

# Legal Solutions newsletter

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## Workplace Bullying & Harassment

As clients would be aware, the *Fair Work Amendment Act 2013* included provisions dealing with workplace bullying which took effect as of 1 January, 2014.

Now a person defined as a “worker” under the *Work, Health & Safety Act 2011* may lodge a claim of bullying with the Fair Work Commission.

“Bullying” is defined at section 789D of the Act as:

- If a worker whilst at work in a constitutionally covered business
- Has an individual or group repeatedly behave unreasonably towards that worker or a group of workers; and
- And the behaviour creates a risk to health and safety.

There is no time limit on when a worker can make an application to the Commission. However, once an application has been made, the Commission must start dealing with the application within 14 days.

The Commission can make any order it considers appropriate if satisfied a worker has been bullied and there is a risk the bullying will continue. However, the order cannot include a pecuniary amount.

### Experience to Date

The Commission’s Anti-Bullying Quarterly Report shows that from 1 January to 31 March 2014, the Commission received 151 anti-bullying applications.

A significant proportion of these were finalized without the Commission making a determination of an order with:

- 23 matters withdrawn early in the process
- 16 resolved during proceedings
- six applications withdrawn prior to listed proceedings; and
- four applications withdrawn after proceedings but before a decision.

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### Cases

The Commission has handed down a handful of decisions since the amended legislation took effect from the start of this year as follows:

#### **AB2014/1009 [2014] FWCFB 1440**

**6 March 2014**

The issue in this matter was whether the Commission had jurisdiction to hear and determine an anti-bullying application which was based on alleged bullying conduct which occurred prior to 1 January 2014.



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The Employer and the AI Group argued that the Commission had no jurisdiction to hear and determine a claim involving alleged bullying conduct that occurred prior to 1 January 2014 as it would give retrospective operation to the legislation.

The Full Bench of the Commission stated that three requirements must be met before the Commission can make an order to stop bullying which includes:

- A worker must have made an application under sect 789FC;
- The Commission must be satisfied that the worker “has been bullied at work by an individual or group of individuals”; and
- The Commission must be satisfied that there is a risk that the worker will continue to be bullied at work by the individual or group.

The Full Bench indicated that the second element was based on past events. That furthermore the amended legislation did not attach any adverse consequence to past bullying conduct but that conduct merely provides the basis for a prospective order to stop future bullying conduct.

As such, the Full Bench rejected the employer’s jurisdictional objection and referred the application to a member of the Commission for further hearing.

### **Application by CD [2014] FWC1741**

**14 March 2014**

In this matter, the applicant made an application for an order to stop bullying. However, the applicant failed to pay the required filing fee.

The Applicant was advised by letter by the Commission that their application required payment of the application fee if they wanted their application to proceed.

Seven days later, the Commission sent another letter to the Applicant advising that the application would be dismissed if the required fee wasn’t paid within 14

days.

No response was provided by the Applicant so accordingly the application was dismissed by the Commission under sect 587(1)(a) of the Act.

### **Arnold Balthazaar v Raelene McGuire; Department of Human Services (Cth) [2014] FWC 2076**

**2 April 2014**

In this matter, the Applicant made an application that alleged bullying by a number of staff members at the Centrelink office at Gosford, NSW stop.

The issue in this matter was whether the application was covered by the anti-bullying jurisdiction as the Applicant receives a social security payment from Centrelink as a carer to assist him to care for his daughter who suffers from a psychotic mental illness.

The Applicant argued that he came within the jurisdiction as he was in receipt of carer payments and as such is an employee and/or an outworker and/or a volunteer and that he carries out work for the Department.

The Department submitted that the Applicant didn’t carry out any work for the Department

Watson VP indicated that the Applicant’s work as a carer is carried out as part of his parental responsibilities for the benefit of his daughter, and the payments he receives are social security payments. This is no sound basis to classify the relationship between him and the Department as one of employer and employee, principal and independent contractor, a volunteer in the undertaking of the Department or the performance of work for the Department in any other capacity.

As such, the Commission found that the Applicant did not perform his carer work for the Department and therefore the application was not a valid application that had jurisdiction under the anti-bullying provisions of the Act. The application was accordingly dismissed.

***Mitchell Shaw v ANZ Banking Group Ltd; Bianca Haines [2014] FWC 3408***

**26 May 2014**

Ex Tempore Decision

The Applicant had made an application for an order to stop bullying.

The Commission issued directions as of 1 April 2014 and a hearing was set down for 14 May 2014.

In the meantime, the Applicant was terminated from his employment with ANZ Bank as of 11 April 2014.

ANZ Bank thus applied for an order under sect 587 (1) to dismiss the application, on the basis that since the Applicant's employment was terminated, there ceased to be a risk that the Applicant will continue to be bullied at work by any individual or group.

In a separate application, the Applicant had lodged a general protection dispute with the Commission alleging adverse action by ANZ for reasons that included that the Applicant had made a complaint about his employment and that he had made an application to stop bullying.

The Applicant indicated that the application to stop bullying should proceed as the termination of his employment was "invalid" whilst he was on approved parental leave.

Gostencnik DP indicated that pursuant to sect 789FF (b) he must be satisfied that the Applicant had been bullied at work and there is a risk that the Applicant will continue to be bullied at work. As the Applicant was no longer employed by ANZ Bank, there cannot be a risk that the Applicant will continue to be bullied at work by an individual or group of individuals identified in the application.

Therefore the Commission found that the application had no reasonable prospect of success for this reason.

Thereby the application for an order to stop bullying was dismissed.

However, the Commission also indicated that if as a consequence of the Applicant's general protection application, or any other remedy he seeks that he is reinstated to his former position or any other position with ANZ and that at that point he has concerns about a risk of being bullied, the Applicant was at liberty to make a fresh application and just because the current application was dismissed, this will not be a bar to any future applications.

**Please contact Workforce Legal Solutions on (03) 9505 6221 should you require assistance in updating or developing your policies and procedures or advice relating to bullying issues in your workplace.**

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Workforce Legal Solutions now offers a recruitment service for senior positions to our clients.

With considerable experience in the health and welfare industry, Workforce Legal Solutions understands the employment related issues facing employers in their recruitment and retention of staff.

We have now developed a “total approach” for recruitment for senior staff appointments to assist employers with the advertisement and recruitment of staff through to the appointment of the successful candidate.

The recruitment services we can provide:

- > Development of advertisement of position and position description
- > Sourcing and short-listing applicants
- > Assistance in the selection panel
- > Reference checking of short-listed applicants
- > Development and negotiation of contract of employment.

**For further information, please contact Workforce Legal Solutions on**

**03 9505 6221 or 0402 477 140**

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