

## CCI WorkplaceBytes

### Bullying Update

From 1 January 2014 employees are now able to apply to the Fair Work Commission for orders to protect them from bullying. As at the end of April 2014 employers' worst fears of an avalanche of claims have not materialised. The Commission has received 151 applications since the start of the year with only 8 requiring a determination by it. The balance of applications were either resolved or dismissed. The majority of claims involved complaints against managers.

Perhaps it is the 'calm before the storm' but hopefully it is an indication that the new bullying jurisdiction will operate in an effective way for both victim and employer. For the foreseeable future employers need to remain alert and closely monitor developments in the area.

Your focus should continue to be on informing your workforce about what might be considered bullying conduct. We are able to assist you with training on the topic. In the meantime this update provides a short summary of some of the major developments in the area.

#### ***Bullying Before 1 January 2014 Counts***

In a recent case an employee asked the Commission to order a fellow worker stop bullying the employee while at work at a not for profit community support centre. The employee alleged she was subject to bullying from November 2007 to May 2013. Importantly, the employee had made no allegation of bullying since May 2013. This raised a jurisdictional issue as to whether the Commission had the power to consider conduct which occurred before 1 January 2014. This was important because, to meet the definition of bullying, the victim must have been subjected to repeated unreasonable behaviour that creates a risk to health and safety. If conduct before 1 January 2014 was not to be taken into account then the employee would have difficulty meeting the definition of bullying.

Given the significance of the issue the matter was referred to a Full Bench of the Commission. In short the Commission held that it did have jurisdiction to consider acts occurring before 1 January 2014 in deciding whether to make an order relating to a bullying application.

#### ***Bullying Laws Only Cover Constitutional- Covered Businesses***

The Commission then needed to consider whether the community support centre was a "constitutionally-covered business". This is because employees who do not work for a "constitutionally-covered business" are unable to bring bullying claims under the new laws. The Commission considered whether the centre was a "trading corporation".

In considering the law and the facts the Commission decided that the centre was not a “trading corporation”:

*“I am satisfied that the activities provided ..... do not have the character of commercial trade in services or elements of exchange or other commercial indicia in the payment so as to be considered as trading activities for present purposes. The activities... are also provided to the community without charge.”*

This decision suggests that not for profit organisations may not be covered by the new bullying laws. As such, these organisations should seek advice regarding this if faced with a bullying claim.

### ***Bullying at Work***

Another key aspect of bringing a bullying application is that the offending behaviour is continuing to occur at work. So what happens for instance if a worker is bullied via social media platform by a fellow worker using a smartphone after hours? There has yet to be a decision under the new jurisdiction specifically dealing with such an issue. Much will depend on whether the Commission requires the bullying to occur at a place of work or while an employee is performing work. The Commission will need to enquire into the facts of how and when work is carried out. If it was to take the same approach that it does in unfair dismissal applications brought by terminated bullies, one might expect that the Commission may seek to give broad scope to being at work and only require that there be a connection between the offending conduct and employment of the victim.

### ***Orders the Commission Can Make***

The Commission has broad powers to make any orders it considers appropriate but cannot order a payment of compensation.

Examples of orders the Commission might make include:

- that offending behaviour stop;
- regular monitoring of behaviour by an employer;
- compliance with an employer’s workplace bullying policy;
- the provision of information, support and training of workers;
- review of an employer’s workplace bullying policy.

On 21 March 2014 the Commission made its first bullying orders which demonstrate the potential breadth of orders the Commission may be prepared to make. In that case the Commission ordered the offending employee:

- *make no comment about the applicant’s clothes or appearance;* and
- *have no contact with the applicant alone.*

Some commentators have queried whether orders of this type without end dates will be open to challenge. Time will tell!

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