

## FAIR WORK COMMISSION ANTI-BULLYING REGULATIONS

As of 1 of January 2014 the Fair Work Commission's (FWC) Jurisdiction now extends to hearing and determining complaints from workers who believe they have been bullied within their workplace. This has come about due to an amendment of the *Fair Work Act 2009*. This is a significant change which further emphasises the importance for businesses of proactive internal responses to bullying. The FWC can now make any order it deems appropriate except for pecuniary (monetary) payments.

### What constitutes as bullying in accordance to the FWC

1. A worker is **bullied at work** if:
  - a. while the worker **is at work** in a constitutionally covered business:
    - i. an individual; or
    - ii. a group of individuals;
    - iii. repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
  - b. that behaviour creates a risk to health and safety.
2. To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

### Who can apply to the FWC?

There are several criteria in determining who is applicable to apply to the FWC:

1. The person must be a 'worker'.  
A 'worker' can be an employee, contractor, contractor's employee, apprentice, trainee, volunteer or labour hire employee.
2. They must be employed by a constitutional covered business or undertaking.  
Generally, a constitutionally covered business is:
  - a) a proprietary limited company
  - b) a foreign corporation
  - c) a trading or financial corporation formed within the limits of the Commonwealth
  - d) the Commonwealth
  - e) the Commonwealth authority
  - f) a body corporate incorporated in a Territory
  - g) a business or organisation conducted principally in a Territory or Commonwealth place.

Sole traders, partnerships, some State government employees, corporations whose main activity is not trading or financial may not be constitutionally covered businesses but this is a complex area of law and the Victorian Chamber recommend you seek expert advice.

3. The alleged bullying must have occurred at work. It is important to note this is not necessarily limited to the physical workplace but generally the behaviour must have occurred during the course of the worker's employment; and
4. There needs to be a continuing risk of the bullying occurring.

Generally this is likely to prevent workers who have left their employment from successfully bringing a claim. However, it is important to note that for those workers who continue in their employment there is no set time frame to lodge a complaint as long as the risk of bullying remains.

## Process

### Step 1: Lodgement of the application

A worker is able to submit their application by filling in a F72 form from the FWC. It is not a requirement that they inform their employer before doing so. The FWC is required to begin acting upon this application within 14 days. It is important to note making an application to the FWC is a workplace right and therefore workers cannot be treated adversely for making a complaint. It is important employers act to ensure all workers are aware of this to limit the risk of any further claims.

### Step 2: Response to the application

The FWC will then notify the employer or principal and the person/s accused of the bullying behaviour and give each of them a chance to respond. They will get the notification and a copy of the application so a response can be formulated. These responses must be completed and submitted within 7 days of it being received and sent to all relevant parties (Applicant, the alleged bully/bullies, representatives, employer of the accused).

### Step 3: Dealing with the application

Upon receiving all the relevant documentation a report will be formulated, from this the FWC then has the discretion to be able to select the appropriate way to handle this matter. This could be in the form of:

- > Preliminary discussion or conference: to establish the correct avenue or following an unsuccessful mediation.
- > Mediation: A voluntary process in which all parties work together to reach a resolution in private.
- > Conference (generally private) or hearing (generally public): will allow for the FWC to be presented with all the facts and evidence and come to a decision in regards to whether bullying has occurred and how to cease it.
- > Workplace Health and Safety regulators (WHS): The FWC may refer the matter to the WHS regulator
- > Dismissal: You can request the FWC dismiss the claim if it is frivolous, no potential for success or not in accordance with the Act. Generally the FWC will be required to hold a conference or hearing to decide whether the claim should be dismissed.

### Step 4: Outcome

If the FWC finds bullying has occurred in the workplace and there is a risk it will continue to occur it can make any order it deems appropriate other than requiring financial payment. Orders could include: relocation, individual or group to stop bullying, support for the applicant, changing or enforcing the company's bullying policy.

In considering the terms of an order, the FWC must take into account:

- > Any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body; and
- > Any procedure available to the worker to resolve grievances or disputes; and
- > Any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes; and
- > Any matters that the FWC considers relevant.

## Breaching the order

If the order is breached it would be considered a statutory offence. A civil remedy may be awarded against you, which will attract a monetary penalty. An alleged breach must be reported within 6 years by the Fair Work inspector, relevant parties or an industrial association.

## Outcome arising from another body

It is important to recognise that the commission itself does not prevent access to other forms of bullying resolution. As it was previously before the legislative amendments individuals will still have access to other avenues when bullying is occurring. In Victoria such avenues potentially include seeking intervention from an Occupational Health and Safety investigator or Equal Opportunity legislation which provides an avenue for those who feel they have been harassed or discriminated against. WorkCover is also a significant area in which the financial cost of bullying can be felt within companies. The above refers to Victorian legislation in this area but their similar protections from other bodies across Australia including the Australian Human Rights and Equal Opportunities Commission. The FWC may factor in determinations in other forms of remedy, but it can make independent determinations.

## What this means for your business

These changes increase the necessity to ensure that you are safe guarding your company by having comprehensive internal bullying policies, processes and training. If a bullying allegation has been lodged from the FWC you would begin your internal management process in a response to the allegations. The only way to protect yourself fully is to ensure you take your own proactive steps in accordance with your policies and procedures.

## Frequently asked questions

### **If you are not a constitutional corporation what does this amendment mean for you?**

Although your employees are not covered by the new jurisdiction, this should not change your company's approach to bullying practices in the workplace. As covered above there are other state jurisdictions in which an employee will still be able to pursue a bullying matter. It is also important to note the detrimental effects bullying can have not just legislatively but upon your organisation's culture and profitability, as it often effects employee engagement and productivity, absenteeism, performance and so on. Therefore it is important to still review your systems, training and responses to bullying.

### **What costs are involved?**

The cost of the hearing falls on each party in terms of party to party and indemnity costs. It is possible for a cost order to be issued in which one party must cover the other parties cost, however this would only be in certain situations. This is in situations in which the claim is found to be vexatious or without reasonable cause. Application for cost must be within 14 days from when the dispute is finished. Less tangible costs include the effects on the business due to these claims such as low morale, staff absence for appearances and resources redirected. You must also consider what payment will be made for those required to appear in front of the commission in work time.

### **What about foreign companies?**

Companies formed out of Australia but employing within Australia are most likely still Constitutional Corporations therefore this jurisdiction will apply.

### **What are the key risk factors?**

- > Time to participate/defend a claim

- > Impact on staff operations and morale
- > Confidentiality
- > Potential of 'go away' money outside the process
- > Issues around payment for time to participate in the FWC process
- > Increases to risks around later claims, including exposure of (or generation of) information that may lead to WorkCover and adverse action/ general protection claims

## **What steps can be taken to mitigate risk of bullying?**

- > Revisit company policies and procedures in regards to your current bullying and grievance procedures and how to handle the matters when they arise.
- > Consider the processes that your business has in place including formal and informal processes.
- > Continually take part in, and offer refresher training on, bully and the legislation and the process.
- > Clearly state to employees what bullying is and the definition
- > Investigate all bullying claims
- > Consider the introduction of other supports internally, such as Contact Officers
- > Work on growing the perception that issues will be dealt with
- > Reinvigorate your company values and consider including an emphasis on respect and accountability
- > Prepare for, and accept, that serial complainants may emerge

## **Strategies for dealing with a FWC claim**

- > Who is responsible for representing the company if 'management' is named as the perpetrator?
- > What is the stance on claims against individuals (as opposed to the company), be it managers or employees? Might they be viewed as the responsibility of the individual?
- > What is your company stance on payment for FWC attendance by employees?

What is your company 'blueprint' for preparing now, prior to any claims being lodged? Are there any potential claims that you could take action to mitigate now?

## Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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