Benchbook

Anti-bullying

About this benchbook

This benchbook is designed to assist parties lodging or responding to anti-bullying applications under the *Fair Work Act 2009* (Fair Work Act). In particular, information is provided to parties to assist in the preparation of material for matters before the Commission.

Please note: because Part 6-4B commenced on 1 January 2014, there are as yet no decisions of the Commission or any relevant court providing definitive guidance as to the meaning and operation of the main provisions of the Part. This benchbook will be updated and modified as appropriate when any such decisions are issued.

Disclaimer

The content of this resource 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 resource or on any linked site.

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

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.

This resource 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 photographs or names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this resource may inadvertently contain such names.

The Fair Work Commission's anti-bullying jurisdiction is new and, as such, the decisions referred to in this resource have come from other jurisdictions. While every precaution has been taken to include only decisions that are applicable to this new jurisdiction, users should be aware that the exact decisions of the Commission cannot be anticipated, and that future decisions may alter the accuracy of this resource.

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First published January 2014

How to use this resource

Symbols

Further information on related topics.

Links to sections of legislation.

Contains issues that may form the basis of a jurisdictional objection.

Cases where the argument raised on this point was successful. Note: this does not indicate that the party that raised the point was successful overall.

Cases where the argument raised on this point was unsuccessful. Note: this does not indicate that the party that raised the point was unsuccessful overall.

Tips—helpful hints that may assist your understanding of the information.

Important information.

Naming conventions

Workers, Employees, Employers, Participants, Applicants and Respondents etc

The parties to workplace bullying matters have generally been referred to in this resource 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
- Individual against whom bullying is alleged (another 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).

Fair Work Commission, Fair Work Australia, Australian Industrial Relations Commission etc

The name of the national workplace relations tribunal has changed a number of times throughout its history. For consistency, in this resource, the tribunal has been referred to as 'the Commission'. The table below outlines the name of the Commission over time.

Name	Short title	Dates
Fair Work Commission	The Commission	1 January 2013 - ongoing
Fair Work Australia	FWA	1 July 2009 - 31 December 2012
Australian Industrial Relations Commission	AIRC, the Commission	1988 - 2009
Australian Conciliation and Arbitration Commission	The Commission	1973 - 1988
Commonwealth Conciliation and Arbitration Commission	The Commission	1956 - 1973
Commonwealth Court of Conciliation and Arbitration		1904 - 1956

Legislation

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 has often been addressed through work health and safety laws. Since 2011, 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. However, anyone seeking to address workplace bullying via a work health and safety regulator should contact the relevant regulator for advice and assessment.

Case law

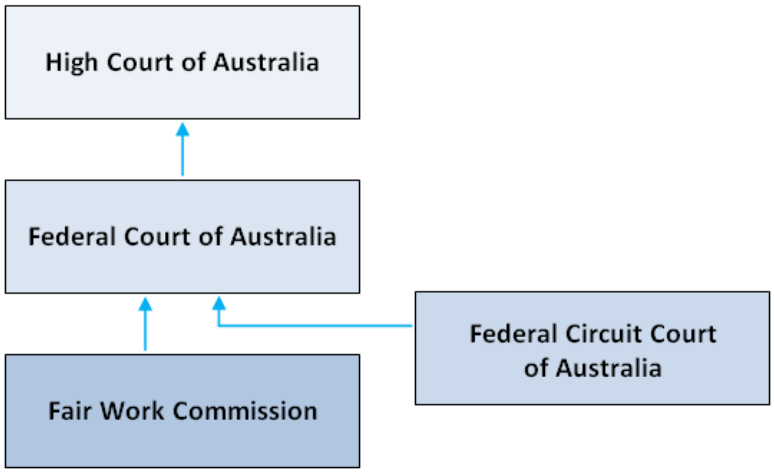
What is case law?

Previous decisions made by courts and tribunals 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 serves as an example for future, similar cases.

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

Hierarchy of Courts and the Fair Work Commission



Referencing

References in this resource use the following formats:

Cases

> [41] *Elgammal v BlackRange Wealth Management Pty Ltd* [2011] FWAFB 4038 (unreported, Harrison SDP, Richards SDP, Williams C, 30 June 2007) [13].
> [42] *Visscher v Giudice* (2009) 239 CLR 361, 388 [81].
> [43] ibid.
> [44] *Searle v Moly Mines Limited* (2008) 174 IR 21 [22]; citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427.

The name of the case will be in italics.

The link will be either to the journal the case has been reported in, or if the case is unreported, to the original reference. For example, some of the abbreviations used are:

- 'IR' for 'Industrial Reports'
- 'CLR' for 'Commonwealth Law Reports'
- 'FWAFB' for a 'Full Bench of Fair Work Australia'

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

If a reference is identical to the one immediately before, the term 'ibid.' is 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 Giudice*
Link to case	[2011] FWAFB 4038 (unreported, Harrison SDP, Richards SDP, Williams C, 30 June 2007) (2009) 239 CLR 361
Page number	(1995) 185 CLR 410, 427
Paragraph number	(2008) 174 IR 21 [22]
Identical reference	[42] *Visscher v Giudice* (2009) 239 CLR 361, 388 [81]. [43] ibid.
Reference to other case	[44] *Searle v Moly Mines Limited* (2008) 174 IR 21 [22]; citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 427.

Legislation

[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.
[7] *Fair Work (Commonwealth Powers) Act 2009* (Vic).
[8] *Industrial Relations (Commonwealth Powers) Act 2009* (NSW).
[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 cited. For example, some of the abbreviations used are:

- 'Cth' is a Commonwealth law
- 'NSW' is a New South Wales law
- 'NT' is a Northern Territory law
- 'Qld' is a Queensland law

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

Item	Example
Legislation names	*Acts Interpretation Act 1901* Fair Work Act Fair Work Regulations *Industrial Relations (Commonwealth Powers) Act 2009*
Jurisdiction	*Acts Interpretation Act 1901* (Cth) *Police Administration Act* (NT) *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld)
Section number	*Acts Interpretation Act 1901* (Cth) s.36(2) Fair Work Act s.381(2) Fair Work Regulations reg 6.08(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**.[1]

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.[2]

Related information

- What does 'Reasonable management action carried out in a reasonable manner' mean?

Examples of bullying

Based on cases heard in other jurisdictions, the following behaviours could be considered as bullying:

- aggressive and intimidating conduct[3]
- belittling or humiliating comments[4]
- victimisation[5]
- spreading malicious rumours[6]
- practical jokes or initiation[7]
- exclusion from work-related events[8], and
- unreasonable work expectations.[9]

[1] Fair Work Act s.789FD(1).
[2] Fair Work Act s.789FD(2).
[3] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618.
[4] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618; *Styles v Murray Meats Pty Ltd (Anti-Discrimination)* [2005] VCAT 914.
[5] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618.
[6] *Willett v State of Victoria* [2013] VSCA 76.
[7] *WorkCover Authority (NSW) (Inspector Maddaford) v Coleman* (2004) 138 IR 21.
[8] *Willett v State of Victoria* [2013] VSCA 76.
[9] *Naidu v Group 4 Securitas Pty Ltd* (2005) NSWSC 618.

Effects of bullying

Workplace bullying often results in significant negative consequences for an individual's health and wellbeing.[10]

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.[11]

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.

[10] House of Representatives Standing Committee on Education and Employment report, *Workplace bullying "We just want it to stop"*, 12.
[11] ibid.

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))[12]
- are not a member of the Defence Force[13], and
- work in a constitutionally-covered business.[14]

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:[15]

- an employee[16]
- a contractor or subcontractor[17]
- an employee of a contractor or subcontractor[18]
- an employee of a labour hire company who has been assigned to work in the person's business or undertaking
- an outworker[19]
- 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).[20]

Others are also deemed to be workers including Australian Federal Police members (including the Commissioner and Deputy Commissioner) and Commonwealth statutory office holders.[21]

[12] Fair Work Act s.789FC(2).
[13] Fair Work Act s.789FC(2)
[14] Fair Work Act s.789FD(1)(a).
[15] WHS Act s.7(1).
[16] For a discussion on the difference between employees and contractors, see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [39]–[58]; *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215 [34]. See also *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)* (2011) 206 IR 252 [188]–[220]; *Fair Work Ombudsman v Metro Northern Enterprise Pty Ltd* [2013] FCCA 216 [13]–[25].
[17] ibid.
[18] ibid.
[19] Fair Work Act s.12.
[20] WHS Act s.5(8); see also *Workplace Health and Safety Regulations 2011* (Cth), reg 7(3).
[21] WHS Act s.7(2).

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).[22]

Employer and employee to have ordinary meaning

The coverage of the anti-bullying provisions are different to other provisions of the Fair Work Act in that the terms employer and employee have their ordinary meaning, and are not limited to national system employers and employees.[23] An ***employee*** is a person who works under a contract of employment with an employer, rather than under some other kind of contract for work.[24]

Exclusion

A member of the Defence Force is not included in this definition.[25]

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


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

No civil contract of any kind is created with the Crown or the Commonwealth[26] as a result of:

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

[22] Butterworths Australian Legal Dictionary, 1997, 870.
[23] Fair Work Act s.789FB.
[24] For a discussion on the difference between employees and contractors, see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215. See also *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)* (2011) 206 IR 252 [188]–[220]; *Fair Work Ombudsman v Metro Northern Enterprise Pty Ltd* [2013] FCCA 216 [13]–[25].
[25] Fair Work Act s.789FC(2).
[26] *Defence (Personnel) Regulations 2002* (Cth) reg 117.

Definition of 'Constitutionally-covered business'

Contains issues that may form the basis of a jurisdictional issue

See Fair Work Act s.789FD(3)

A ***constitutionally-covered business*** is a person conducting a business or undertaking (PCBU), conducted principally in a Territory or Commonwealth place, or where the person conducting the business or undertaking is:

- a constitutional corporation[27]
- the Commonwealth
- a Commonwealth Authority,[28] or
- a body corporate incorporated in a Territory.

Businesses are usually enterprises operated with the aim of making a profit, and 'have a degree of organisation, system and continuity'.[29]

Undertakings usually have 'elements of organisation, systems and possibly continuity, but are usually not profit-making or commercial in nature'.[30]

Related information

- What is a person conducting a business or undertaking?
- 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?

What is a person conducting a business or undertaking?

The term ***person conducting a business or undertaking*** or PCBU refers to 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.

However, 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 PCBU's are covered by these provisions.

PCBUs also cover the Commonwealth including its Departments, local governments and other government businesses and undertakings. The concept does not extend to include people engaged solely as workers, for example supervisors or managers, as being the PCBU.

[27] Fair Work Act s.12; see also *Australian Constitution* s.51(xx).
[28] Fair Work Act s.12; see also *Commonwealth Authorities and Companies Act 1997* (Cth) s.7.
[29] SafeWork Australia - Interpretive Guidelines to model WHS Act - The meaning of 'person conducting a business or undertaking', 1.
[30] ibid.

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—including principals that use contractors or subcontractors, franchisors and bailors.

A person (including a corporate entity)[31] may conduct a business or undertaking alone or with others,[32] and whether or not the business or undertaking is conducted for profit or gain.[33]

Exclusions

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

- an elected member of a local authority (acting in that capacity),[34] and
- a wholly 'volunteer association' that does not employ anyone (whether incorporated or not).[35]

Volunteer associations

Volunteer associations (whether incorporated or not) that do not employ anyone, do not conduct a business or undertaking, and are therefore exempt from workplace bullying claims.[36]

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.[37]

'Acting together for one or more community purpose' is designed to include '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'.[38]

If a person is employed to carry out work,[39] then the volunteer association loses the exemption and may be considered a business or undertaking. This is limited to where a person can be characterised as being employed, as opposed to being a different kind of worker, such as a contractor or subcontractor.[40]

[31] See *Acts Interpretation Act 1901* (Cth) s.2C.
[32] WHS Act s.5(1)(a).
[33] WHS Act s.5(1)(b).
[34] WHS Act s.5(5).
[35] WHS Act s.5(7).
[36] WHS Act s.5(7).
[37] WHS Act s.5(8).
[38] Explanatory Memorandum, Work Health and Safety Bill 2011 [26].
[39] For a discussion on the difference between employees and contractors, see *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Abdalla v Viewdaze Pty Ltd t/a Malta Travel* (2003) 122 IR 215. See also *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No. 3)* (2011) 206 IR 252 [188]–[220]; *Fair Work Ombudsman v Metro Northern Enterprise Pty Ltd* [2013] FCCA 216 [13]–[25].
[40] ibid.

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).[41]

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'.[42]

The Australian Constitution defines constitutional corporations as 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'.[43]

This definition has two limbs that are 'comprehensive alternatives'.[44] 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.[45]

[41] *Australian Constitution* s.52(i); Fair Work Act s.12.
[42] Fair Work Act s.12.
[43] *Australian Constitution* s.51(xx).
[44] *The State of New South Wales v the Commonwealth of Australia* (1990) 169 CLR 482, 504 (Deane J).
[45] 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.[46]

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.[47]

Foreign corporations

A foreign corporation is a corporation that has been formed outside of Australia.[48]

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.[49]

Case example

Foreign corporation	Case reference
Employer company was formed in New Zealand but employee performed work in Australia The Fair Work Act applied to the dismissal, in Australia, of an employee who performed work in Australia under a contract of employment with a foreign corporation.	*Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (unreported, Gooley C, 25 February 2010).

Trading or financial corporation formed within the limits of the Commonwealth

Trading denotes the activity of providing goods or services for payment.[50]

The Commission will consider the nature of a corporation with reference to its activities, rather than the purpose for which it was formed.[51]

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.[52]

A corporation will be a trading corporation if the trading engaged in is 'a sufficiently significant proportion of its overall activities'.[53]

A corporation can be a trading corporation even if it was not originally formed to trade.[54]

[46] A Stewart, *Stewart's Guide to Employment Law* (4th ed, 2013) 36.
[47] ibid., 34.
[48] *The State of New South Wales v the Commonwealth of Australia* (1990) 169 CLR 482, 504 (Deane J).
[49] See also *Gardner v Milka-Ware International Ltd* [2010] FWA 1589 (unreported, Gooley C, 25 February 2010) [24].
[50] *Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134, 139.
[51] *Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190, 208.
[52] ibid., 239.
[53] ibid., 233.
[54] *Garvey v Institute of General Practice Education Incorporated* (2007) 165 IR 62 [30].

One factor that may be considered is the commercial nature of the activity.[55] 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.[56]

A **financial corporation** is one 'which borrows and lends or otherwise deals in finance as its principal or characteristic activity...'[57]

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.[58]

Case examples

Trading or financial corporation	Case reference
Professional sporting organisation and club—trading corporation The High Court, by majority, held that a football 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. This constituted trading activity.	*R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190.
Charitable organisation—trading corporation The RSPCA, a charitable organisation, was found to be a trading corporation on the basis that it earned substantial income from trading activities. It did not matter that this income was used for charitable purposes rather to create a profit.	*Orion Pet Products Pty Ltd v Royal Society for the Prevention of Cruelty to Animals (Vic) Inc (No 2)* (2002) 120 FCR 191.

[55] *University of Western Australia v National Tertiary Education Industry Union* (unreported, AIRC, O'Connor C, 20 June 1997) Print P1962 3; citing *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (1979) 143 CLR 190, 209.
[56] *University of Western Australia v National Tertiary Education Industry Union* (unreported, AIRC, O'Connor C, 20 June 1997) Print P1962 3; citing *The Australian Beauty Trades Suppliers Ltd* (1991) 29 FCR 68, 72.
[57] *Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134, 138.
[58] *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 303.

Trading or financial corporation	Case reference
Not-for-profit organisation and hospital—trading corporations The Australian Red Cross Society and the Royal Prince Alfred Hospital were held to be trading corporations, on the basis that they both generated substantial income from trading activities, even though that income was only a minority proportion of total income. The motive for which that trading income was earned was not relevant.	*E v Australian Red Cross Society* (1991) 27 FCR 310.
Metropolitan Fire and Emergency Services Board—trading corporation The Court found that the trading activities of the Metropolitan Fire and Emergency Services Board (the Board) generated substantial income and were sufficient to constitute the Board as a trading corporation. The principal activity of 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.	*United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board* (1998) 83 FCR 346.
Building Society—financial corporations 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. The fact that this activity was not for profit and involved the performance of an important social function was not determinative.	*Re Ku-Ring-Gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134.
Trustee of Superannuation fund—financial corporation A statutory corporation formed to provide superannuation benefits for state public servants was determined to be a financial corporation, on the basis that it engaged in financial activities on a very substantial scale. The fact that this activity was engaged in for the purpose of providing superannuation benefits to contributors was no obstacle to the conclusion that it was a financial corporation.	*State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282.

NOT a trading or financial corporation	Case reference
District or amateur sporting organisation Incorporated cricket clubs were found not to be trading corporations (although the Western Australian Cricket Association with which they were associated was found to be a trading corporation). 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.	*Hughes v Western Australia Cricket Association (Inc)* (1986) 19 FCR 10.
Charitable organisation The respondent was found not to be a trading corporation. The trading activities it did engage in were insubstantial and peripheral to the central activity of medical research.	*Hardeman v Children's Medical Research Institute* (2007) 166 IR 196.

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.

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.[59]

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.

There are approximately 150 Commonwealth statutory authorities. Examples of Commonwealth statutory 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)

A 'Flipchart' listing Commonwealth statutory authorities is available on the Department of Finance and Deregulation website: http://www.finance.gov.au/publications/flipchart/index.html

[59] Butterworths Australian Legal Dictionary, 1997, 224.

What is a body corporate incorporated in a Territory?

The term ***body corporate*** covers 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.

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.

The definition gives effect to the Government's response to the House of Representatives Standing Committee on Education and Employment's report *Workplace bullying "We just want it to stop"*.

Repeated unreasonable behaviour

The Committee noted that 'repeated behaviour' refers to the persistent nature of the behaviour and can refer to a range of behaviours over time and that '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). This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.[60] There is no specific number of incidents required for the behaviour to be considered 'repeated', nor does the same specific kind of behaviour have to be repeated.

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.[61] The ordinary meaning of 'risk' is exposure to the chance of injury or loss.[62]

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.[63]

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

Related information

- What is workplace bullying?
- Examples of bullying
- What does 'Reasonable management action carried out in a reasonable manner' mean?

[60] House of Representatives Standing Committee on Education and Employment report, *Workplace bullying "We just want it to stop"*, 15.
[61] *Thiess Pty Limited v Industrial Court of New South Wales* [2010] NSWCA 252, 78 NSWLR 94 at [65]-[67]; *Abigroup Contractors Pty Ltd v WorkCover Authority of New South Wales* (2004) 135 IR 317 [58].
[62] Macquarie Concise Dictionary definition.
[63] *Newcastle Wallsend Coal Co Pty Ltd v Workcover Authority (NSW) (Inspector McMartin)* [2006] NSWIRComm 339; 159 IR 121 at [301]

Bullying—Case examples

Note: There are no decisions as yet concerning what may constitute bullying at work under Part 6-4B of the Fair Work Act. The following examples concern 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 examples

Examples of bullying behaviour	Case reference
Multiple manifestations 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. The Court found that 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'.	*Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377.

Examples of bullying behaviour	Case reference
Initiation rites A 16-year old apprentice at a factory was subjected to a 30-minute 'initiation ceremony' by five male colleagues, including being wrapped in cling wrap from neck to toe, threatened with violence, spun on a trolley, covered in sawdust and glue, and repeatedly having sawdust forced into his mouth between bouts of having a fire hose squirted into his mouth. The New South Wales Industrial Relations Commission confirmed that the employer had breached its duty under section 8 of the *Occupational Health and Safety Act 2000* (NSW) in failing to ensure a healthy and safe workplace. It commented that courts are unsympathetic to claims that bullying involves 'harmless pranks or workplace high-jinks'. **Note:** While behaviour in this case was characterised as bullying, it may not have met the definition of bullying under the *Fair Work Act* as the behaviour occurred in a single incident of short duration.	*WorkCover Authority (NSW) (Inspector Maddaford) v Coleman* (2004) 138 IR 21.
Physical and verbal Three male employees bullied a junior apprentice for 4 years, from age 17. The apprentice was stripped, painted, rolled around the workplace in a 44-gallon drum, pinned to a bench using a vice, fastened to a bench by having his overalls nailed to it, threatened with rape, taunted and witnessed a work experience employee suspended over a fire. Almost a decade later he took court action. The Court held that the target's employer had been negligent in failing to prevent the bullying. It did not accept suggestions that the abuse was 'training' or harmless 'pranks'. It awarded $350,000 to cover medical costs, lost wages, earning capacity and damages.	*Blenner-Hassett v Murray Goulburn Co-Operative Co. Ltd* [1999] VCC 6.

Examples of bullying behaviour	Case reference
Bullying top down—Ostracism 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. The jury found that the target did suffer injury as a result of the employer's negligence. The decision was affirmed on appeal.	*Willett v State of Victoria* [2013] VSCA 76.
Bullying top down—Physical, verbal abuse and humiliation The plaintiff sought leave to recover damages for injury to his psyche caused by alleged bullying by two senior work colleagues that involved: • rude remarks and inappropriate insults • racist name calling, including being called a terrorist 'because of his dark hair and long dark beard' • increased workload, failure to respond to a request for assistance and rejection of a request for protective safety equipment • inappropriate approach to the resolution of issues to do with performance and health and safety compliance, and • abusive insults following accusations of not following procedure, including a 'tussle', and the supervisor pulling machinery out of the victim's hands and 'smashing it onto the floor'. The court found that the victim suffered compensable psychiatric injury.	*Ferguson v Strautman Australia Pty Ltd* [2009] VCC 184.

Examples of bullying behaviour	Case reference
Intimidating and humiliating behaviour The plaintiff, a private investment adviser, complained to his employer that he was subjected to a series of malicious personal attacks, verbal abuse and insults by his immediate supervisor, and his clients had been reallocated to other colleagues. He went on sick leave and was advised that his employment was considered terminated. The plaintiff successfully brought an action for breach of employment contract, including substantial damages for psychological illness caused by bullying. The Court accepted that the employer had delayed too long in responding to complaints, having regard to the victim's delicate mental state at the time, and that there was a breach of contract. It noted that when becoming an employee he had been required to sight and formally acknowledge the *Working with Us* policy document that featured provisions regarding harassment, integrity, safety and grievance procedures. This had formed part of his employment contract, under which the employer promised to 'take every practicable step' to protect his health and safety. The decision was affirmed on appeal except as to an order for costs.	*Goldman Sachs JBWere Services Pty Ltd v Nickolich* (2007) 163 FCR 62.
Bullying upwards 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. 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.	*State of NSW v Mannall* [2005] NSWCA 367.

Examples of bullying behaviour	Case reference
Bullying downwards 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. The court accepted the worker was subjected to 'a pattern of victimisation' and granted relief including reinstatement to her former employment and compensation.	*Swaran Lata Kumar and Macquarie Partnership Lawyers* [2005] NSWIRComm 202.

Examples of bullying behaviour	Case reference
Bullying downwards The applicant resigned 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. The Commission described the situation as 'incessant bullying' and reinstated the worker's employment.	*Dillon v Arnotts Biscuits Limited* (unreported, AIRC, Tolley C, 10 September 1997) Print P4843.

NOT examples of bullying behaviour	Case reference
Psychiatric injury not caused by bullying The applicant, who was employed at a racetrack, suffered a workplace injury and was away from work for 2 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. 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.	*Aksentijevic v Victoria Racing Club Limited* [2011] VSC 538.

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'.[64]

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.'[65] Therefore, an employee may be 'at work' even if required by the employer 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.[66]

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.[67] It is a broader phrase than "at the employer's place of work".[68]

Previous cases in the workers' compensation area have interpreted the phrase 'arising out of or in the course of employment'[69] broadly. These cases, for example, have found workers' compensation liability arising where the worker is at an interval or interlude within an overall period of work.[70] However, cases in which the meaning of the phrase 'arising out of or in the course of employment' has been considered may not be relevant to the determination of the meaning of 'at work' in the present context, since that phrase may have a wider application than 'at work'.

Examples of when an injury occurred 'in the course of employment' include:

- a lunch break spent onsite[71]
- a work trip conducted outside normal working hours[72]
- lunchtime activities where the worker is expected not to leave the site,[73] and
- working from home.[74]

[64] Fair Work Act s.789FD(1).
[65] Explanatory Memorandum, Workplace Health and Safety Bill 2011 [22].
[66] See e.g. *Petar Ankucic v Drake Personnel Limited, t/as Drake* [1997] NSWIRComm 157.
[67] *Clarke v WL Meinhardt and Partners Pty Ltd* (unreported, NSW Industrial Court, Fisher CJ, 30 June 1992); followed in *Workcover Authority of NSW (Inspector Farrell) v Ross Colin Morrison* [2001] NSWIRComm 325 at [50].
[68] *Inspector Campbell v James Gordon Hitchcock* [2004] NSWIRComm 87, 135 IR 377 at 301
[69] *Safety Rehabilitation and Compensation Act 1988* (Cth) s.5A.
[70] *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473.
[71] *Commonwealth v Oliver* (1962) 107 CLR 353.
[72] *Hatzimanolis v ANI Corporation Limited* (1992) 173 CLR 473; but cf. *Comcare v PVYW* [2013] HCA 41.
[73] *Commonwealth v Oliver* (1962) 107 CLR 353.
[74] *Hargreaves v Telstra Corp Ltd* (2011) 208 IR 66.

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 bulled 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.

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.[75]

This exclusion 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?

What is management action?

The following are examples of what may constitute management action:

- Performance appraisals[76]
- Ongoing meetings to address underperformance[77]
- Counselling or disciplining a worker for misconduct[78]
- Modifying a worker's duties including by transferring or re-deploying the worker[79]

[75] Fair Work Act s.789FD(2).
[76] *Thompson and Comcare* [2012] AATA 752.
[77] *Martinez and Comcare* [2012] AATA 795.
[78] *Truscott and Comcare* [2012] AATA 220.

- Investigating alleged misconduct[80]
- Denying a worker a benefit in relation to their employment[81]
- Refusing an employee permission to return to work due to a medical condition[82]

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.[83]

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.[84]

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):

> *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.*

This suggests that the legislature intended everyday actions to 'effectively direct and control the way work is carried out' to be covered by the exclusion.

Note: 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 provided by the Anti-bullying provisions of the Fair Work Act.

[79] *Towns v Comcare* [2011] AATA 92.
[80] *State of Tasmania* v *Clifford* [2011] TASSC 10.
[81] *Towns and Comcare* [2011] AATA 92.
[82] *Drenth v Comcare* (2012) 128 ALD 1; [2012] FCAFC 86.
[83] *Rutledge and Comcare* (2011) 130 ALD 94; [2011] AATA 865.
[84] *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463; (2012) 217 IR 335.

Case examples

NOT considered management action—Workers' Compensation	Case reference
General operational action 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. A Full Court of the Federal Court did not accept this submission. It held that the exclusion applies 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.	*Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463; (2012) 217 IR 335.
Regular meetings 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. The court held that, because the meeting was not arranged for the purpose of discussing the worker's performance, the behaviour did not fall within the 'reasonable administrative action' exclusion for a workers' compensation claim.	*National Australia Bank Limited v KRDV* (2012) 204 FCR 436.

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.[85]

This covers the specific 'attributes and circumstances'[86] of the situation including the emotional state and psychological health of the worker involved.[87]

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'.[88] 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 not[89]
- 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.

At the very least, to be considered reasonable, the action must be lawful[90] and must not be 'irrational, absurd or ridiculous'.[91]

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.

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.[92]

[85] *Georges and Telstra Corporation Limited* [2009] AATA 731 [23].
[86] ibid.
[87] ibid.
[88] *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 [79].
[89] *Department of Education & Training v Sinclair* [2005] NSWCA 465.
[90] *Von Stieglitz and Comcare* [2010] AATA 263 [67].
[91] ibid.
[92] *Keen v Workers Rehabilitation & Compensation Corporation* (1998) 71 SASR 42; [1998] SASC 6519.

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[93]
- whether established policies or procedures were followed,[94] and
- whether any investigations were carried out in a timely manner.[95]

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.[96]

Case examples

Carried out in a reasonable manner	Case reference
Failure to obtain a promotion 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'. The Administrative Appeals Tribunal upheld this decision, finding that all applicable guidelines had been followed.	*Devasahayam and Comcare* [2010] AATA 785.
Perceived bullying and harassment 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 the manager's manner to be rude and belittling. The employer accepted that events at work had contributed to a significant degree to her 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.	*Ferguson and Commonwealth Bank of Australia* [2012] AATA 718.

[93] *Georges and Telstra Corporation* [2009] AATA 731 [23].
[94] *Yu and Comcare* (2010) 121 ALD 583; [2010] AATA 960; *Devasahayam and Comcare* [2010] AATA 785.
[95] *Wei and Comcare* [2010] AATA 894.
[96] *Comcare v Martinez (No. 2)* [2013] FCA 439 [73], [76].

NOT carried out in a reasonable manner	Case reference
Adherence to established internal policies 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'. 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.	*Yu and Comcare* (2010) 121 ALD 583; [2010] AATA 960.

NOT carried out in a reasonable manner	Case reference
Performance monitoring and mentoring 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…'. 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'.	*Krygsman-Yeates v State of Victoria* [2011] VMC 57.

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 Commission for an order to stop bullying.

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

Making an application to the Commission for an order to stop bullying is a workplace right protected under the general protections provisions of the Fair Work Act.

When can a person make an application for orders to stop workplace bullying?

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.

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: http://benchbooks.fwc.gov.au/unfair/

You can access the **General Protections** Benchbook through the following link: http://benchbooks.fwc.gov.au/generalprotections/

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.

Hearings and conferences

Commission to deal with applications promptly

The Commission must start to deal with an application for an order to stop bullying within 14 days after the application is made.

Powers of the Commission

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.[97]

The Commission may refer a matter to a work health and safety (WHS) regulator where it considers this necessary and appropriate.[98] If the Commission makes such a referral, it does not necessarily mean that the Commission will defer dealing with an application before it.

Conducting a conference


See Fair Work Act s.592

Any conference conducted by the Commission must be held in private unless the Commission specifically directs otherwise.[99]

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.[100]

In private

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.[101]

[97] Fair Work Act s.590.
[98] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [117].
[99] Fair Work Act s.592(3).
[100] Fair Work Act s.592(4).
[101] *SZAYW v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 230 CLR 486 [25].

Confidentiality orders

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.[102] 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 makes 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 in the proceedings, and the Commission's decision or reasons in relation to the matter.[103]

Power to dismiss applications

The Commission may dismiss an application for an order to stop bullying if:

- the application is not made in accordance with the Act
- the application is frivolous or vexatious, or
- the application has no reasonable prospects of success;[104]

or 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).[105]

A ***covert operation*** is a 'function' or 'service' of the AFP[106] 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'.[107]

[102] Fair Work Act s.577(c).
[103] Fair Work Act ss.593–594.
[104] Fair Work Act s.587(1).
[105] Fair Work Act s.789FE(2).
[106] *Australian Federal Police Act 1979* (Cth) s.8.
[107] 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.[108]

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. [109]

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 Employment and Workplace Relations. [110]

Declarations by the Chief of the Defence Force

The Chief of the Defence Force[111] 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 Security[112] 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 Service[113] 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.[114]

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.

[108] Note to WHS Act s.8.
[109] WHS Act s.12E(2).
[110] Fair Work Act ss.789FJ–789FL.
[111] See *Defence Act 1903* (Cth) s.9.
[112] See *Australian Security Intelligence Organisation Act 1979* (Cth) s.7.
[113] See *Intelligence Services Act 2001* (Cth) s.17.
[114] Fair Work Act s.789FI.

Evidence

See Fair Work Act ss.590 and 591

Section 590 of the Fair Work Act outlines the ways in which 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.[115]

The rules of evidence 'provide general guidance as to the manner in which the Commission chooses to inform itself'.[116]

Commission members are expected to act judicially and in accordance with 'notions of procedural fairness and impartiality'.[117]

Commission members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.[118]

Case example

Following rules of evidence	Case reference
Employer used illegally obtained evidence for allegation of theft 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. It was held that the evidence of the sample was unlawfully obtained and that the evidence should not be admitted.	*Walker v Mittagong Sands Pty (t/as Cowra Quartz)* [2010] FWA 9440 (unreported, Thatcher C, 8 December 2010).

[115] *Re: Construction, Forestry, Mining & Energy Union*, (unreported, AIRC, Ross VP, 25 July 2003) PR935310 [36].
[116] *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd* (2011) 209 IR 1 [28]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining & Energy Union* (2004) 143 IR 354 [47]–[50].
[117] *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 [25]; Fair Work Commission, 'Member Code of Conduct' (1 March 2013), 2.
[118] ibid.

Self incrimination

A witness may be required by the Fair Work Commission to answer a question or produce specific documents. Where a witness is required to answer a question and they fail to do so they commit an offence with a penalty of imprisonment.[119]

A person may be required by the Fair Work Commission to answer a question or produce specific documents. Where a person is required to produce a document and they fail to do so, they also commit an offence with a penalty of imprisonment.[120]

Where a person has a reasonable excuse not to provide the document or answer the question, they are not required to do so.[121]

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. The same may apply in respect to a risk of exposure to a civil penalty.[122] 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.

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

[119] Fair Work Act s.677(3).
[120] Fair Work Act s.677(4).
[121] Fair Work Act s.677(4).
[122] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Police Service Board v Morris* (1985) 156 CLR 397; *Valantine v Technical and Further Education Commission* [2007] NSWCA 208; but cf. *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 [31]; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 [24].

What are the outcomes?

Orders to stop bullying

See Fair Work Act s.789FF

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.[123]

Who can an order be made against?

Section 789FF 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 Case[124] 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.[125]

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).

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.[126]

The Commission has a very broad discretion to make any orders it considers appropriate (other than those requiring a financial payment).[127]

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[123] Fair Work Act s.789FF(1).
[124] *Work Choices Case* (2006) 229 CLR 1.
[125] ibid., [178].
[126] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [120].
[127] See *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 [186]; *Construction, Forestry, Mining & Energy Union v Eco Recyclers Pty Ltd* [2013] FCA 24 [67]; and

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.[128]

Orders will not necessarily be limited or apply only to the employer, but could also apply to others, such as co-workers and visitors to the workplace. Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to work.[129]

What cannot be ordered

The Commission cannot order reinstatement or the payment of compensation or a pecuniary amount.[130]

An order for payment of a pecuniary amount is 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.

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. [131]

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).[132]

Transport Workers' Union, NSW Branch v No Fuss Liquid Waste Pty Limited [2011] FCA 982 at [43]–[47] re a power granted in comparable terms.

[128] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [121].

[129] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [119].

[130] Fair Work Act s.789FF(1).

[131] Fair Work Act s.789FF(2).

[132] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [123].

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.[133]

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.[134]

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.[135]

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.

[133] Fair Work Act s.789FH.
[134] Fair Work Act s.789FF(2)(a).
[135] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [88].

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.[136]

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.[137]

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.[138]

No reasonable prospect of success

Generally, for an application to have no reasonable prospect of success, it must be manifestly untenable and groundless.[139]

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 see 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.[140]

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[136] Fair Work Act s.587(3).
[137] Fair Work Act s.587(1).
[138] *Micheletto v Korowa Anglican Girls' School* (2003) 128 IR 269 [17]; citing *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 128–130.
[139] *Wright v Australian Customs Services* (unreported, AIRCFB, Giudice J, Williams SDP, Foggo C, 23 December 2002) PR926115 [23].
[140] *Applicant v Respondent* [2010] FWA 1765 (unreported, McCarthy SDP, 4 March 2010) [15]; citing *Wang v Anying Group Pty Ltd* [2009] FCA 1500 [43]; and *Davis v Insolvency and Trustee Service Australia (No 3)* [2010] FCA 69 [15].

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.[141]

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 unfair dismissal cases, not anti-bullying cases.

Case examples

Application dismissed	Case reference
Frivolous or vexatious An application by an employee who admitted to negligently driving a forklift into a building support column was dismissed as being frivolous, vexatious or lacking in substance.	*West v Hi-Trans Express t/as NSW Logistics Pty Ltd* (unreported, AIRC, Hamberger SDP, 4 December 2006) PR974807.
Frivolous or vexatious—no real question to be determined The employees were dismissed for using their employer's trademarks for an improper purpose. 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.	*Taminiau v Austin Group Limited* (unreported, AIRC, Harrison C, 5 October 2006) PR974223.
No reasonable prospect of success An application by an employee dismissed for sexual harassment and victimisation of other employees was found to have no evidence of sufficient quality or weight to be able to succeed.	*Applicant v Respondent* [2010] FWA 1765 (unreported, McCarthy SDP, 4 March 2010).

[141] *Townsley v State of Victoria (Department of Education & Early Childhood Development)* [2013] FWCFB 5834 (unreported, Hatcher VP, Hamilton DP, Wilson C, 20 September 2013) [17]–[24].

Application dismissed	Case reference
No reasonable prospects of success—failure to provide evidence 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. 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.	*Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern* [2010] FWA 3389 (unreported, Harrison DP, 28 April 2010).

Application NOT dismissed	Case reference
Dispute over deed of release—facts in dispute 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. It was 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.	*Kalloor v SGS Australia Pty Ltd* [2009] AIRC 682 (unreported, Harrison C, 10 July 2009).
Facts in dispute The employee was dismissed for poor performance. There were fundamental disagreements between the parties on the facts of the matter. The Commissioner was not able to decide which of the two conflicting versions was correct based on the parties written submissions alone. The Commissioner was not satisfied that the application was frivolous, vexatious or lacking in substance such that it should be dismissed without any further hearing.	*Perrella v ITW Australia Pty Ltd T/A Hobart Food Equipment Service and Sales* [2009] AIRC 107 (unreported, Williams C, 3 February 2009).

Contravening an order of the Commission

A person to whom an order to stop bullying applies must not contravene a term of the order.

The requirement to abide by an order to stop bullying is a civil remedy provision.[142]

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.[143]

An application regarding a breach of a civil remedy provision must be made within 6 years of the alleged contravention.[144]

[142] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 [95].
[143] Fair Work Act s.539(2).
[144] Fair Work Act s.544.

Costs

See Fair Work Act s.611

People who incur legal costs in a matter before the Commission generally pay their own costs.[145]

The Commission has the discretion to order one party to pay the other party's legal costs.[146]

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.[147]

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.[148]

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.[149]

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.[150]

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[145] Fair Work Act s.611(1).
[146] Fair Work Act s.611(2).
[147] *Butterworths Australian Legal Dictionary*, 1997, 852.
[148] ibid.
[149] *Butterworths Australian Legal Dictionary*, 1997, 586.
[150] *Oshlack v Richmond River Council* (1998) 193 CLR 72 [44]; cited in *Goffett v Recruitment National Pty Ltd* (2009) 187 IR 262 [50]; and *Stanley v QBE Management Services Pty Ltd* [2012] FWA 10164 (unreported, Jones C, 18 December 2012) [24].

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.[151]

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.[152]

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.[153]

When are costs ordered?

See Fair Work Act s.611

Section 611 of 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.[154]

[151] Fair Work Act s.377.
[152] Fair Work Regulations reg 3.04; sch 3.1.
[153] Fair Work Regulations reg 3.04; sch 3.1.
[154] *McKenzie v Meran Rise Pty Ltd* (unreported, AIRCFB, Giudice J, Watson SDP, Whelan C, 7 April 2000) Print S4692 [7].

Vexatiously

Vexatious means that:

- the main purpose of an application (or response) is to harass, annoy or embarrass the other party,[155] or
- there is another purpose for the action other than the settlement of the issues arising in the application (or response).[156]

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'.[157]

The Commission may also consider whether, at the time the application (or response) was made, there was a 'substantial prospect of success.'[158] 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.[159]

An application (or response) is not without reasonable cause just because the court rejects a person's arguments.[160]

In simple terms, **without reasonable cause** means that an application (or response) is made without there being any real reason, basis or purpose.

[155] *Nilsen v Loyal Orange Trust* (1997) 76 IR 180, 181; citing *Attorney-General v Wentworth* (1988) 14 NSWLR 481, 491; cited in *Holland v Nude Pty Ltd (t/as Nude Delicafe)* (2012) 224 IR 16 [7].
[156] ibid.
[157] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* (2011) 210 IR 370 [17].
[158] *Kanan v Australian Postal & Telecommunications Union* (1992) 43 IR 257; cited in *Dryden v Bethanie Group Inc* [2013] FWC 224 (unreported, Williams C, 11 January 2013) [20].
[159] ibid.
[160] *R v Moore; Ex Parte Federated Miscellaneous Workers' Union of Australia* (1978) 140 CLR 470, 473; cited in *Walker v Mittagong Sands Pty Limited T/A Cowra Quartz* (2011) 210 IR 370 [20].

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**.[161]

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'.[162]

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.

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.

[161] *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (unreported, Watson SDP, Drake SDP, Harrison C, 27 June 2011) [10]; citing *Wodonga Rural City Council v Lewis* (2005) 142 IR 188, 191 [6].

[162] *Baker v Salver Resources Pty Ltd* [2012] FWAFB 4014 (unreported, Watson SDP, Drake SDP, Harrison C, 27 June 2011) [10]; citing *Deane v Paper Australia Pty Ltd* (unreported, AIRCFB, Giudice J, Williams SDP, Simmonds C, 6 June 2003) PR932454 [7].

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.

Overview

A person who is aggrieved by a decision made by a single member of the Commission may appeal the decision.[163] An appeal may only be made with the permission of the Commission.[164]

Aggrieved means feeling resentment, anger or offense because of unjust treatment.

Time limit

An appeal must be lodged with the Commission **within 21 days** after the date the decision being appealed was issued.[165] If an appeal is lodged late, an application can be made for an extension to the time limit.[166]

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.

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.[167]

[163] Fair Work Act s.604(1).
[164] *Tokoda v Westpac Banking Corporation T/A Westpac* [2012] FWAFB 3995 (unreported, Ross J, Hamberger SDP, Jones C, 17 May 2012) [7].
[165] Fair Work Commission Rules 2013 r 56(2)(a)–(b).
[166] Fair Work Commission Rules 2013 r 56(2)(c).
[167] Fair Work Act s.604(2).

Public interest

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[168]

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.[169]

The public interest test is not satisfied simply by the identification of error or a preference for a different result.[170]

Grounds for appeal

Error of law

An error of law of law may be a jurisdictional error, which means an error concerning the tribunal'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.[171]

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...'[172]

The Commission will consider whether the conclusion reached was reasonably open on the facts.[173] If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision.[174]

It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker.[175] The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.[176]

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[168] *Coal and Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78 [44].
[169] *GlaxoSmithKline Australia Pty Ltd v Makin* (2010) 197 IR 266 [27].
[170] See e.g. *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (unreported, Harrison SDP, Richards SDP, Blair C, 17 July 2012) [58].
[171] *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338 [40].
[172] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, 155–156.
[173] *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338 [40].
[174] *House v The King* (1936) 55 CLR 499.
[175] ibid.
[176] ibid.

Case examples

Permission to appeal granted	Case reference
Duty to provide adequate reasons The appellant argued that there were a number of significant errors of fact in the original decision. The Full Bench found that there were no errors warranting review on appeal on the decision-making process on unfair dismissal. However, in failing to give adequate reasons for the decision as 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.	*Dianna Smith T/A Escape Hair Design v Fitzgerald* [2011] FWAFB 1422 (unreported, Acton SDP, Cartwright SDP, Blair C, 15 March 2011). Appeal against decision [2010] FWA 7358.
Misapplication of provisions of Act In deciding the initial application, 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 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. The appeal was allowed, the order quashed, and the matter re-heard.	*Aperio Group (Australia) Pty Ltd T/a Aperio Finewrap v Sulemanovski* (2011) 203 IR 18. Appeal against decision [2010] FWA 9958 and order PR505584.
Interpretation of provisions of the Fair Work Act These were two appeals against a decision determining whether certain dismissals were the result of genuine redundancies. The Full Bench found that, because these appeals concerned the interpretation of an important section of the Fair Work Act which had not been considered by a Full Bench before, it was in the public interest to grant permission to appeal. However, 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.	*Ulan Coal Mines Limited v Honeysett* [2010] FWAFB 7578 (unreported, Giudice J, Hamberger SDP, Cambridge C, 12 November 2010). Appeal against decision [2010] FWA 4817.

Permission to appeal refused	Case reference
Significant error of fact established but not in the public interest to grant permission to appeal 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. 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.	*Qantas Airways Limited v Carter* [2012] FWAFB 5776 (unreported, Harrison SDP, Richards SDP, Blair C, 17 July 2012). Appeal against decision [2011] FWA 8025 and order PR517011.

Glossary of terms

Adjournment	To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or to end the proceedings.
Applicant	A person who lodges an application with the Commission.
Application	The way of starting a case before the Commission. An application can only be made using a form prescribed by the *Fair Work Commission Rules 2013* (Cth).
Balance of probabilities	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.
Compensation	A requirement to pay money to an applicant as reimbursement for loss suffered as a consequence of an action.
Commission member	Please see **Member**
Conciliation	An informal method of resolving a dispute by helping the parties to reach a settlement. An independent conciliator can help the parties explore options for a resolution without the need for a conference or hearing before a member.
Conference	A private proceeding conducted by a Commission member.
Decision	A determination made by a single member or Full Bench of the Commission which is legally enforceable. A decision in relation to a matter before the Commission can include the names of the parties and will generally outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.
Discontinue	To formally end a matter before the Commission. A discontinuance can be used during proceedings to stop those proceedings or after proceedings to help finalise a settlement. Once a matter has been discontinued it cannot be restarted.

Enterprise agreement	A legally enforceable document that sets out the employment conditions of a group of employees and their employer. An enterprise agreement is created through negotiations between bargaining representatives of that group of employees and their employer. An enterprise agreement sets out the rights and obligations of the employees and the employer covered by the agreement. An enterprise agreement must meet a number of requirements before it can be approved by the Commission.
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 contained within or attached to an affidavit or provided verbally by a witness in a hearing.
Hearing	A public proceeding or arbitration conducted before a Commission member.
Instrument	A generic term for a legally binding document which details the rights and obligations of the parties bound by the document, such as an 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 contained in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament.
Lodge	The act of making a formal application, response or submission to the Commission.
Matter	Cases at the Commission are referred to as matters.
Member	Someone appointed by the Governor-General to decide matters at the Commission. A member may be a Commissioner, a Deputy President, a Senior Deputy President, a Vice President or a President.
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 made by the Commission which gives effect to a decision and is legally enforceable.
Party (Parties)	A person or organisation involved in a matter before the Commission.

Procedural fairness	Procedural fairness is concerned with the procedures followed, or steps taken, by a person when making a decision rather than the actual decision itself. It requires that a fair and proper procedure be used when making a decision and reinforces the idea of 'a fair go all around'. The terms 'procedural fairness' and 'natural justice' have similar meanings and can be used interchangeably.
Quashed	To set aside or reject a decision (or order) as invalid, resulting in that earlier decision (or order) having no legal effect.
Referred state	States that have referred some (or all) of their workplace relations powers to the Commonwealth. All states except Western Australia have referred these powers.
Reinstatement	To return an employee to the job they previously held before they were dismissed. If the original position is not available the employee should be returned to a position as close as possible in remuneration and status to the original position.
Representative	Someone who you allow to act on your behalf to advance your case. This could be a lawyer, a paid agent, an employee or employer organisation or someone else. A lawyer or paid agent can only represent you before the Commission with permission of the Commission.
Respondent	A party responding to an application made to the Commission.
Serving documents	Please see **service**
Service (Serve)	A requirement to send a copy of a document (and all supporting documents) to another party or their representative, usually within a specified period. A person's obligation to serve documents can be met in a number of ways. The acceptable ways in which a document can be served are listed in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.
Settlement	An agreed resolution of a dispute. Generally, a negotiated outcome which both parties are satisfied with and bound by.
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.