

**National Academy of Arbitrators – International Dispute Resolution Series 16 July 2020**  
**Deputy President Anna Booth Fair Work Commission Australia**

Professor Andrew Stewart has provided an excellent overview of labour regulation in Australia. I would like to comment on two areas where our parliament has recently extended the jurisdiction and function of the Fair Work Commission. (FWC)

*New Approaches: Cooperative and Productive Workplaces*

In 2013, the *Fair Work Act 2009* was amended to provide Australia's Fair Work Commission (Commission) with a new function: "Promoting cooperative and productive workplace relations and preventing disputes" (s.576(2)(aa)). The Commission and its predecessors have always sought to achieve this objective especially in resolving disputes. This provision has removed any doubt about the ability of the Commission to take a pro-active role in facilitating negotiations and dealing with dispute prevention.<sup>1</sup>

The *New Approaches: Promoting Co-operative and Productive Workplaces (New Approaches)* strategy was developed to give effect to this new function where FWC tribunal members:

- promote cooperative and productive workplace relations through interest-based approaches to bargaining for enterprise agreements
- develop new ways of resolving disputes at the workplace using interest-based problem-solving; and
- support the facilitation of change, innovation and productivity improvement through new ways of collaborating outside of the bargaining cycle, and before a dispute occurs.

As part of the Commission's New Approaches program, a number of new services have been developed and are now available to parties, including:

- training in interest-based bargaining;
- facilitation of enterprise bargaining;
- facilitation of joint processes to implement enterprise agreements;
- training in interest-based dispute resolution; and
- training and facilitation in collaborative workplace change, including training for consultative committees.

Through its early experiences, the FWC has been able to learn incrementally about how best to offer New Approaches services to the parties in order to provide the greatest benefits. Services provided to parties and the level of intervention by the FWC has varied according to the different circumstances that have arisen in each matter. For instance, the FWC's involvement has included hands on, on-site facilitation of discussions to assist parties to develop their relationships, methods of working together, and negotiation styles. In addition, as parties begin to feel comfortable with the new methods of managing their relationships, the FWC's role has extended to one of support, with parties reporting in periodically to advise progress and seek guidance.

*Anti-Bullying*

Following a Parliamentary Inquiry into bullying in the workplace in Australia the Fair Work Act was amended to include a new jurisdiction for the FWC, commencing in 2014, that seeks to resolve and prevent workplace bullying. A restorative rather than a compensatory approach is taken. Tribunal members seek to preserve and reconcile relationships and continue the employment relationship rather than promoting settlements to end employment with financial incentive.

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<sup>1</sup> Andrew Stewart, Anthony Forsyth, Mark Irving, Richard Johnstone and Shae McCrystal *Creighton and Stewart's Labour Law 6<sup>th</sup> edition* p. 153.

Key features of the approach taken are:

- Early and direct engagement with parties
- High levels of information for parties
- “Triage” by a dedicated team
- Streaming of matters according to their own circumstances
- Facilitative mediation where appropriate
- Stop bullying order where appropriate

Applicants may be an employee, a contractor, a labour hire worker, volunteer – basically anyone who works in a workplace. Applicants may identify another worker, including a manager, or even customer as an alleged perpetrator.

All matters started to be dealt with in 14 day period. The first thing the FWC does when it receives an application is contact the applicant for a conversation to understand the applicant’s circumstances. Some applications resolve at this very early stage through the provision of information. If an applicant wants to proceed the application is provided to the alleged perpetrator and the employer. Further conversations are held with these people to “triage” the application. This stage can also result in resolution when people discover that another person believes their behavior to be bullying or the employer is able to address the situation.

Bullying is defined as when a person repeatedly behaves unreasonably towards a worker, or a group of workers of which the worker is a member and that behaviour creates a risk to health and safety. This is an objective not a subjective test and the onus is on the applicant to prove, on the balance of probability that bullying is occurring.

The FWC has observed that bullying might include intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.

Many applications received cite performance management as a context for bullying. The legislation provides that reasonable management action carried out in a reasonable manner is not bullying and many applications that are dismissed on a merit basis concern circumstances where the applicant has not established that being performance managed is bullying.

From 1 January 2014 to 31 December 2019 the Commission has had 4359 applications for an order to stop bullying.

Over this period 35% of applications have been resolved by agreement, 12% were dismissed for jurisdictional or merit reasons and 53% have closed without formal agreement. This includes the applicant being satisfied with the response and discontinuing as well as those that were the subject of stop bullying order. 24 final orders have been made and 8 of these were by consent.

The kind of orders that may be given include direct conduct (do or not do something), physical arrangements, implementation of anti-bullying policy, reporting and investigation arrangements, changes in reporting arrangements and role clarification, monitoring of culture and conduct, training and personal development in policies, effective leadership, conflict management, self-awareness and coaching or mediation.