

# Summary of Decision

6 March 2014



## Anti Bullying Jurisdiction

AB2014/1009

[2014] FWCFB 1440

[1] The issue for determination in this matter was whether the Commission has jurisdiction to hear and determine an application for an order to stop bullying which was based on alleged bullying conduct which occurred before 1 January 2014.

[2] Part 6-4B (the anti bullying measures) was inserted into the *Fair Work Act 2009* (Cth) (the FW Act) by the *Fair Work Amendment Act 2013* (Cth) (the 2013 Amendment Act). Section 789FC(1) sets out who may apply to the Commission for an order under s.789FF to prevent a worker from being bullied at work:

“s.789FC(1) A worker who reasonably believes he or she has been bullied at work may apply to the FWC for an order under section 789FF.” (emphasis added)

[3] Schedule 4 to the FW Act deals with the application and transitional provisions relating to the amendments and Item 8 of that Schedule provides that the anti-bullying provisions apply to applications made after their commencement, 1 January 2014. This means that an application under s.789FC can only be made after the commencement of Schedule 3, but the provision is silent on whether such an application can be based on bullying behaviour that has occurred prior to the date of commencement.

[4] The employer and Ai Group submitted that the Commission has no jurisdiction to hear and determine a claim involving alleged bullying conduct that occurred before the commencement of Part 6-4B of the Act (ie. before 1 January 2014). This submission was put on the basis that if the Commission were to entertain such a claim it would give Part 6-4B a retrospective operation or application in circumstances where Parliament did not intend the provisions to have such an operation.

[5] The Full Bench was not persuaded that entertaining an application for a s.789FF order based on bullying behaviour alleged to have occurred prior to the commencement of Part 6-4B can properly be characterised as giving Part 6-4B a retrospective operation. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation. The Full Bench said:

“When considering the question of retrospectivity the authorities draw a distinction between legislation having a prior effect on past events and legislation basing future action on past events.”

[6] A number of authorities were referred to in support of this proposition.<sup>1</sup> Like the authorities referred to, the Commission’s power to make orders to stop bullying operates prospectively based, in part, on past events.

[7] Three requirements must be met before the Commission can consider making an order to stop bullying:

(i) a worker (who reasonably believes they have been bullied at work) must have made an application under s.789FC (hence the jurisdiction cannot be exercised on the Commission’s own motion); and

(ii) the Commission must be satisfied that the worker ‘has been bullied at work by an individual or group of individuals’; and

(iii) the Commission must be satisfied that there is a risk that the worker will continue to be bullied at work by the individual or group.

[8] The Full Bench said that the second requirement was clearly based on past events - as is apparent from the use of the expression ‘has been’ in s.789FF(1)(b)(i). The Full Bench also said that the enactment of Part 6-4B does not attach any adverse consequence to past bullying conduct, rather, such conduct merely provides the basis for a prospective order to stop future bullying conduct.

[9] The Full Bench said that Part 6-4B of the Act is legislation basing future action on past events, and hence is not properly characterised as retrospective.

[10] The Full Bench rejected the employer’s jurisdictional objection and remitted the application to Commissioner Hampton for further hearing and determination of the remaining issues.

[\[2014\] FWCFCB 1440](#)

- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.*

- ENDS -

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<sup>1</sup> See *Maxwell v Murphy* (1957) 96 CLR 261; *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379; *Rodway v The Queen* (1990) 169 CLR 515; *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23; *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333