

STOP THE BULLYING: THE ANTI-BULLYING PROVISIONS IN THE *FAIR WORK ACT* AND RESTORING THE EMPLOYMENT RELATIONSHIP

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I INTRODUCTION

‘We just want it to stop’ was the catchcry adopted by the House of Representatives Standing Committee on Education and Employment (‘Parliamentary Committee on Workplace Bullying’) in respect of its 2012 report into workplace bullying in Australia.¹ The authors of that report recommended ‘that the Commonwealth Government implement arrangements that would allow an individual right of recourse for people who are targeted by workplace bullying to seek remedies through an adjudicative process’.² The Australian Government responded, and on 1 January 2014 Australia’s industrial relations umpire, the Fair Work Commission (‘FWC’), was given jurisdiction to hear and determine anti-bullying applications under part 6-4B (the ‘anti-bullying jurisdiction’) of the *Fair Work Act 2009* (Cth) (‘*FWA*’).³

The focus of the anti-bullying jurisdiction is on preventing the harm that may be occasioned by workplace bullying by ‘providing a quick and cost-effective remedy to individuals’.⁴ The then Minister for Employment and Workplace Relations, the Hon Bill Shorten, explained that the aims of the anti-bullying jurisdiction are ‘to encourage early intervention to stop the bullying, to help people resume normal working relationships, and to prevent further episodes of bullying in the workplace into the future’.⁵

The purpose of this article is to examine the scope of the new *FWA* anti-bullying provisions and, through an analysis and discussion of Fair Work (‘FW’) decisions since its commencement, to consider the likelihood of employers and

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1 House of Representatives Standing Committee on Education and Employment, Parliament of Australia, *Workplace Bullying: We Just Want It To Stop* (2012) (‘*Workplace Bullying Report*’).

2 *Ibid* xxiv. See also: at 183–90.

3 As inserted by *Fair Work Amendment Act 2013* (Cth) s 3 sch 3.

4 Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth) 9.

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2908.

employees restoring harmonious working relations. It is argued that although the FW jurisdiction is an important avenue for employees to seek intervention in workplace bullying, the aims of stopping bullying and restoring harmonious employment relationships for now remain elusive. Part II to Part IV of the article will provide a brief overview of the nature and consequences of workplace bullying in order to place the discussion in context. Part V will address two key issues in relation to the FW jurisdiction, namely, the under-reporting of workplace bullying and evidentiary challenges in bringing a successful claim. This will be followed by a discussion in Part VI of the potential impact of anti-bullying applications on the employment relationship and the prospects of applicants returning to the same workplace.

II WHAT IS WORKPLACE BULLYING?

Defining bullying whether in law, policy or research remains a challenge. Nonetheless, the literature on workplace bullying generally recognises bullying as unreasonable behaviour that is repeated and highly detrimental and harmful to a person's safety and wellbeing. This is evident in the following definitions.

As a starting point, the International Labour Organization has described bullying as:

repeated offensive behaviour through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees. Bullying is frequently covert and occurs out of sight of potential witnesses. However, the behaviours usually escalate in intensity over time. These persistently negative attacks on the personal and professional performance of victims are typically unpredictable, irrational and unfair.⁶

Elsewhere, workplace bullying has similarly been defined as:

- 'repeated, health-harming mistreatment of a person by one or more workers that takes the form of verbal abuse; conduct or behaviors that are threatening, intimidating, or humiliating; sabotage that prevents work from getting done; or some combination of the three';⁷
- 'the repeated unethical and unfavorable treatment of one person by another in the workplace';⁸

6 Duncan Chappell and Vittorio Di Martino, International Labour Organization, *Violence at Work* (International Labour Office, 3rd ed, 2006) 20 <http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221108406_EN/lang--en/index.htm> (emphasis altered).

7 Gary Namie and Ruth Namie, *The Bully at Work: What You Can Do To Stop the Hurt and Reclaim Your Dignity on the Job* (Sourcebooks, 2nd ed, 2009) 3.

8 Clive R Boddy, 'Corporate Psychopaths, Bullying and Unfair Supervision in the Workplace' (2011) 100 *Journal of Business Ethics* 367, 367.

- ‘the pattern of destructive and generally deliberate demeaning of co-workers or subordinates that reminds us of the activities of the schoolyard bully’;⁹ and
- the ‘situation in which a person persistently is on the receiving end of negative actions from one or several others in a situation where the person exposed to the negative treatment has difficulties defending himself or herself against these actions’.¹⁰

These definitions encompass core ‘elements’ of workplace bullying which tend to be common to most definitions in the literature,¹¹ namely frequency,¹² duration,¹³ power imbalance,¹⁴ and hostility.¹⁵ Taking these elements into account, Einarsen et al proposed the following comprehensive definition:

Bullying at work means *harassing, offending, or socially excluding* someone or negatively affecting someone’s work. In order for the label bullying (or mobbing) to be applied to a particular activity, interaction, or process, the bullying behaviour has to occur *repeatedly and regularly* (eg, weekly) and *over a period of time* (eg, about six months). Bullying is an escalating process in the course of which the person confronted *ends up in an inferior position* and becomes the target of systematic negative social acts. A conflict cannot be called bullying if the incident is an isolated event or if two parties of approximately equal strength are in conflict.¹⁶

Although ‘frequency’ or repetition of behaviour appears to be a defining feature of bullying, researchers do not all agree that frequency and duration of behaviours are necessary for such behaviours to be labelled bullying.¹⁷ Einarsen and Skogstad suggested that the behaviours must occur weekly or now and then for six months in order to be bullying.¹⁸ Leymann on the other hand thought that the behaviours had to occur nearly daily for at least six months to avoid capturing ‘temporary conflicts’.¹⁹ Björkqvist, Österman and Hjelt-Bäck reported that harassment (that is, bullying) ‘may be short in duration and extremely

9 Gina Vega and Debra R Comer, ‘Sticks and Stones May Break Your Bones, but Words Can Break Your Spirit: Bullying in the Workplace’ (2005) 58 *Journal of Business Ethics* 101, 101.

10 Tina Løkke Vie, Lars Glasø and Ståle Einarsen, ‘Health Outcomes and Self-labeling as a Victim of Workplace Bullying’ (2011) 70 *Journal of Psychosomatic Research* 37, 37, citing Ståle Einarsen and Anders Skogstad, ‘Bullying at Work: Epidemiological Findings in Public and Private Organizations’ (1996) 5 *European Journal of Work and Organizational Psychology* 185; Dan Olweus, *Bullying at School: What We Know and What We Can Do* (Blackwell Publishing, 1993).

11 Al-Karim Samnani and Parbudyal Singh, ‘20 Years of Workplace Bullying Research: A Review of the Antecedents and Consequences of Bullying in the Workplace’ (2012) 17 *Aggression and Violent Behavior* 581, 582.

12 Ståle Einarsen et al, ‘The Concept of Bullying and Harassment at Work: The European Tradition’ in Ståle Einarsen et al (eds), *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice* (CRC Press, 2nd ed, 2011) 3, 11–12.

13 Ibid 12–13.

14 Ibid 15–16.

15 Ibid 13–15.

16 Ibid 22 (emphasis altered).

17 Helen Cowie et al, ‘Measuring Workplace Bullying’ (2002) 7 *Aggression and Violent Behavior* 33, 35–6.

18 Einarsen and Skogstad, above n 10, 190, 195.

19 Heinz Leymann, ‘Mobbing and Psychological Terror at Workplaces’ (1990) 5 *Violence and Victims* 119, 120.

intense²⁰ or may also ‘be less intense but stretched²⁰ over a long period of time’.²¹ On balance, and as a minimum, the literature discloses a requirement that bullying behaviours exhibit ‘some degree of repetition’.²²

Another dimension of bullying is power imbalance, which ‘refers to the disparity in perceived power between the target and the perpetrator’.²³ That is, power imbalance occurs when the target ‘perceives that he or she has little recourse to retaliate’.²⁴ It is said that ‘imbalance of power often mirrors the formal power structure of the organisational context in which the bullying scenario unfolds’,²⁵ although bullying exists in relationships other than that of manager–subordinate. Workplace bullying may also be perpetrated between co-workers, or by a subordinate to their superior,²⁶ the latter being described as ‘upward bullying’.²⁷ The importance of power imbalance is that conflict between ‘two parties of approximately equal strength’²⁸ is not, according to Einarsen et al, bullying. Put another way, ‘to be a victim of such bullying one must also feel inferiority in defending oneself in the actual situation’.²⁹

‘Workplace bullying’ is a convenient label applied to a continuum of hostile behaviour, from subtle acts and omissions³⁰ to overt ‘aggression and violence’,³¹ with the former being ‘far more prevalent’.³² Hostility, according to Samnani and Singh, ‘refers to the underlying negativity of the [bullying] behaviors’.³³ Rayner and Hoel grouped bullying behaviours and proposed the following categories:

threat to professional status (eg belittling opinion, public professional humiliation, accusation regarding lack of effort); threat to personal standing (eg name-calling, insults, intimidation, devaluing with reference to age); isolation (eg preventing access to opportunities, physical or social isolation, withholding of information); overwork (eg undue pressure, impossible deadlines, unnecessary disruptions); and destabilization (eg

20 Kaj Björkqvist, Karin Österman and Monika Hjelt-Bäck, ‘Aggression among University Employees’ (1994) 20 *Aggressive Behavior* 173, 174.

21 Ibid.

22 Cowie et al, above n 17, 35.

23 Samnani and Singh, above n 11, 582.

24 Einarsen et al, above n 12, 15, citing Ståle Einarsen, ‘The Nature and Causes of Bullying at Work’ (1999) 20 *International Journal of Manpower* 16.

25 Einarsen et al, above n 12, 15.

26 Carlo Caponecchia and Anne Wyatt, *Preventing Workplace Bullying: An Evidence-Based Guide for Managers and Employees* (Allen & Unwin, 2011) 9.

27 See, eg, Helen Giles, ‘Upwards Bullying in the Workplace’, *HR* (online), 7 December 2012 <<http://www.hr magazine.co.uk/hr/opinion/1075633/upwards-bullying-workplace>>; Belinda Wallace, Lucy Johnston, and Linda Trenberth, ‘Bullying the Boss: The Prevalence of Upward Bullying Behaviours’ (2010) 3 *Australian and New Zealand Journal of Organisational Psychology* 66.

28 Einarsen et al, above n 12, 22.

29 Einarsen and Skogstad, above n 10, 187.

30 Jeffrey B Arthur, ‘Do HR System Characteristics Affect the Frequency of Interpersonal Deviance in Organizations? The Role of Team Autonomy and Internal Labor Market Practices’ (2011) 50 *Industrial Relations: A Journal of Economy and Society* 30, 30.

31 Ibid.

32 Ibid.

33 Samnani and Singh, above n 11, 582. See also Dieter Zapf, ‘Organisational, Work Group Related and Personal Causes of Mobbing/Bullying at Work’ (1999) 20 *International Journal of Manpower* 70.

failure to give credit when due, meaningless tasks, removal of responsibility, repeated reminders of blunders, setting up to fail).³⁴

It is beyond the scope of this article to attempt to exhaustively list the behaviours which may constitute bullying (if such an endeavour is even possible),³⁵ it being sufficient to observe that bullying behaviour can take many forms, as indicated above.

The definition of bullying in the *FWA* reflects key elements of bullying as noted in the literature and corresponds with definitions found in workplace health and safety policies and guidelines.³⁶ Section 789FD of the *FWA* provides that a person will have been ‘bullied at work’ if they have been subjected to repeated unreasonable behaviour while at work, which is not ‘reasonable management action carried out in a reasonable manner’,³⁷ and which create a risk to health and safety.³⁸

The definition of ‘bullied at work’ in section 789FD includes the requirement that the unreasonable behaviour must be repeated. Section 789FD does not, however, stipulate a minimum period of time for which the unreasonable behaviour must persist before it may be labelled ‘bullying’. In *SB*, it was noted that

[t]here is no specific number of incidents required for the behaviour to represent “repeatedly” behaving unreasonably (provided there is more than one occurrence), nor does it appear that the same specific behaviour has to be repeated.³⁹

Accordingly, the definition of ‘bullied at work’ in section 789FD will likely capture a broader range of behaviour compared with definitions posed in the literature.

The element of ‘hostility’ is arguably present in section 789FD insofar that behaviour must be ‘unreasonable’ in order to fall within the scope of the section. Similarly, the element of ‘power imbalance’ is not explicitly taken up in the definition of ‘bullied at work’ in section 789FD. Accordingly, it is possible that the FWC could objectively determine that behaviours are unreasonable and create a risk to health and safety ‘having regard to all the relevant circumstances applying at the time’,⁴⁰ notwithstanding the absence of a perceived or actual imbalance of power between the parties.

34 Charlotte Rayner and Helge Hoel, ‘A Summary Review of Literature Relating to Workplace Bullying’ (1997) 7 *Journal of Community & Applied Social Psychology* 181, 183.

35 There is limited guidance from case law on what behaviours constitute bullying: see, eg, *WorkCover Authority (NSW) v Coleman* (2004) 138 IR 21; *Naidu v Group 4 Securitas Pty Ltd* (2005) EOC 93-408; *Styles v Murray Meats Pty Ltd* (2005) EOC 93-387; *Willett v Victoria* [2013] VSCA 76.

36 See, eg, Safe Work Australia, *Guide for Preventing and Responding to Workplace Bullying* (Publication, 27 November 2013) <<http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/guide-workplace-bullying>>.

37 *FWA* ss 789FD(1)(a), (2). Hatcher V-P notes that this provision is ‘loosely modelled upon provisions in Australian workers’ compensation statutes which exclude employers’ liability for certain workplace injuries caused by reasonable management action’: *Mac v Bank of Queensland Ltd* [2015] FWC 774 (Unreported, Hatcher V-P, 13 February 2015) [95] (‘*Amie Mac*’).

38 *FWA* s 789FD(1)(b).

39 [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [41].

40 *Ibid* [43].

Section 789FD of the *FWA* provides little guidance as to the types of behaviours that constitute workplace bullying, other than the behaviour must be ‘unreasonable’. This is qualified by section 789FD(2) which provides that, ‘to avoid doubt’, bullying behaviour is not ‘reasonable management action carried out in a reasonable manner’. As noted by Commissioner Hampton in *SB*, reasonable management action ‘is not so much an “exclusion” but a qualification which reinforces that bullying conduct must of itself be unreasonable’.⁴¹ Further, ‘[d]etermining 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’.⁴²

Over time decisions published by the FWC (and appellate courts) will no doubt clarify the types of behaviours which fall within the scope of section 789FD and which will constitute workplace bullying. Nonetheless there is much research on bullying generally and on workplace bullying that provides comprehensive insights into the nature and serious health-harming consequences of workplace bullying.

III CONSEQUENCES OF WORKPLACE BULLYING

The personal, social and economic consequences of bullying are well documented and it is evident that workplace bullying presents a potentially significant risk to the health, safety and wellbeing of Australian workers. The Parliamentary Committee on Workplace Bullying observed that ‘workplace bullying can result in significant damage to an individual’s health and wellbeing, and in extreme cases, can lead targets of bullying to suicide’.⁴³ The literature on workplace bullying identifies a plethora of mental, physical and economic consequences for the targets of workplace bullying. The most common complaints associated with workplace bullying are ‘stress, depression and lowered self-esteem’.⁴⁴

Targets of workplace bullying may also develop physical symptoms such as muscular tension, headaches, nausea and stomach upset.⁴⁵ At the most serious end of the spectrum, the trauma⁴⁶ caused by the experience of workplace bullying

41 Ibid [47].

42 Ibid [49]. See also Commissioner Lewin’s statement that management ‘action carried out in a reasonable manner will require judgement by the Commission of what would be reasonable in the particular circumstances of a case’: *Willis v Gibson* [2015] FWC 1131 (Unreported, Commissioner Lewin, 17 February 2015) [10].

43 *Workplace Bullying Report*, above n 1, ix.

44 Cowie et al, above n 17, 34, citing Klaus Niedl, ‘Mobbing and Wellbeing: Economic and Personnel Development Implications’ (1996) 5 *European Journal of Work and Organizational Psychology* 239.

45 Caponecchia and Wyatt, above n 26, 41–2.

46 Pamela Lutgen-Sandvik, ‘Intensive Remedial Identity Work: Responses to Workplace Bullying Trauma and Stigmatization’ (2008) 15 *Organization* 97.

can lead to post-traumatic stress disorder.⁴⁷ In the worst cases, it can lead to suicide,⁴⁸ as in the tragic case of Brodie Panlock who took her own life ‘in 2006 after enduring persistent and vicious bullying’⁴⁹ while working in a Melbourne café.⁵⁰

Workplace bullying also presents serious economic consequences as it erodes and may eventually destroy the employment relationship. The target of bullying may decide (or be forced) to exit the workplace,⁵¹ and look for alternative employment which may, or may not, be available.⁵² In serious cases, workplace bullying may render the target incapable of returning to the labour market for a period of time, or at all.⁵³ As Vie, Glasø and Einarsen explain,

the target becomes stigmatized and finds it more and more difficult to protect himself or herself against ... increasingly harsh attacks. As a result, the target may suffer from a wide range of stress symptoms, which in turn may lead him or her to withdraw from both social and professional activities.⁵⁴

This was demonstrated in the Canadian case of *Boucher v Wal-Mart Canada Corp* (‘*Boucher*’).⁵⁵ In this case the employee, who was described as a model employee, was bullied by a store manager after she refused to falsify information on a temperature log that recorded temperatures of food stored in coolers. The applicant was subjected to relentless belittling and humiliation by the store

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- 47 Heinz Leymann, ‘The Content and Development of Mobbing at Work’ (1996) 5 *European Journal of Work and Organizational Psychology* 165, 174; Noreen Tehrani, ‘Bullying: A Source of Chronic Post Traumatic Stress?’ (2004) 32 *British Journal of Guidance & Counselling* 357, 364–5; Sarah Vaughan, ‘*Ya ’makasi* or the Art of Displacement in the Corporate World: A Target’s Perspective on the Impact of Workplace Bullying’ in Noreen Tehrani (ed), *Workplace Bullying: Symptoms and Solutions* (Routledge, 2012) 51.
- 48 Angelo Soares, ‘When Darkness Comes: Workplace Bullying and Suicidal Ideation’ in Noreen Tehrani (ed), *Workplace Bullying: Symptoms and Solutions* (Routledge, 2012) 69; Leymann, ‘The Content and Development of Mobbing’, above n 47, 176; Charlotte Rayner, Helge Hoel and Cary L Cooper, *Workplace Bullying: What We Know, Who Is To Blame, and What Can We Do?* (Taylor & Francis, 2002) 51.
- 49 *Workplace Bullying Report*, above n 1, 39.
- 50 WorkSafe Victoria, *Prosecution Results Summaries: Incident Summary: MAP Foundation Pty Ltd 08/02/2010*, Victorian WorkCover Authority <<http://www1.worksafe.vic.gov.au/vwa/vwa097-002.nsf/content/LSID164635-1>>.
- 51 Maryam Omari and Megan Paull, ‘“Shut Up and Bill”: Workplace Bullying Challenges for the Legal Profession’ (2013) 20 *International Journal of the Legal Profession* 141, 152.
- 52 The authors acknowledge that in some circumstances the decision to leave the workplace and find alternative employment may bring financial benefits: see Premilla D’Cruz and Ernesto Noronha, ‘The Exit Coping Response to Workplace Bullying: The Contribution of Inclusivist and Exclusivist HRM Strategies’ (2010) 32 *Employee Relations* 102, 118.
- 53 Leymann, ‘The Content and Development of Mobbing’, above n 47, 174; *Workplace Bullying Report*, above n 1, 2.
- 54 Vie, Glasø and Einarsen, above n 10, 37, citing Hélène Sandmark, ‘Job Mismatching, Unequal Opportunities and Long-Term Sickness Absence in Female White-Collar Workers in Sweden’ (2009) 37 *Scandinavian Journal of Public Health* 43; Isabelle Niedhammer et al, ‘Workplace Bullying and Sleep Disturbances: Findings from a Large Scale Cross-Sectional Survey in the French Working Population’ (2009) 32 *SLEEP* 1211.
- 55 120 OR (3d) 481 (Ontario Court of Appeal). The Court of Appeal upheld the jury’s decision but reduced the quantum of damages.

manager. She finally left her job in 2009 when Wal-Mart senior management failed to take any action to properly investigate and stop the bullying behaviour. The jury found that the employee had been constructively dismissed and awarded damages totalling approximately US\$1.45 million, which included aggravated and punitive damages (later reduced on appeal), against Wal-Mart and the store manager, for ‘intentional infliction of mental suffering’.⁵⁶ The applicant suffered from stress-related physical symptoms, was described by co-workers as a ‘defeated broken person’, and by September 2012 when the trial started, had not yet found other employment.⁵⁷

As illustrated in *Boucher*, the consequences of workplace bullying for organisations are serious and should not be ignored by management who, leaving aside a moral imperative, wish to protect the ‘financial bottom-line’.⁵⁸ Employers may also incur substantial legal costs associated with dealing with workplace bullying claims.⁵⁹ Overall, workplace bullying is a serious ‘source of financial waste’ for organisations.⁶⁰ In this regard, the Parliamentary Committee on Workplace Bullying, relying on information provided by the Productivity Commission, reported that each case of ‘[w]orkplace bullying costs employers an average of \$17 000 to \$24 000’.⁶¹

Vega and Comer observe that ‘[a]lienation, unemployability, disaffection, and court involvement’⁶² occasioned by workplace bullying ‘have social as well as broad economic implications’.⁶³ On this basis, they argue that ‘[i]t is in everyone’s interest to keep the impact of bullying under control’.⁶⁴

The general ill effects of workplace bullying on an organisation were summarised by Sheehan as including ‘declining morale and decreased profits; decreased productivity and work intensification; and declining commitment, job satisfaction and motivation’.⁶⁵ Omari and Paull add that workplace bullying can also damage organisational reputation and result in exit decisions by targets of bullying,⁶⁶ leading to a loss of skills, experience and knowledge. Further, damage is not limited to the immediate relationship between the bully and the target;

56 Ibid 482 (Laskin JA).

57 Ibid 497–8 (Laskin JA). See also ‘Workplace Bullying: The Silent Epidemic’, *CBC News* (online), 12 June 2014 <<http://www.cbc.ca/news/business/workplace-bullying-a-major-concern-in-canada-says-woman-who-sued-wal-mart-1.2673109>>, in which the applicant is interviewed.

58 Michael Harvey et al, ‘Bullying in the 21st Century Global Organization: An Ethical Perspective’ (2009) 85 *Journal of Business Ethics* 27, 27.

59 Vega and Comer, above n 9, 106.

60 Rayner, Hoel and Cooper, above n 48, 56.

61 *Workplace Bullying Report*, above n 1, 10.

62 Vega and Comer, above n 9, 106–7.

63 Ibid 107.

64 Ibid.

65 Michael Sheehan, ‘Workplace Bullying: Responding with Some Emotional Intelligence’ (1999) 20 *International Journal of Manpower* 57, 58 (citations omitted).

66 Omari and Paull, above n 51, 152.

witnesses of bullying are also reported to function sub-optimally,⁶⁷ and may also decide to exit the organisation.⁶⁸

Although Samnani and Singh note that little research exists on societal-level consequences of workplace bullying,⁶⁹ the consequences are conceivable. Lower participation in the labour market (through, for example, early retirement caused by workplace bullying)⁷⁰ would logically diminish the tax base, in turn diminishing tax revenues available to governments. Workers who have exited the labour market due to workplace bullying may, depending on their circumstances, come to rely on social security systems to survive, thereby increasing government spending in that area,⁷¹ potentially at the expense of other programs. Speculation aside, the Parliamentary Committee on Workplace Bullying, relying on data provided by the Productivity Commission, reported that workplace bullying costs the Australian economy between ‘\$6 billion and \$36 billion every year’.⁷² Even in the best case, \$6 billion is a significant cost to Australia.

Research reveals that workplace bullying holds serious consequences for individuals, organisations and society in general. Although the evidence base in Australia on workplace bullying is arguably inadequate,⁷³ there is sufficient understanding of the nature and gravity of its consequences to justify the creation of the anti-bullying jurisdiction under the *FWA*.

IV THE FAIR WORK ANTI-BULLYING JURISDICTION

Prior to the creation of the FW anti-bullying jurisdiction, targets of bullying could, and still can, seek relief under various areas of law. These areas include workers’ compensation legislation, anti-discrimination and harassment legislation, industrial legislation, and common law causes of action in contract and tort.⁷⁴ Moreover, actions can also be brought under occupational health and safety legislation through which employers and employees can be held criminally liable for workplace bullying, but which does not provide relief

67 Ibid.

68 Rayner, Hoel and Cooper, above n 48, 56.

69 Samnani and Singh, above n 11, 586.

70 Leymann, ‘The Content and Development of Mobbing’, above n 47, 173.

71 Samnani and Singh, above n 11, 586.

72 *Workplace Bullying Report*, above n 1, 10.

73 Ibid 8–10.

74 Joan Squelch and Robert Guthrie, ‘The Australian Legal Framework for Workplace Bullying’ (2010) 32 *Comparative Labor Law & Policy Journal* 15. See also Joan Squelch and Robert Guthrie, ‘Workplace Health and Safety: Managing the Risk of Workplace Bullying’ (2012) 14 *Legal Issues in Business* 9. For a report on bullying and workers’ compensation, see Safe Work Australia, *The Incidence of Accepted Workers’ Compensation Claims for Mental Stress in Australia* (Publication, April 2013) <<http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/769/The-Incidence-Accepted-WC-Claims-Mental-Stress-Australia.pdf>>.

directly to the victim of bullying.⁷⁵ However, as Squelch and Guthrie argued, the legal framework (as it then was) provided little scope for ‘courts and tribunals to intervene while bullying behaviors [were] occurring’,⁷⁶ with emphasis instead placed on compensation for the target of bullying once the damage had been done.

The FW anti-bullying jurisdiction is contained in part 6-4B of the *FWA*. It aims to provide an accessible mechanism for a person who ‘reasonably believes’ they have been ‘bullied at work’ to apply to the FWC for an order to prevent the worker from being bullied at work (‘anti-bullying orders’).⁷⁷ The FWC will grant anti-bullying orders where it is satisfied that the applicant has been ‘bullied at work’ and that ‘there is a risk that the worker will continue to be bullied’.⁷⁸ The FWC will not grant an order to stop bullying if there is no prospect of the bullying continuing either because the applicant has left the workplace or the circumstances are such that no risk of bullying arises. The FWC will therefore dismiss the application if there is ‘no reasonable prospect of success’.⁷⁹

Section 789FD(1)(a) provides that a worker is ‘bullied at work’ if ‘while the worker is at work in a constitutionally-covered business’ they are subjected to repeated unreasonable behaviour by an individual or group of individuals. The meaning of ‘at work’ is therefore ‘central to the operation of Part 6-4B’ and was in contention in the case of *Bowker v DP World Melbourne Ltd* (‘*Bowker*’).⁸⁰ In this case, the applicants sought an order against the respondents to stop bullying. The respondents contended certain alleged conduct should be struck out on the basis of it not occurring ‘at work’.⁸¹ The FWC therefore considered the meaning of the expression ‘while the worker is at work’ in section 789FD(1)(a) within the legislative context. The FWC first noted that in ascertaining the meaning of a statutory provision, the starting point is ‘the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose’.⁸² The Commission further noted that a construction that promotes the purpose or object of the *FWA* is to be preferred, and that ‘[a]ny ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow’.⁸³

75 See, eg, Squelch and Guthrie, ‘Workplace Health and Safety’, above n 74, 9. See also WorkSafe Victoria, above n 50, in which the business, the director and employees were fined some \$335 000 in total for bullying.

76 Squelch and Guthrie, ‘The Australian Legal Framework’, above n 74, 51.

77 *FWA* s 789FC.

78 *FWA* s 789FF(1).

79 *Obatoki v Mallee Track Health & Community Services* [2014] FWC 8828 (Unreported, Deputy President Kovacic, 5 December 2014); *Re PK* [2015] FWC 562 (Unreported, Commissioner Hampton, 11 February 2015); *Jackson* [2015] FWC 402 (Unreported, Senior Deputy President Hamberger, 15 January 2015).

80 [2014] FWC 9227 (Unreported, Ross P, Hatcher V-P, Deputy President Gostencnik, Commissioner Hampton and Commissioner Johns, 19 December 2014) [11]. See also *Amie Mac* [2015] FWC 774 (Unreported, Hatcher V-P, 13 February 2015) [82]–[84].

81 *Bowker* [2014] FWC 9227 (Unreported, Ross P, Hatcher V-P, Deputy President Gostencnik, Commissioner Hampton and Commissioner Johns, 19 December 2014) [4].

82 *Ibid* [20].

83 *Ibid* [26].

Following on from this, the Commission argued that ‘[t]he first part of the expression “while the worker is at work” is less contentious; it ‘create[s] a temporal connection between the bullying conduct ... and the worker being “at work”’.⁸⁴ As a conjunction, the word ‘while’ means ‘during the time that’, which is consistent with the ordinary meaning of the words. However, the Commission argued that the words ‘at work’ present a more challenging interpretive task. Referring to the meaning of ‘at work’ in the *Work Health and Safety Act 2011* (Cth),⁸⁵ and providing a comparable meaning, the Commission held that ‘at work’ is not confined to ‘a physical workplace’ and that a worker is at work ‘at any time the worker performs work, regardless of his or her location or the time’.⁸⁶ The Commission ‘concluded that the legal meaning of the expression “while the worker is at work” certainly encompasses the circumstance in which the alleged bullying conduct ... occurs at a time when the worker is “performing work”’, and is not confined to ‘a physical workplace’.⁸⁷ However, the Commission acknowledged that ‘[t]he application of the meaning of “at work” ... will depend on all the circumstances and ... the jurisprudence [will] develop on a case by case basis’.⁸⁸

Although the FW jurisdiction covers the majority of employers and employees, coverage is still limited by section 789FD(1)(a) which requires the workplace to be a ‘constitutionally-covered business’. In other words, the bullying conduct must take place while the worker is at work in a ‘constitutionally-covered business’. A ‘constitutionally-covered business’ is defined in section 789FD(3) as one of the following: a constitutional corporation,⁸⁹ the Commonwealth, a Commonwealth authority (for example, Australian Rail Track Corporation Ltd), a body corporate incorporated in a Territory, or a business that is conducted principally in a Territory or Commonwealth place. Therefore employees not captured by this provision will not have access to the FWC. This is illustrated by the FWC decision in *AB*, in which the bullying application by AB was dismissed for want of jurisdiction. The applicant AB was employed by the New South Wales Department of Education and worked as a teacher in a public school.⁹⁰ The jurisdictional issue raised was whether the Department of Education is a ‘constitutionally-covered business’. The Commission held that the Department of Education (and the school) is

84 Ibid [32]–[33] (emphasis in original).

85 Section 8(1) of the Act also broadly defines ‘a workplace’ as ‘a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work’.

86 *Bowker* [2014] FWCFB 9227 (Unreported, Ross P, Hatcher V-P, Deputy President Gostencnik, Commissioner Hampton and Commissioner Johns, 19 December 2014) [48].

87 Ibid.

88 Ibid [58].

89 Defined in *FWA* s 12 in terms of s 51(xx) of the *Australian Constitution* as ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.

90 [2014] FWC 6723 (Unreported, Commissioner Hampton, 30 September 2014).

neither a Commonwealth entity nor a trading corporation,⁹¹ and hence ‘the workplace concerned is not a constitutionally-covered workplace’.⁹² The FW anti-bullying jurisdiction therefore excludes a major sector of the workforce.⁹³

V THE ANTI-BULLYING JURISDICTION AND WORKING RELATIONSHIPS

The FW anti-bullying jurisdiction aims ‘to encourage early intervention to stop the bullying, [and] to help people resume normal working relationships’.⁹⁴ However, issues of under-reporting and evidentiary matters present a challenge, and the adversarial nature of proceedings is likely to have a negative impact on employment relations and possibly undermine the reparation of the employment relationship.

A Under-reporting of Workplace Bullying

Workplace bullying cannot be addressed if it is hidden. Under-reporting therefore presents a real challenge to efforts to combat workplace bullying. It is widely accepted that targets of bullying are often reluctant to report their experience of workplace bullying. The Parliamentary Committee on Workplace Bullying briefly acknowledged this issue, observing that:

There may be many reasons why workers do not report, do not report early, or leave their job without reporting the problem. These reasons may include embarrassment, fear of losing one’s job, fear of reprisal, distrust of the hierarchy, or not wanting to be seen as a troublemaker. Other contributing factors might include lack of trust in the complaint handling procedure, low self-esteem, guilt about having possibly encouraged the behaviour, and the social conditioning linked to the workplace atmosphere and environment.⁹⁵

It has been reported that targets of workplace bullying often have ‘difficulty [in] communicating the experience to others who have not been bullied’.⁹⁶ In cases of subtle bullying, ‘targets may be reluctant to ascribe negative intentions

91 For a discussion on schools as trading corporations, see Joan Squelch and Lisa Goldacre, ‘School Prospectuses and the Potential Liability of Private Schools under Section 52 of the *Trade Practices Act 1974* (Cth)’ (2009) 14(1) *International Journal of Law & Education* 39.

92 *AB* [2014] FWC 6723 (Unreported, Commissioner Hampton, 30 September 2014) [19].

93 In most jurisdictions, state sector and local government employees are not covered by the national FW system but by the state industrial relations system. For an overview of the coverage of the FW system, see Fair Work Ombudsman, *The Fair Work System* <<http://www.fairwork.gov.au/About-us/the-fair-work-system>>.

94 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2013, 2908 (Bill Shorten, Minister for Employment and Workplace Relations).

95 *Workplace Bullying Report*, above n 1, 79.

96 Frances Hay-Mackenzie, ‘Tackling the Bullies: In the Classroom and in the Staffroom’ (2002) 7(2) *Australia & New Zealand Journal of Law & Education* 87, 116.

to the perpetrator because he/she may be uncertain whether ... [the behaviours] ... are in fact intended to be harmful'.⁹⁷

The FW anti-bullying jurisdiction is intended to make reporting easier, more accessible and less burdensome, especially as application costs are kept low and there is no automatic right to legal representation. Importantly, employees are also not required to exhaust an organisation's internal grievance mechanism before they can seek external intervention via the FWC. Nonetheless, the anti-bullying jurisdiction is only enlivened once a person who reasonably believes they are being bullied makes an application under section 789FC of the *FWA*. The FWC has no ability to initiate anti-bullying proceedings on its own motion,⁹⁸ nor does the *FWA* allow a third party to make an application on behalf of a worker whom they believe is being 'bullied at work'.⁹⁹

Despite initial dire warnings that the FWC would be flooded with applications, this has not been the case, as discussed below. The 'self-help' nature of the anti-bullying jurisdiction makes it susceptible to the phenomenon of under-reporting. As a result, targets of workplace bullying may: (1) fail to make an application; or (2) make non-conforming applications and fail to engage with the FWC to remedy the non-conformance, leading to the dismissal of the application.

1 Failure To Make an Application

In 2013, the FWC commissioned a report ('*Acas Report*').¹⁰⁰ The purpose of the report was to '[examine] the approaches used by the UK Advisory, Conciliation and Arbitration Service (Acas) in dealing with bullying and harassment issues and complaints and [consider] how such approaches might be applied in the Australian context'.¹⁰¹

The authors of the *Acas Report* noted that Acas conciliates 'relatively few claims of harassment ... that are taken by individuals who have remained in

97 Al-Karim Samnani, 'The Early Stages of Workplace Bullying and How It Becomes Prolonged: The Role of Culture in Predicting Target Responses' (2013) 113 *Journal of Business Ethics* 119, 121, citing Elfi Baillien et al, 'A Qualitative Study on the Development of Workplace Bullying: Towards a Three Way Model' (2009) 19 *Journal of Community & Applied Social Psychology* 1.

98 The authors submit that the Fair Work Ombudsman ('FWO') can take an active role in investigating workplace bullying complaints, especially where workplace bullying is an adverse action and associated with harassment, discrimination and other contraventions of the *FWA*: *FWA* s 682(1)(c). The FWO can also commence proceedings in court or make an application to the FWC: *FWA* s 682(1)(d). See also Bridget Brennan and Lucy McNally, 'Fruit Picking Industry Operator Investigated over Claims of Bullying, Sexual Harassment in Mildura', *ABC News* (online), 6 January 2015 <<http://www.abc.net.au/news/2015-01-05/mildura-employer-allegedly-paid-backpackers-60-cents-an-hour/6001218>>; Kirsten Robb, 'Melbourne Gourmet Food Manufacturer Finds More Trouble with Employment Watchdog', *SmartCompany* (online), 15 September 2014 <<http://www.smartcompany.com.au/legal/43724-melbourne-gourmet-food-manufacturer-finds-more-trouble-with-employment-watchdog.html#>>.

99 See *FWA* ss 789FC(1), 789FF(1)(b).

100 Sarah Oxenbridge and Justine Evesson, Fair Work Commission, *Bullying Jurisdiction Strategies: An Analysis of Acas' Experience and Its Application in the Australian Context* (Report, July 2013) <<http://www.fwc.gov.au/documents/documents/resources/ERA-BullyingStrategy-Report-Jul-2013.pdf>>.

101 Ibid 4.

employment'.¹⁰² The authors speculate that the reason for this is 'the reluctance of employees to "rock the boat" in cases where they feel vulnerable'¹⁰³ and note that '[f]urther research may establish why few "in work" claims are made'.¹⁰⁴ The risk of under-utilisation of the anti-bullying jurisdiction by those for whom it was designed to help has therefore been recognised.

Statistics published by the FWC provide an early indicator that the anti-bullying jurisdiction may be under-utilised on account of under-reporting. Contrary to reports in the media that the anti-bullying jurisdiction would see a 'flood' of complaints on and from its creation,¹⁰⁵ the number of applications has been modest with a very low number of successful applications. For the period between 1 January 2014 and 30 September 2014, the FWC processed a total of 532 applications.¹⁰⁶ Of these applications, a mere 36 were finalised by a decision with 35 applications being dismissed and only 1 application resulting in anti-bullying orders (by the consent of the parties). The majority of applications were 'withdrawn early in [the] case management process' (108 applications), 'prior to proceedings' (65 applications) and 'during the course of proceedings' (111 applications).¹⁰⁷ Clearly the quantum of anti-bullying applications currently being encountered by the FWC can hardly be described as a 'flood'. Further, the number of applications made appears to be disproportionately small when compared with the estimated high prevalence of workplace bullying.¹⁰⁸

2 *Non-conforming Applications*

A person wishing to make an anti-bullying application is required to complete and submit Form F72, available from the FWC's website,¹⁰⁹ and pay the

102 Ibid 29 (emphasis added).

103 Ibid.

104 Ibid.

105 See, eg, Lollie Barr, 'Workplace Bullying Costs Businesses Billions', *News.com.au* (online), 26 August 2013 <<http://www.news.com.au/finance/work/workplace-bullying-costs-businesses-billions/story-e6frfm9r-1226703856928>>; Michael Bleby, 'New Anti-bullying Laws to Open "Litany" of Complaints', *BRW* (online), 15 November 2013 <http://www.brw.com.au/p/business/new_anti_bullying_laws_to_open_litany_E4hVzAo0PrkPoeqEfQGF6J>; Lucy Carter, 'Business Concerns over New Bullying Laws', *ABC News* (online), 30 December 2013 <<http://www.abc.net.au/news/2013-12-27/business-concerns-over-new-bullying-laws-set-to-take-effect/5176026>>; Clay Lucas, 'Bullying Complaints against Business Expected to Soar', *The Sydney Morning Herald* (online), 27 December 2013 <<http://www.smh.com.au/federal-politics/political-news/bullying-complaints-against-business-expected-to-soar-20131226-2zy5i.html>>; Michaela Whitbourn, 'New Trend in Workplace Bullying Claims: Bosses Cry Foul over Mob Tactics', *Australian Financial Review* (online), 11 October 2013 <http://www.afr.com/p/australia2-0/tactics_trend_mob_workplace_bullying_hAxVvLubhjuPZsGG4BwGJK>.

106 Fair Work Commission, *Quarterly Report: Anti-bullying Report Jan-Mar 2014* (23 April 2014) <<https://www.fwc.gov.au/documents/documents/quarterlyreports/AB-Q3-FYR13-14.pdf>>; Fair Work Commission, *Quarterly Report: Anti-bullying Report Apr-Jun 2014* <<https://www.fwc.gov.au/documents/documents/quarterlyreports/AB-4Q-FYR13-14.pdf>>; Fair Work Commission, *Quarterly Report: Anti-bullying Report Jul-Sep 2014* <<https://www.fwc.gov.au/documents/documents/quarterlyreports/AB-1Q-FYR14-15.pdf>>.

107 Ibid.

108 See *Workplace Bullying Report*, above n 1, 8–9.

109 Fair Work Commission, *Form F72 – Application for an Order to Stop Bullying* (Application Form, 20 June 2014) <http://www.fwc.gov.au/documents/documents/forms/Form_F72.pdf>.

prescribed fee,¹¹⁰ which is currently \$67.20.¹¹¹ The fee may be waived in circumstances where the applicant also submits a fee waiver application and satisfies the FWC that they will suffer serious hardship if required to pay the fee.¹¹²

A significant proportion of the anti-bullying decisions published to date¹¹³ concern the dismissal of non-conforming applications.¹¹⁴ Reasons for non-conforming applications were reported as: 12 were held to be incomplete; 13 had not been made on the correct form; and 32 had not submitted the filing fee or a form seeking the fee to be waived.¹¹⁵ The FWC will generally make several

110 *FWA* s 789FC(4).

111 *Fair Work Regulations 2009* (Cth) reg 6.07A; Fair Work Commission, *Lodge an Application* (24 April 2015) <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/lodge-application#field-content-1-heading>>.

112 *FWA* s 789FC(4)(c); *Fair Work Regulations 2009* (Cth) reg 6.07A(7).

113 See, eg, *BD* [2014] FWC 1019 (Unreported, Commissioner Hampton, 12 February 2014); *PC* [2014] FWC 1021 (Unreported, Commissioner Hampton, 12 February 2014); *Application by ZB* [2014] FWC 1098 (Unreported, Commissioner Hampton, 14 February 2014); *Application by AO* [2014] FWC 1416 (Unreported, Commissioner Hampton, 5 March 2014); *Application by TK* [2014] FWC 1427 (Unreported, Commissioner Hampton, 3 March 2014); *Application by CD* [2014] FWC 1741 (Unreported, Commissioner Hampton, 14 March 2014); *CP* [2014] FWC 2884 (Unreported, Commissioner Hampton, 2 May 2014); *Application by CM* [2014] FWC 3151 (Unreported, Commissioner Hampton, 14 May 2014); *Application by SB* [2014] FWC 3761 (Unreported, Commissioner Hampton, 5 June 2014); *Application by SK* [2014] FWC 3759 (Unreported, Commissioner Hampton, 10 June 2014); *Application by AB* [2014] FWC 4502 (Unreported, Commissioner Hampton, 7 July 2014); *Application by GC* [2014] FWC 4497 (Unreported, Commissioner Hampton, 7 July 2014); *Application by AG* [2014] FWC 4895 (Unreported, Commissioner Hampton, 22 July 2014); *Application by WM* [2014] FWC 4897 (Unreported, Commissioner Hampton, 28 July 2014); *Application by CW* [2014] FWC 6067 (Unreported, Commissioner Hampton, 28 July 2014); *Application by GW* [2014] FWC 6064 (Unreported, Commissioner Hampton, 4 September 2014); *Application by SG* [2014] FWC 6065 (Unreported, Commissioner Hampton, 4 September 2014); *Application by WM* [2014] FWC 6066 (Unreported, Commissioner Hampton, 4 September 2014); *Application by BW* [2014] FWC 6563 (Unreported, Commissioner Hampton, 19 September 2014); *Application by DM* [2014] FWC 6555 (Unreported, Commissioner Hampton, 19 September 2014); *BH* [2014] FWC 6967 (Unreported, Commissioner Hampton, 3 October 2014); *LP* [2014] FWC 6962 (Unreported, Commissioner Hampton 3 October 2014); *PT* [2014] FWC 6964 (Unreported, Commissioner Hampton, 3 October 2014); *AN* [2014] FWC 7422 (Unreported, Commissioner Hampton, 21 October 2014); *KS* [2014] FWC 7421 (Unreported, Commissioner Hampton, 21 October 2014); *NM* [2014] FWC 7527 (Unreported, Commissioner Hampton, 10 November 2014); *JS* [2014] FWC 7925 (Unreported, Commissioner Hampton, 12 November 2014); *LH* [2014] FWC 8240 (Unreported, Commissioner Hampton, 4 December 2014); *DG* [2015] FWC 2 (Unreported, Commissioner Hampton, 12 January 2015); *LR* [2015] FWC 1 (Unreported, Commissioner Hampton, 12 January 2015); *AC* [2015] FWC 508 (Unreported, Commissioner Hampton, 20 January 2015); *SC* [2015] FWC 491 (Unreported, Commissioner Hampton, 20 January 2015); *EB* [2015] FWC 494 (Unreported, Commissioner Hampton, 27 January 2015); *AS* [2015] FWC 496 (Unreported, Commissioner Hampton, 27 January 2015); *FC* [2015] FWC 507 (Unreported, Commissioner Hampton, 27 January 2015).

114 The power to dismiss an application is contained in *FWA* s 587. The power may be exercised where, inter alia, an application has not been made in accordance with the Act.

115 The number of reasons adds to a figure greater than the number of decisions on the basis that, in some decisions, multiple reasons were given for the dismissal of the application.

attempts to contact an applicant to have the non-conformance remedied prior to dismissing their application.¹¹⁶

Reasons for non-conforming applications may vary but in the absence of any data, it is conceivable that at least some non-conforming applications submitted to the FWC have been made by targets of workplace bullying who have struggled to comply with the formal requirements of the application because of their compromised mental health.¹¹⁷ Further, failure by an applicant to respond to the FWC's communications following the making of a non-conforming application is consistent with the actions of a person who is not coping with their experience of being bullied and 'fear[s] that they will be victimized or ostracized, or that their future employment prospects will be undermined if they report bullying'.¹¹⁸

B Evidentiary Challenges in Anti-bullying Proceedings

One of the key challenges facing applicants in bringing a successful application to stop the bullying, especially covert bullying, is providing evidence to substantiate and support their claims. To make orders, the FWC must be 'satisfied'¹¹⁹ that the applicant was 'bullied at work'¹²⁰ and that there is a risk that the bullying will continue if orders are not made.¹²¹ While '[t]he FWC is not bound by the rules of evidence and procedure',¹²² any findings of fact made by the FWC must be based 'in evidence having rational probative force'.¹²³

Applicants to the anti-bullying jurisdiction may fail to obtain anti-bullying orders not because they do not have a case and have not been bullied, but because they were unable to adduce and properly characterise all available evidence.¹²⁴ An applicant's case may be adversely affected because:

1. workplace bullying, especially its subtle forms, is inherently difficult to characterise and prove;
2. self-represented applicants may struggle to put their case at its highest; and
3. the applicant may find it difficult to secure supportive witness testimony.

Further, in examining anti-bullying decisions published to date, it is arguable that the current methodology (discussed below) adopted by the FWC in

116 See, eg, *MT* [2014] FWC 3852 (Unreported, Commissioner Johns, 23 June 2014) [12]–[18], in which the Commission sets out its attempts to contact the applicant, which included leaving several voice messages on the applicant's mobile phone.

117 Consider the personal consequences of workplace bullying discussed in Part III above.

118 Squelch and Guthrie, 'The Australian Legal Framework', above n 74, 54.

119 *FWA* s 789FF(1)(b).

120 *FWA* s 789FF(1)(b)(i).

121 *FWA* s 789FF(1)(b)(ii).

122 *FWA* s 591.

123 *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482, 492 (Brennan J), quoting *Consolidated Edison Co of New York v National Labor Relations Board*, 305 US 197, 230 (Hughes CJ) (1938).

124 Department of the Attorney General (WA), *Equality before the Law* (Bench Book, November 2009) 8.3.6 [8.3.3.1] <http://www.supremecourt.wa.gov.au/_files/equality_before_the_law_benchbook.pdf>.

determining whether a worker has been ‘bullied at work’ increases the risk that bullying behaviours may not be found to be ‘unreasonable’ for the purposes of section 789FD of the *FWA*.

1 Workplace Bullying Is Difficult To Characterise and Prove

Workplace bullying can be difficult to prove, especially where bullying behaviours are subtle, indirect and go unnoticed by colleagues and third parties.¹²⁵ It may be the case that the perpetrator will ‘bully through behaviors that (1) are difficult to recognize and (2) can be justified and rationalized to others’.¹²⁶

Targets of bullying may initially fail to recognise that they are being bullied.¹²⁷ This may result in the target failing to document examples of bullying behaviours before they blend indistinguishably into an ‘insidious and persistent wearing down process [that] is difficult to describe in a formal complaint’.¹²⁸ When a target finally realises they have been bullied they may only be able to describe their experience in very general terms and provide examples of bullying behaviour which seem trivial.¹²⁹

In some circumstances, targets of workplace bullying may be the only witnesses to the alleged bullying behaviours. The reliability of self-reports by targets of bullying is viewed with some doubt, primarily because ‘there is little evidence of the accuracy or stability of [targets’] recollections or reports across time’.¹³⁰ Further, it has been reported ‘that targets who labeled their experiences as bullying perceived people as less benevolent than did targets who did not label their experiences in such manner’.¹³¹ The literature therefore recognises the possibility that targets of workplace bullying may subjectively mischaracterise behaviours as bullying. It would be of concern if this manifested in a general distrust of an applicant’s evidence.

Applicants to the anti-bullying jurisdiction are not, without the permission of the FWC, entitled to legal representation.¹³² While applicants may be represented by third parties such as a union representative,¹³³ or a spouse,¹³⁴ in practice ‘many will choose not to be represented’.¹³⁵ The anti-bullying jurisdiction is therefore susceptible to problems associated with self-represented people in the legal

125 Cowie et al, above n 17, 35; Vie, Glasø and Einarsen, above n 10, 37.

126 Samnani, above n 97, 121.

127 Vie, Glasø and Einarsen, above n 10, 37–8.

128 Hay-Mackenzie, above n 96, 118.

129 Andrea Adams and Neil Crawford, *Bullying at Work: How To Confront and Overcome It* (Virago Press, 1992) 116.

130 Cowie et al, above n 17, 36.

131 Vie, Glasø and Einarsen, above n 10, 41, citing Jennifer W Out, *Meanings of Workplace Bullying: Labelling versus Experiencing and the Belief in a Just World* (PhD Thesis, University of Windsor, 2005).

132 *FWA* ss 596(1)–(2).

133 *FWA* s 596(4).

134 See, eg, *H v Centre* [2014] FWC 6128 (Unreported, Commissioner Wilson, 4 September 2014).

135 E Richardson, T Sourdin and N Wallace, Australian Centre for Justice Innovation, Monash University, *Self-represented Litigants: Gathering Useful Information* (Final Report, June 2012) 77 <<http://law.monash.edu.au/centres/acji/projects/self-represented-litigants/final-acji-srl-report-amended-26oct2012-cjro.pdf>>.

system. Generally speaking, self-represented persons may ‘not be skilled in advocacy and [may not be] able to test adequately an opponent’s evidence, or cross-examine effectively’.¹³⁶ They may also not understand the rules of evidence.¹³⁷ Self-represented persons are more likely to identify and pursue irrelevant issues and evidence as part of their case.¹³⁸ Conversely, self-represented litigants may also fail to adduce relevant evidence,¹³⁹ limiting their chances of a successful outcome.

The *FWA* contains provisions which may ameliorate the evidentiary challenges faced by self-represented applicants. For example, section 591 of the *FWA* dispenses with the rules of evidence and procedure. Section 591, in theory, allows the FWC to consider and rely on evidence which would, if tendered in court, be inadmissible. By way of example, anti-bullying proceedings may include an allegation that the alleged perpetrator was spreading rumours about the applicant. Even if the applicant was able to call a colleague who heard the rumour first hand from the alleged perpetrator, evidence of the rumour would likely be hearsay. It would be open to the FWC, under section 591, to rely on that hearsay evidence notwithstanding that a court would rule such evidence inadmissible.

However, section 591 of the *FWA* does not provide the FWC with an unfettered licence to completely disregard the rules of evidence and procedure. On the contrary, the rules of evidence ‘are relevant and cannot be ignored if that would cause unfairness between the parties’.¹⁴⁰ Further, ‘where the allegation is serious in nature, or is inherently unlikely or may, if established, lead to grave consequences; the [FWC] is more likely to apply the rules of evidence, or the principles underlying those rules, in that situation’.¹⁴¹

Section 590(1) of the *FWA* gives the FWC the power to ‘inform itself in relation to any matter before it in such manner as it considers appropriate’. This broad power includes (without limitation) the power to compel a person to attend the FWC and give evidence,¹⁴² conduct inquiries,¹⁴³ and undertake or commission research.¹⁴⁴ Yet, the power conferred on the FWC by section 590 does not operate

136 Department of the Attorney General (WA), above n 124, 8.1.5 [8.1.5].

137 Ibid.

138 Richardson, Sourdin and Wallace, above n 135, 32.

139 Department of the Attorney General (WA), above n 124, 8.2.1 [8.2.1].

140 Fair Work Commission, *General Protections Benchbook* (Bench Book, 1 July 2014) 124 <<http://benchbooks.fwc.gov.au/generalProtections/assets/File/GPBenchbook.pdf>>, citing *Construction, Forestry, Mining and Energy Union* (Unreported, Australian Industrial Relations Commission, Ross V-P, 25 July 2003) [36].

141 Fair Work Commission, *General Protections Benchbook*, above n 140, 124, citing *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; *McNiece and Big Punt Pty Ltd* (Unreported, Australian Industrial Relations Commission, Commissioner Lewin, 5 October 2006) [32].

142 *FWA* s 590(2)(a), (d).

143 *FWA* s 590(2)(f).

144 *FWA* s 590(2)(g).

at large. Members of the FWC are ‘expected to act judicially and in accordance with “notions of procedural fairness and impartiality”’.¹⁴⁵

There is evidence that the FWC is willing to utilise the latitude afforded to it by sections 590 and 591 to assist self-represented applicants to the anti-bullying jurisdiction. For example, in the case of *SB*, Commissioner Hampton described the assistance afforded to the applicant in the following terms:

I provided appropriate assistance and latitude in the presentation of the applicant’s case; particularly to ensure that there was a common understanding of the issues in dispute and to ensure that, as far as possible, the disputed matters were raised with relevant witnesses. I also took steps during the examination of witnesses to inform myself about relevant matters.¹⁴⁶

Allowances were also made for the self-represented applicant in the case of *Applicant v General Manager*, albeit with the agreement of the respondent employer (who was represented by legal counsel).¹⁴⁷ Commissioner Roe explained:

The parties agreed that given that the Applicant was not represented I should not draw any inference from the failure to put a matter to a witness where the evidence was in conflict and to assume unless otherwise stated that the person making the statement abides by their version of events as opposed to an alternative version put by another witness.¹⁴⁸

It is not clear from this decision whether Commissioner Roe provided the applicant with assistance in the presentation of her case, similar to that which was provided to the applicant in *SB*.

Whether the FWC can completely nullify the disadvantages faced by self-represented applicants in effectively putting their cases remains to be seen. In *SB* and *Applicant v General Manager*, both applications were dismissed on the basis that there was insufficient evidence to ground anti-bullying orders. Whether the dismissals were due to the bullying allegations lacking foundation, or were the result of evidence not being presented to the FWC is not apparent on the face of the decisions. In the case of *SB* it is arguable that not all available witness evidence was put before the FWC. This issue is discussed below.

2 Witness Testimony in Anti-bullying Proceedings

Witness accounts of bullying behaviours may be unreliable. D’Cruz and Noronha report that employees who witness workplace bullying eventually ‘retreat and withhold their support’ from the target on account of the ‘high costs of involvement’ in the conflict.¹⁴⁹ Further, colleagues who showed outward support for the target were subject to the ‘negative reactions [of the perpetrator

145 Fair Work Commission, *General Protections Benchbook*, above n 140, quoting *Coal and Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78, 83 [25] (Buchanan J).

146 [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [3].

147 [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014) [3].

148 *Ibid* [4].

149 Premilla D’Cruz and Ernesto Noronha, ‘The Limits to Workplace Friendship: Managerialist HRM and Bystander Behaviour in the Context of Workplace Bullying’ (2011) 33 *Employee Relations* 269, 286.

which] would translate into vindictiveness'.¹⁵⁰ These findings led Samnani and Singh to conclude that 'employees who witness bullying behaviors tend to take sides ... and more often take the perpetrator's side in fear of becoming the next target'.¹⁵¹

For these reasons applicants to the anti-bullying jurisdiction may struggle to obtain supportive witness testimony. This may manifest as witnesses who fail to provide full and frank testimony to the FWC or simply refuse to give evidence altogether (referred to as 'type 1 witnesses'). Alternatively, witnesses may provide testimony which is tailored to be adverse to the interests of the applicant in order to protect their own position (referred to as 'type 2 witnesses'). Each type of witness behaviour is discussed below with reference to decided anti-bullying cases.

(a) Type 1 Witnesses – Case Example: SB

In *SB*, Commissioner Hampton noted 'that one of the witnesses for the applicant ... was unwilling to provide details of the incidents apparently summarised in her statement'.¹⁵² While the Commissioner remarked that the reluctance of the witness to provide these details was 'understandable given the ongoing working and reporting relationships', it also meant 'that little weight could be given to that evidence on the critical issues'.¹⁵³ It is not clear to what extent the witness was pressed to provide full and frank testimony.

The reluctance of witnesses to provide testimony to the FWC was not, however, confined solely to those called on behalf of the applicant. Commissioner Hampton also observed that '[b]oth the applicant and [the respondent employee] sought to rely upon statements that were apparently made by persons who were either unwilling or unable to attend to give evidence'.¹⁵⁴

The evidentiary consequence of the failure of witnesses to attend to give evidence was that their written statements were not admitted into evidence or given any weight by Commissioner Hampton in his decision.¹⁵⁵ The Commissioner's rationale for excluding the written statements was to avoid 'the potentially prejudicial import of the statements and the inability to test the veracity of the evidence'.¹⁵⁶

In *SB*, the application was dismissed primarily because the evidence of the alleged bullying behaviours was 'insufficient to provide a basis for findings that an individual or group of individuals ... repeatedly behaved unreasonably towards the applicant so as to create a risk to health and safety'.¹⁵⁷ There are,

150 Ibid 280.

151 Samnani and Singh, above n 11, 584.

152 [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [32].

153 Ibid.

154 Ibid [33].

155 Ibid.

156 Ibid.

157 Ibid [106].

however, several references in *SB* to alleged bullying behaviour which did not fall to be considered under section 789FD because of a want of evidence.¹⁵⁸

It may be the case that evidence supporting these allegations existed in the form of witness testimony which was not adduced before the FWC. One may ponder whether the outcome in *SB* would have been different had all available witness testimony been adduced, especially in circumstances where Commissioner Hampton remarked that the application was not, in his view, ‘made without any foundation’.¹⁵⁹

(b) Type 2 Witnesses – Case Example: Applicant v General Manager

The FWC may hear witness testimony which has been manufactured or embellished to be adverse to the applicant’s case. Commissioner Roe was faced with this situation in *Applicant v General Manager*. In that case, the applicant alleged that she was bullied by her manager (who was referred to in the decision as the General Manager). During the course of the hearing, the respondents called 10 witnesses, including a ‘Mr C’.

In his decision, Commissioner Roe questioned the credibility of the respondents’ witnesses and the veracity of their evidence:

Having regard to all the circumstances and to the evidence of Mr C in particular I consider it possible that some of the other managers who gave evidence may have been motivated by a desire to defend themselves and the General Manager and to maximize negative impressions about the Applicant because she had raised a complaint against the General Manager.¹⁶⁰

The Commissioner then proceeded to describe the difficulty with witness testimony in anti-bullying cases:

The perceptions of those who feel comfortable within the culture of a team about the leader of that team and about someone who is perceived to be threatening to the culture of that team should be treated with some scepticism. In the context of a bullying allegation such evidence should be treated with some caution. It is unlikely to be a reliable indicator that bullying has not occurred. If there were a circumstance where a person in a position of authority was engaged in bullying they may well be supported by plenty of evidence of this kind.¹⁶¹

Commissioner Roe’s comments are consistent with the extant literature insofar as the latter anticipates that witness testimony in anti-bullying cases may be unreliable. The point of difference, however, is that the literature proposes that unreliable witness testimony is motivated by the witness’s fear of becoming a target. In the present case, the tenor of Commissioner Roe’s decision suggests that the witnesses embellished their evidence in circumstances where they felt ‘comfortable within the culture of a team’.¹⁶² Nevertheless, the decision in *Applicant v General Manager* supports the view that the FWC is aware that there is a risk in anti-bullying proceedings that witness testimony may be unreliable.

158 Ibid [80], [82], [92], [94], [95], [102].

159 Ibid [109].

160 *Applicant v General Manager* [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014) [42].

161 Ibid [43] (emphasis added).

162 Ibid.

3 *The Proof/Characterisation Conundrum – The FWC’s Approach to the Evidence*

Even if an applicant manages to adduce sufficient evidence to support a finding that the alleged behaviours did occur, an applicant may nevertheless fail to obtain anti-bullying orders if they are unable to persuade the FWC that the behaviours constitute bullying as defined under section 789FD.

To determine whether an applicant has been ‘bullied at work’, the FWC’s current approach is to isolate each instance of bullying behaviour and determine, in relation to each, whether the behaviour was unreasonable, or whether it was ‘reasonable management action carried out in a reasonable manner’.¹⁶³ While the FWC has acknowledged that ‘[a]n overall view of the behaviour and the circumstances is required’,¹⁶⁴ the methodical consideration of each alleged event of bullying behaviour in isolation may increase the risk that bullying behaviours will be mischaracterised.

For example, in the case of *Applicant v General Manager*, Commissioner Roe made a finding that the applicant’s manager, during a meeting on 30 October 2013, became angry, spoke to the applicant in an aggressive tone and pointed at her.¹⁶⁵ However, this behaviour was not found to be unreasonable in the circumstances because:

It is to be expected that people, including managers, will from time to time get upset and angry and will express that upset and anger. It was reasonable management action in all of the circumstances for the General Manager to forcefully communicate in both words and body language that the way in which the Applicant was interacting with him was unacceptable and that it could not continue.¹⁶⁶

Commissioner Roe did, however, qualify this finding by saying that ‘I accept that if this behaviour was then reinforced by repeated similar behaviour then the behaviour at the ... meeting should be considered in a different light and contribute to a finding of unreasonable or bullying behaviour’.¹⁶⁷

At a subsequent meeting in November 2013, the applicant alleged that her manager yelled twice at her, ‘you are wrong’ before conceding, ‘you’re right’.¹⁶⁸ The manager denied that he had yelled at the applicant. Commissioner Roe declined to make a finding on whether the manager had yelled at the applicant because ‘even if the [manager] raised his voice his immediate concession that “you’re right” means that this isolated instance of raised voice would not constitute unreasonable behaviour’.¹⁶⁹

163 See, eg, *SB* [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014); *Sun* [2014] FWC 3839 (Unreported, Commissioner Cloghan, 16 June 2014); *Applicant v General Manager* [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014); *Amie Mac* [2015] FWC 774 (Unreported, Hatcher V-P, 13 February 2015).

164 *SB* [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [75].

165 [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014) [64].

166 *Ibid* [65].

167 *Ibid*.

168 *Ibid* [73].

169 *Ibid*.

Given the Commissioner's findings in relation to the 30 October 2013 meeting, it seems odd that the manager's yelling at the subsequent meeting was treated as an isolated incident. The manager's conduct at each of the meetings may be excused when viewed in isolation. However, when the two meetings are considered together the manager's incivility towards the applicant could more readily be characterised as bullying.

It must not be forgotten that the anti-bullying jurisdiction has been designed to prevent workplace bullying. The FWC has already confirmed that it is not a requirement of section 789FD that exactly the same unreasonable behaviour be repeated in order to constitute bullying.¹⁷⁰ Further, an applicant need only show that unreasonable behaviour occurred more than once in order to satisfy the element of repetition.¹⁷¹ A target should not need to accrue a thick dossier of evidence of bullying behaviour before approaching the FWC. According to the manner in which section 789FD has been interpreted,¹⁷² two examples of unreasonable behaviour should be sufficient to enliven the anti-bullying jurisdiction and permit anti-bullying orders to issue in order to prevent the risk of future harm.

The FWC is somewhat trapped by the drafting of section 789FD into considering each alleged event of unreasonable behaviour in isolation to ensure that its reasons for decision accord with the requirements of section 25D of the *Acts Interpretation Act 1901* (Cth). Accordingly, the FWC must guard assiduously against taking a myopic view of alleged bullying behaviours. A behaviour which by itself appears innocuous may, when viewed in context, take on a bullying character.

VI THE IMPACT OF ANTI-BULLYING PROCEEDINGS ON THE EMPLOYMENT RELATIONSHIP

Anti-bullying proceedings are adversarial in nature. While attempts are made to resolve anti-bullying applications by alternative dispute resolution mechanisms (such as mediation),¹⁷³ unresolved matters eventually proceed to a final hearing in which the applicant and respondent are required to present their case to a member of the FWC.¹⁷⁴ Although the *FWA* jurisdiction aims to restore employment relationships and ensure that a person can safely return to work without fear of ongoing bullying, participation in anti-bullying proceedings may in fact cause

170 *SB* [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [41].

171 *Ibid.*

172 *Ibid.*

173 Statistics published by the FWC indicate that alternative dispute resolution is resolving matters before they proceed to final hearing and determination: Fair Work Commission, *Anti-bullying Report Jan–Mar 2014*, above n 106, 2 <<https://www.fwc.gov.au/documents/documents/quarterlyreports/AB-Q3-FYR13-14.pdf>>.

174 Fair Work Commission, *Anti-bullying Jurisdiction: Summary of the Case Management Model* (Publication, 20 November 2013) 11 <<http://www.fwc.gov.au/documents/documents/resources/Anti-bullying-case-mgmt-model.pdf>>.

further damage to the employment relationship, diminishing or destroying the prospects of a return to normal working relations.

A Self-representation and Returning to Work

Applicants and respondents to anti-bullying proceedings are not entitled as a right to be represented by a lawyer or paid agent by operation of section 596(1) of the *FWA*. If a party wishes to be represented, they must obtain the permission of the FWC.¹⁷⁵ Section 596 does not, however, prohibit a party to anti-bullying proceedings from seeking and obtaining legal advice in the preparation of their case.¹⁷⁶

As at 31 January 2015 there is one published decision in which an applicant to the anti-bullying jurisdiction applied to be represented by a lawyer.¹⁷⁷ There are, however, five published decisions in which the FWC has granted permission for respondents to be represented by a lawyer.¹⁷⁸ It therefore appears that the majority of anti-bullying cases are being conducted by self-represented parties.

As noted above, self-representation may pose a real challenge for applicants because, even though the process and procedures are more informal and less technical, applicants nonetheless need to have some knowledge of legal process and be able to develop and present a case. This is likely to be particularly difficult for employees who believe they are being or have been bullied. In the *Equality before the Law Bench Book* published by the Department of the Attorney-General of Western Australia, it is observed that self-represented people often feel ‘anxious, frightened, frustrated, and/or bewildered’ about legal proceedings.¹⁷⁹ In addition, it is noted that ‘[t]he case may also be impacting, or starting to impact, on their emotional and/or physical health’.¹⁸⁰

These observations are of particular concern for the anti-bullying jurisdiction in circumstances where applicants are at an increased risk of presenting to the FWC with a bullying-related illness. For example, of the five anti-bullying applications decided on the merits,¹⁸¹ three have involved applicants suffering from a medical condition caused by the alleged bullying:

175 *FWA* s 596(1).

176 See also Fair Work Commission, *Form F72*, above n 109.

177 *GC* [2014] FWC 6988 (Unreported, Commissioner Hampton, 9 December 2014) [5].

178 *Applicant v General Manager* [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014); *Applicant v Respondents* [2014] FWC 4198 (Unreported, Deputy President Kovacic, 24 June 2014); *H v Centre* [2014] FWC 6128 (Unreported, Commissioner Wilson, 4 September 2014); *Applicant* [2014] FWC 7378 (Unreported, Commissioner Bissett, 31 October 2014); *Obatoki v Mallee Track Health & Community Services* [2014] FWC 8828 (Unreported, Deputy President Kovacic, 5 December 2014).

179 Department of the Attorney General (WA), above n 128, 8.1.5 [8.1.5].

180 *Ibid.* For further discussion on self-represented litigants, see Sally Sheppard and Caroline Bush, *Straight from the Horse's Mouth: Dealing with Unrepresented Litigants* (12 April 2012) Clayton Utz <http://www.claytonutz.com/publications/edition/12_april_2012/20120412/straight_from_the_horses_mouth_dealing_with_unrepresented_litigants.page>; Richardson, Sourdin and Wallace, above n 135, 32; Family Court of Australia, *Self-represented Litigants: A Challenge* (Project Report, May 2003) <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/publications/Papers/archived/FCOA_pr_Self_Represented_Litigants>.

181 Taking into account anti-bullying decisions published on or before 31 January 2015.

- in *Applicant v General Manager*, the applicant presented to the FWC with a significant stress-related illness caused by the alleged bullying behaviour.¹⁸² Commissioner Roe acknowledged that applicant found the experience of ‘preparing for and participating in [anti-bullying] proceedings stressful’;¹⁸³
- in *SB*, Commissioner Hampton acknowledged that that applicant had ‘been subject to a diagnosed medical condition related to [the alleged bullying] and [at the time of the hearing was] subject to a return to work arrangement as part of an accepted workers compensation claim’;¹⁸⁴ and
- in *Applicant v Respondent*, Senior Deputy President Drake noted that the applicant’s ‘perception of [the alleged bully’s] malevolent motivation, and an apprehension of termination of employment as an outcome of that conduct, has given rise to significant health issues’.¹⁸⁵ The final hearing of the matter was delayed as a result of the applicant’s ill health.¹⁸⁶

The applicants in the abovementioned cases were unsuccessful in obtaining anti-bullying orders. It is not known whether they were successful in returning to work following the conclusion of the anti-bullying proceedings, although Commissioner Roe cast doubt on whether the applicant in *Applicant v General Manager* could return to work given the manner in which the respondents had run their case.¹⁸⁷

In some circumstances applicants may abandon anti-bullying proceedings, as occurred in the case of *Hill v L E Stewart Investments Pty Ltd*.¹⁸⁸ In this case the applicant (Paul Hill) disengaged with the proceedings following an exchange of emails between the parties and the presiding Member’s Associate. The last communication that the FWC received from Mr Hill was an email transmitted on 19 June 2014 in which Mr Hill, clearly upset, accused the Associate of ‘assist[ing] one party by damaging the other’.¹⁸⁹

Mr Hill’s failure to prosecute his case is somewhat explained by communications sent to the FWC by his wife. On 4 July 2014, Mrs Hill advised the FWC that her husband was ‘not well enough to deal with this matter’.¹⁹⁰ This was followed by an email on 17 July 2014 in which Mrs Hill provided a more drastic appraisal of her husband’s health, observing that he was ‘very close to having a nervous breakdown’.¹⁹¹ If Mrs Hill is to be believed, Mr Hill was unable to cope with the anti-bullying proceedings and his response was to disengage. Mrs Hill’s observation of a ‘nervous breakdown’ indicates that Mr Hill was

182 [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014).

183 Ibid [3].

184 [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [72].

185 [2014] FWC 6285 (Unreported, Senior Deputy President Drake, 31 October 2014) [21].

186 Ibid [2].

187 [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014) [21].

188 [2014] FWC 4666 (Unreported, Hatcher V-P, 25 July 2014).

189 Ibid [3].

190 Ibid [10].

191 Ibid [18].

suffering from a mental illness. Under these circumstances, participation in the anti-bullying proceedings arguably resulted in a poor outcome for Mr Hill.¹⁹²

The nature of the anti-bullying jurisdiction dictates that the FWC will likely deal with individuals who are at an increased risk of accruing (or exacerbating) a bullying-related illness from the stress of participating in proceedings. Where this risk materialises, an applicant's chances of successfully returning to work are diminished, contrary to the jurisdiction's restorative aim.

Given the potential negative impact of anti-bullying proceedings on the health of applicants, valuable research could be conducted with a view to:

- understanding how participation in anti-bullying proceedings may affect the ability of the applicant to successfully return to work; and
- identifying opportunities to facilitate the participation of applicants who are suffering from an illness caused by workplace bullying.

While participating in anti-bullying proceedings may be a stressful experience in and of itself, the manner in which respondents conduct themselves during proceedings may also jeopardise the employment relationship with the applicant and frustrate the anti-bullying jurisdiction's restorative aim. This issue is considered next.

B The Respondent's Behaviour in Anti-bullying Proceedings

Respondents in the anti-bullying jurisdiction may engage in behaviours which have the potential to diminish the prospect that normal working relations can resume following the completion of anti-bullying proceedings. Those behaviours are: (1) counter-allegations of bullying or bad conduct against the applicant; and (2) tactical termination of the applicant's employment in order to bring anti-bullying proceedings to an end.

1 Counter-allegations of Bullying or Bad Conduct against the Applicant

There is no uniform response to bullying exhibited by targets of bullying.¹⁹³ While it has been reported 'that targets can become increasingly unlikely to react to bullying as it progresses',¹⁹⁴ targets may also engage in 'resistance-based behaviours' in response to workplace bullying.¹⁹⁵ Positive acts of resistance by a

192 The authors acknowledge that Mr Hill's employment was terminated prior to the institution of anti-bullying proceedings. Accordingly, there was no prospect that Mr Hill would return to work for the employer in that case.

193 Lars Glasø et al, 'Do Targets of Workplace Bullying Portray a General Victim Personality Profile?' (2007) 48 *Scandinavian Journal of Psychology* 313, 314–15; Lars Glasø, Morten Birkeland Nielsen and Ståle Einarsen, 'Interpersonal Problems among Perpetrators and Targets of Workplace Bullying' (2009) 39 *Journal of Applied Social Psychology* 1316, 1319; Vie, Glasø and Einarsen, above n 10, 38.

194 Samnani, above n 97, 129, citing Baillien et al, above n 97.

195 Ibid 126–7. See also Joanne D Leck and Bella L Galperin, 'Worker Responses to Bully Bosses' (2006) 32 *Canadian Public Policy – Analyse de Politiques* 85, 93–5.

target (including aggression) may stop bullying, but it may also elicit revenge behaviours from the bully and escalate the conflict.¹⁹⁶

Where a target of workplace bullying engages in acts of resistance there is a risk that such behaviour may be labelled by the employer as poor or bad conduct. In some cases, resistance-based behaviour may lead to the perpetrator making an allegation of bullying against the target.¹⁹⁷ Vie et al reported that ‘exposure to bullying may both validate and amplify the targets’ subjective appraisal of being victimized, as well as their negative attitudes to others, which in turn causes others to react adversely against them’.¹⁹⁸ It can therefore be very difficult to determine in a particular case who is the bully, and who is being bullied.¹⁹⁹

There have been several cases before the FWC in which the conduct of the applicant has formed part of the respondent’s case to varying effect:

- In *MT*, the respondent employer notified the FWC that they had concerns about the applicant’s conduct.²⁰⁰ These concerns subsequently led to the respondent employer terminating the applicant’s employment and,²⁰¹ as a result, the anti-bullying proceedings were dismissed.²⁰²
- In *SB*, the applicant managed a small team of employees. One of the team members made allegations of bullying against the applicant. Shortly thereafter, the applicant instituted anti-bullying proceedings alleging, inter alia, that the team member was the bully. The respondent employer investigated both sets of allegations and found that the allegations against the applicant were substantiated in part, while the allegations against the team member were unsubstantiated.²⁰³ During the course of the proceedings it appeared that the respondent employer sought to rely on the outcomes of the internal investigation to support its case that the applicant had not been bullied. However, the respondent employer refused to produce a full copy of the investigator’s report to the FWC (asserting legal professional privilege).²⁰⁴ As a result, the FWC placed no weight on the outcomes of the investigation to the extent that it provided insight into the conduct of the applicant and the team member.²⁰⁵

196 Samnani, above n 97, 127; Dieter Zapf and Ståle Einarsen, ‘Individual Antecedents of Bullying: Victims and Perpetrators’ in Einarsen et al (eds), *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice* (CRC Press, 2nd ed, 2011) 177, 193.

197 Samnani, above n 97, 128.

198 Vie, Glasø and Einarsen, above n 10, 41.

199 Vega and Comer, above n 9, 108; Noreen Tehrani, ‘Workplace Bullying: The Role for Counselling’ in Einarsen et al (eds), *Bullying and Harassment in the Workplace: Developments in Theory, Research, and Practice* (CRC Press, 2nd ed, 2011) 381, 383–4.

200 [2014] FWC 3852 (Unreported, Commissioner Johns, 23 June 2014) [4].

201 Ibid [10].

202 Ibid [23].

203 [2014] FWC 2104 (Unreported, Commissioner Hampton, 12 May 2014) [5]–[8].

204 Ibid [99].

205 Ibid.

- In *Applicant v General Manager*, the respondents mounted a ‘vigorous’ defence against the applicant.²⁰⁶ The respondents contended ‘that the Applicant was an extremely difficult employee, ... resisted ... changed reporting arrangements and engaged in a campaign against the General Manager involving reluctant cooperation and at times open hostility’. These matters were used to support a submission that the applicant had, in fact, bullied her manager.²⁰⁷ Commissioner Roe thought that the manner in which the respondents had run their case ‘may have an impact on the prospects of a successful return to work by the Applicant’.²⁰⁸ The application was ultimately dismissed on the basis that there was insufficient evidence of repeated unreasonable behaviour to ground anti-bullying orders.²⁰⁹

While respondents may instinctively take an adversarial posture and a win-at-all-costs attitude in anti-bullying proceedings, in so doing there is a real risk of further damage to the employment relationship. In circumstances where workplace bullying is known to cause conduct issues on the part of the target, respondent employers should strive to be model litigants in anti-bullying proceedings, to guard against the risk that a vigorous defence may, in fact, be a further attack on an already vulnerable person.

Respondents who decide to mount an attack on the applicant (or otherwise behave badly) in anti-bullying proceedings do so at their own peril. There is no reason in principle why the FWC could not take into account a respondent’s behaviour during anti-bullying proceedings in determining whether the applicant has been ‘bullied at work’. Further, bad behaviour by the respondent during proceedings may inform the FWC’s view on whether there is a risk that bullying will continue if orders are not made.

2 *Tactical Termination of the Applicant’s Employment*

Some respondent employers may choose to terminate the employment of the applicant as a way to bring anti-bullying proceedings to an end. The ability of a respondent employer to do so lies in the requirement that the FWC must be satisfied that there is a risk that a worker will continue to be bullied if anti-bullying orders are not issued.²¹⁰

There have now been several cases in which the FWC has held that termination of employment nullifies any risk of future bullying. As a result, the underlying application is considered to have no reasonable prospect of success.²¹¹

206 [2014] FWC 3940 (Unreported, Commissioner Roe, 17 June 2014) [21].

207 Ibid [22].

208 Ibid [21].

209 Ibid [100]–[101].

210 *FWA* s 789FF(1)(b)(ii).

211 See *Shaw v Australia & New Zealand Banking Group Ltd* [2014] FWC 3408 (Unreported, Deputy President Gostencnick, 26 May 2014) (‘*Mitchell Shaw*’); *MT* [2014] FWC 3852 (Unreported, Commissioner Johns, 23 June 2014); *Brenton* [2014] FWC 4166 (Unreported, Commissioner Cloghan, 24 June 2014); *Paula Thomas* [2014] FWC 5235 (Unreported, Commissioner Cribb, 4 August 2014).

Accordingly, the applications in those cases were dismissed pursuant to section 587(1)(c) of the *FWA*. There is however no direct evidence that the respondent employers in these cases terminated the employment of the applicant with the express intention of bringing anti-bullying proceedings to an end. For example, in *MT*, it appears that termination of the applicant's employment was motivated by alleged conduct issues.²¹² That being said, it would be naive to assume that all terminations following the institution of anti-bullying proceedings are bona fide, especially taking into account the timing of the terminations.

There are two avenues of redress under the *FWA* for an applicant who believes they were terminated for making an anti-bullying application. First, an applicant may apply for reinstatement or compensation (which is capped at \$66 500)²¹³ under the unfair dismissal provisions in the *FWA*.²¹⁴ However, to pursue this course of action the applicant must be a person who is 'protected from unfair dismissal',²¹⁵ which requires, inter alia, that they earn less than the high income threshold, which is currently set at \$133 000,²¹⁶ and have worked for the employer for at least one year in the case of small business, or six months in all other cases.²¹⁷

Alternatively, an applicant may take an action against the employer for 'adverse action'²¹⁸ under part 3-1 of the *FWA*. The applicant would likely contend that the employer dismissed the applicant from employment because they sought to exercise a 'workplace right'²¹⁹ (by making an anti-bullying application), thereby contravening the protection against adverse action contained in section 340 of the *FWA*.

Protection against adverse action in the *FWA* is a civil remedy provision, meaning the applicant would need to take their case to the Federal Court or the Federal Circuit Court.²²⁰ The Court is given wide discretion under section 545 of the *FWA* to grant remedial orders (which includes the power to order that the applicant be reinstated to work). In addition, the Federal Court or Federal Circuit Court may make pecuniary penalty orders in the amount of 60 penalty units for individuals²²¹ (that is, \$10 200) or 300 penalty units for bodies corporate²²² (that is, \$51 000).

Even if the applicant is reinstated to their employment following unfair dismissal or adverse action proceedings, the bullying behaviour may continue, in

212 *MT* [2014] FWC 3852 (Unreported, Commissioner Johns, 23 June 2014) [8]–[10].

213 Fair Work Commission, *Filing Fee – Dismissals, General Protections and Anti-bullying Applications* (24 June 2014) <<https://www.fwc.gov.au/about-us/news-and-events/filing-fee-dismissals-general-protections-and-anti-bullying-applications>>.

214 *FWA* pt 3-2.

215 *FWA* s 382.

216 Fair Work Commission, *Filing Fee*, above n 213.

217 *FWA* s 383.

218 *FWA* s 340.

219 *FWA* s 341.

220 *FWA* s 539(2).

221 *FWA* s 546(2)(a).

222 *FWA* s 546(2)(b).

which case the target would need to make a fresh anti-bullying application.²²³ Such an outcome would make a mockery of the anti-bullying jurisdiction and its aim of facilitating the quick and timely return to normal working relations.

VII CONCLUSION

The *FWA* anti-bullying jurisdiction was created to provide targets of workplace bullying with a remedy which would ‘stop the bullying’ and allow them to go about their work unmolested. This article has provided an overview of the nature of workplace bullying and the consequences of bullying for workplace relations. It is evident from the research that workplace bullying undermines and may destroy the employment relationship with the result that employees who are bullied (or believe they have been bullied) find it difficult to continue working for the employer.

A key aim of the anti-bullying jurisdiction is to facilitate the resumption of normal working relations following an episode of bullying. Yet, as has been argued in this article, several factors limit the ability of the anti-bullying jurisdiction to achieve its restorative aim.

The literature reveals that targets of workplace bullying are predisposed towards not reporting their experiences. Accordingly, targets may under-utilise the anti-bullying jurisdiction by failing to make applications, or by making non-conforming applications which are eventually dismissed.

A further challenge that applicants face is substantiating their claims. The extant literature reveals that workplace bullying is inherently difficult to characterise and prove. It is therefore unsurprising that applicants to the anti-bullying jurisdiction (who are generally self-represented) will find it difficult to collate and adduce evidence to support their case. In situations where the alleged bullying behaviours are subtle and capable of being rationalised or construed in various ways, the manner in which a case is put may have a determinative impact on the FWC’s decision.

Applicants may also encounter problems in securing supportive witness testimony, which may inhibit their ability to satisfy the FWC that particular individuals exhibited the behaviours which are the subject of the proceedings. In determining whether an applicant has been ‘bullied at work’, care must be taken to avoid a myopic view of the evidence. The current practice of potentially treating each alleged incident of bullying behaviour in isolation is apt to cause the FWC to divorce behaviours from their context.

In some cases anti-bullying proceedings may reduce an applicant’s chances of successfully resuming normal working relations. The stress of participating in anti-bullying proceedings may cause or exacerbate an applicant’s bullying related illness, and render them unfit for work. Further, some respondents may conduct

223 *Mitchell Shaw* [2014] FWC 3408 (Unreported, Deputy President Gostencnick, 26 May 2014) [17].

their case in a manner which is likely to damage or completely destroy the employment relationship with the applicant.

A concerning feature of several of the reported cases is the termination of an applicant's employment following the institution of anti-bullying proceedings. The consequence of termination is that anti-bullying proceedings will be dismissed, as there is no risk that the applicant employee will continue to be bullied. While it is hoped that the threat of unfair dismissal or adverse action proceedings will deter respondent employers from using termination of employment as a tactic to throw anti-bullying proceedings, legislators may need to provide the FWC with additional powers (such as the power to make interlocutory orders) to preserve the working relationship while anti-bullying proceedings are afoot.

The FW anti-bullying jurisdiction provides an important avenue to people who are seeking readily accessible external intervention into workplace bullying without applicants having to exhaust internal organisational processes. However, while the FW jurisdiction has been designed to provide a less onerous avenue to address workplace bullying, it is evident from the discussion that bringing a successful application for an order to stop the bullying is more challenging than applicants might imagine. Moreover, the personal stories that emerge from the FWC decisions clearly point to the often highly charged, strained and acrimonious relations between the employee and their employer, and co-workers. When relationships in the workplace deteriorate to this extent, it seems unlikely that the applicant will return to the workplace, or that the employee-employer relationship will be easily repaired and restored to a harmonious state.