibility* of danger to health and safety - the danger does not have to have actually occurred. However, the risk should be real, and not just conceptual. 'Risk' is to mean the chance of injury or loss.

### **The Bullying Behaviour must be 'Repeated' and not a Single Occurrence**

Commissioner Hampton in *Ms SB* [2014] FWC 2104 held that there was no specific number of incidents required for unreasonable behaviour to be considered to be 'repeated' behaviour, provided the behaviour happened at least more than once.

Furthermore, he held that the same specific kind of behaviour does not have to be repeated. This means that several different kinds of bullying behaviour can be combined in order to fulfil the requirement of repeated behaviour – for example, an employee may allege that a colleague made a humiliating comment to them on only one occasion, but if other bullying behaviour of a different nature is also shown, such as the employee also being excluded from work-related events, these behaviours combined could constitute repeated unreasonable behaviour.

### **What is ‘At Work’ for the Purposes of the Legislation?**

Section 789FD of the *Fair Work Act* requires that a worker must have been bullied ‘at work’ in order for the bullying to come within the jurisdiction of the FWC. However, ‘at work’ is not defined within the Act. The FWC in their Anti-Bullying Benchbook suggest that the definition of ‘at work’ can be quite broad in that it may include entering, moving about and leaving the workplace. Furthermore, ‘at work’ may include where the worker is required to perform work at a place other than the employer’s premises.

A Full Bench of the FWC (Justice Ross, President of the FWC, Deputy President Gostencnik, Vice President Hatcher, Commissioner Hampton and Commissioner Johns) in *Sharon Bowker, Annette Coombe, Stephen Zwarts v DP World Melbourne Limited, Maritime Union of Australia (Victorian branch) and Others* [2014] FWC 9227 provided some further interpretation as to when a worker might be bullied ‘at work’. They took a cautious approach to providing any clarification on the term, as they felt that it was ‘preferable that the approach to this issue develop over time, on a case by case basis’.

The Full Bench stated on the issue of ‘at work’ that:

*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).*

Additionally, with regards to whether a worker is bullied ‘at work’, the Full Bench determined that the focus is on the worker who makes the complaint is ‘at work’. The individual(s) who carry out the alleged bullying conduct need not be ‘at work’ at the time of their actions, and they may not even be ‘workers’ – the alleged bullying could be carried out by, for example, customers of a business.

It was noted that in most situations, deciding whether a worker was ‘at work’ at the time of the alleged bullying will be fairly simple – but sometimes more complex cases may arise. Social media was an area which was pointed out as being one example of a potentially complex area, such as where Facebook posts of a bullying nature are posted online.

The Full Bench determined that the person/s who make the alleged bullying Facebook posts do not need to be ‘at work’ at the time the posts are made. But what about the workers who are the subject of the bullying posts? One of the Respondents to the matter in this case, the Maritime Union of Australia, submitted that the worker the subject of a bullying Facebook post was required to be ‘at work’ at the time the Facebook post was created. The Full Bench disagreed with MUA’s submission. Instead, they took the view that:

*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’.*

Full Bench comments in this decision highlight the need for employers to have comprehensive workplace harassment/bullying and social media policies and code of conduct in place. If employees are encouraged to report instances of alleged bullying (e.g. bullying Facebook comments) in accordance with an employer’s workplace policy, this could potentially assist in an internal resolution to a bullying complaint - as opposed to the employee applying to the FWC for a stop bullying order.

## WHAT IS 'REASONABLE MANAGEMENT ACTION'?

The *Fair Work Act* states that bullying does **not** include reasonable management action carried out in a reasonable manner.

The FWC Anti-Bullying Benchbook explains that reasonable management action is comprised of three elements:

- The behaviour must be reasonable 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.

The FWC Benchbook provides that examples of what can be considered reasonable management action can include (but is not limited to):

- Performance appraisals;
- Ongoing meetings to address underperformance;
- Counselling or disciplining a worker for misconduct;
- Modifying a worker's duties including by transferring or re-deploying the worker;
- Investigating alleged misconduct;
- Denying a worker a benefit in relation to their employment;
- Refusing an employee permission to return to work due to a medical condition.

## When is Management Action Reasonable?

An assessment of whether the management action is reasonable requires an objective assessment of the action and the circumstances of the situation. Commissioner Hampton in *Ms SB* [2014] FWC 2104 noted that without limiting the assessment, the considerations may include:

- 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.

The test is whether the action was reasonable in the circumstances, not whether it could have been more reasonable or more acceptable. In general terms this is likely to mean that:

- management actions do not need to be perfect or ideal to be considered reasonable;
- a course of action may still be 'reasonable action' even if particular steps are not;
- any 'unreasonableness' must arise from the actual management action in question, rather than the worker's perception of it; 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.

## WHAT IS THE PROCESS WHEN A BULLYING COMPLAINT IS MADE?

### Responding to an Application Made by an Employee

A worker may make an application by submitting a Form F72 (an application for an order to stop bullying) to the FWC. The Form requires the following:

- Details of the employer/principal as well as the person/persons who are alleged to be bullying the worker;
- Detailed information about the alleged behaviours;
- Whether the worker complained internally and if so, what happened;
- Whether performance management action has been undertaken;

- Whether the employer/principal has grievance resolution processes in place (e.g. a complaints protocol);
- Details of immediate safety risks.

There is no requirement for a worker to have first raised the matter internally or to first notify the employer that they are making a complaint. If the worker has decided not to notify the employer that a complaint is being made, the first time that an employer may be made aware of the complaint is when they receive correspondence from the FWC regarding the complaint.

The FWC will send the employer/principal a Form F73 – ‘Response from an employer principal to an application for an order to stop bullying’, as well as a copy of the Applicant worker’s Form (the worker becomes the ‘Applicant’ in the FWC process) so that the worker’s allegations can be addressed. The response should be provided to the Commission within 7 days, and it should also be provided to the other relevant parties, being:

- the worker who made the application;
- the person/s the worker alleges is bullying them;
- and any other employers/principals involved (such as the employers/principals of the alleged bully/ies).

The person/s who are alleged to be bullying the Applicant worker will also be sent a form F74 – ‘Response from a person against whom bullying has been alleged’. This person/s may decide to respond to the complaint, however they are not required to do so. If they do decide to respond, they must do so within 7 days, and their response must be provided to:

- the FWC;
- the person or business who employs/engages the Applicant worker;
- the person or business who employs/engages the person (if different to that of the Applicant worker); and
- any other person or persons who are alleged to have bullied the worker.

An employer may be able to make an objection to the application for an order to stop bullying if they believe the FWC is prevented from hearing the matter on a jurisdictional ground. If an objection is made, this should be included on the employer’s response form.

As the FWC’s Guide to Anti-Bullying states, some relevant jurisdictional objections can include:

- The Applicant is not a ‘worker’ for the purposes of the relevant legislation;
- The Applicant is not working in a ‘constitutionally-covered business’ as required by the relevant legislation;
- The Applicant was not ‘at work’ when the alleged bullying occurred;
- The alleged bullying behaviour was reasonable management action, carried out in a reasonable manner.

### **Mediation**

If the FWC determines that it is appropriate in the circumstances, a time will be scheduled for the parties to attend a mediation session which is facilitated by a FWC mediator or a Commission Member. Mediation sessions may be by phone, video conference or in person.

A mediation session is a private, voluntary session where the parties discuss the issues with a view to resolving them. Although the particulars of each session will differ, generally the parties outline their claim/response to the claim and the Commission Member or Mediator will assist the parties in seeking possible resolutions. Unlike other jurisdictions such as unfair dismissal, the Mediator or Commission Member will *not* suggest monetary payments as a solution because of the nature of anti-bullying claims.

### **CONFERENCES/HEARINGS**

If a matter is not resolved during a mediation session, or if the FWC has determined the matter is not appropriately dealt with through mediation, the FWC may direct parties to attend a conference or hearing.

Conferences are generally private, whereas hearings are usually open to the public. The Commission may decide that all or part of an anti-bullying matter be held in private and that names or other details are not to be published.

The purpose of a conference or hearing is so that the FWC can determine whether a bullying complaint is substantiated and if an order to stop bullying should be made. The FWC can make any order that it considers appropriate in order to stop a worker being bullied – the specifics of an order can vary depending on each situation.

An order may include requirements such as:

- Requiring individuals determined to have been bullying to stop the behaviour;
- Regular monitoring of the behaviour of relevant employees;
- The provision of education or policies to workers in relation to anti-bullying.

(Note: the FWC cannot make an order for compensation to be paid the Applicant as part of an order to stop bullying.)

If the FWC decides to make an order to stop bullying it must (to the extent that it is aware):

- Take into account any outcomes arising from an investigation into a bullying complaint/matter by other parties or bodies (whether or not the investigation has been completed);
- Take into account any procedures which were available to the worker to resolve grievances/disputes regarding bullying behaviour and the outcome of any relevant procedure; and
- Take into account any other matter that the FWC considers relevant.

## **HOW BULLYING IS DEALT WITH IN OTHER QUEENSLAND BASED JURISDICTIONS**

As noted under the heading 'Background', in addition to employees being able to apply to the FWC for a stop bullying order in the federal jurisdiction, employees may also make a claim through workers' compensation legislation on the basis of a psychological or psychiatric injury, or make a complaint to Work Health and Safety Queensland.

The FWC definition of bullying does not apply in these circumstances as they fall outside the FWC's jurisdiction. Instead Safe Work Australia's *Guide for Preventing and Responding to Workplace Bullying* (which was adopted by the Queensland Government in March 2014) provides a definition of workplace bullying which applies for both WorkCover claims and complaints to Work Health and Safety Queensland.

Workplace bullying is defined within this Guide as repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety. Repeated behaviour refers to the persistent nature of the behaviour and can involve a range of behaviours over time.

Unreasonable behaviour means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening.

Detailed below are examples of behaviours that may, whether they are intentional or unintentional, be considered to be workplace bullying if they are repeated, unreasonable and create a risk to health and safety. This is not an exhaustive list, however, it does outline some of the more common types of harassing behaviours.

Examples outlined in the Guide include:

- abusive, insulting or offensive language or comments;
- unjustified criticism or complaints;
- deliberately excluding someone from workplace activities;
- withholding information that is vital for effective work performance;
- setting unreasonable timelines or constantly changing deadlines;

- setting tasks that are unreasonably below or beyond a person's skill level;
- denying access to information, supervision, consultation or resources to the detriment of the worker;
- spreading misinformation or malicious rumours; and
- changing work arrangements such as rosters and leave to deliberately inconvenience a particular worker or workers.

Employers need to be aware of this definition of workplace bullying *and* the definition in the *Fair Work Act*, since an employee can potentially make a workplace bullying complaint through more than one jurisdiction. For example, an employee could potentially decide to file a workplace bullying complaint to the FWC and to Work Health and Safety Queensland, as well as make a WorkCover Claim on the basis of a psychological or psychiatric injury.

Additionally, because of the possibility of workplace bullying claims through multiple avenues, employers should ensure that their policies and codes of conduct reflect both definitions of workplace bullying.

#### **Further Assistance**

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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