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Keynote Address: The New Anti-Bullying Provisions and the Growth of Individual Employment Rights

The Growth of Individual Employment Rights

Once upon a time, if you had a problem at work and you wanted something done, it was more than likely that you would go to your union. If the matter was serious enough - and it was a concern shared by your fellow workers - the union might take the matter to the Australian (or more likely the State) Industrial Relations Commission and/or engage in or threaten industrial action.

For most workers those days are a thing of the past.

Union membership has declined from well over 50 per cent of the work force in the 1970s to around 17 per cent now. Industrial action has declined even more sharply - with only 130,000 working days lost due to industrial disputation in 2013 compared to four million in 1982.

The State Industrial Relations Commissions have either been abolished - or are pale reflections of their former selves. The successor to the Australian Industrial Relations Commission - the Fair Work Commission - still deals with workplace disputes - but in most cases the worker is not represented by a union.

However the decline in the **collective** aspects of labour market regulation, most notably the reduction in the role of unions and the

dismantling of the centralised wage fixing system, has been accompanied by an increase in **individual** employment rights.

This has included a progressive expansion of anti-discrimination laws at the Federal and State levels since the mid-1970s.

An extensive unfair dismissals jurisdiction has also developed, commencing at the Federal level in 1993.

This has also been reflected in a change in the role of awards - from being the outcome of **collective** disputes between unions and employers to a safety net determined by the Fair Work Commission, primarily providing rights to **individual** employees.

Moreover while the content and reach of awards has been significantly reduced there has been an increasing trend for Parliament to establish minimum conditions of employment for **individual** workers by legislation.

The 2009 Fair Work Act included a series of National Employment Standards covering a wide range of employment conditions.

The Fair Work Act also consolidated and extended a long list of individual employment rights under the General Protections provisions. As well as a series of rights primarily related to freedom of association, the general protections provisions also prohibit employers from discriminating against employees, or prospective employees, on a wide range of grounds.

Employers are not only prohibited from terminating employment of employees on these grounds -- they must not take any ‘adverse action’ based on them.

One result has been a major change in the type of work the Commission does from mainly collective to mainly individual.

To illustrate, in 1998–99, about two thirds of the applications lodged with the Commission were collective in nature, while the remaining third were applications lodged by individuals. By 2011–12, these proportions have been reversed, with 63 per cent of applications lodged by individuals and 37 per cent related to collective matters.

While unions might be in decline, the same cannot be said for the Fair Work Ombudsman, which is predominantly tasked with helping **individual** workers secure their rights. Certainly the FWO is a much more sophisticated and well resourced organisation than the old arbitration inspectorate.

No doubt partly in response to this growing focus on statutory individual rights, most employers have implemented internal grievance procedures. These are usually designed to be used by individual employees.

Such procedures usually deal at a minimum with complaints about matters such as bullying, harassment and discrimination -- though many in practice can be used to resolve a wide range of individual employment related disputes.

My own research suggests that far more matters are dealt with through these internal grievance procedures than through dispute settlement procedures in enterprise agreements - which still remain largely the preserve of unions.

Employers correctly see such grievance procedures as providing a mechanism for managing the risk of litigation about individual employments rights - though they undoubtedly have other benefits as well.

These developments are not unique to Australia. Professor Alex Colvin of Cornell University has noted that ‘This same period of declining collective representation is also the era of the **individual rights revolution** in employment relations.’ He has drawn attention

to the simultaneous growth in individual employment rights in North America, the UK and Europe.

One of the challenges posed by the increasing web of individual employment rights is the provision of accessible, cost-effective and efficient methods of resolving disputes about these rights.

Jurisdictions around the world have been trying to grapple with the costs imposed by a steady increase in litigation in employment tribunals and courts.

There is no doubt that seeking to enforce individual employment rights through the legal system imposes costs. These costs don't only relate to employers and the public purse. There is also a significant cost to employees.

These costs are not only financial but can be social and psychological.

Social and psychological costs are likely to be most severe when the legal action relates to a workplace where the worker is still engaged. This is particularly stark when one considers the new anti-bullying jurisdiction under the Fair Work Act - which can be seen as the latest wave in the individual employment rights 'revolution' in Australia.

The genesis of the anti-bullying provisions

The anti-bullying provisions in the Fair Work Act were passed by the Parliament in 2013 and came into effect on 1 January this year. Unlike so much industrial relations legislation they have received broadly bipartisan support.

The legislation had its genesis in the October 2012 report of the House of Representatives Standing Committee on Education and Employment 'Workplace Bullying: we just want it to stop'.

In the foreword to the report, the Chair, Amanda Rishworth MP wrote 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. Such behaviour can also undercut the productivity of an entire organisation, which incurs financial costs to employers and the national economy. Beyond the enormous personal and organisational costs, the Productivity Commission estimates that workplace bullying costs the Australian economy between $6 billion and $36 billion annually*’.

The first recommendation of the report was that the Commonwealth Government should promote the national adoption of a definition of bullying as ‘repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety.’

The Committee also recommended that the Commonwealth Government, in consultation with stakeholders, establish a new national service to provide advice, assistance and resolution services to employers and workers. Its activities should include:

- a hotline service to provide advice to employers and workers alike on a variety of topics including:

  ⇒ practical, preventative and proactive steps that employers can take to reduce the risk of workplace bullying;

  ⇒ empowering workers to respond early to the problem behaviour they encounter;

  ⇒ provide advice to workers who have been accused of bullying others in their workplace;

- providing downloadable training packages for employers to tailor to their industry and size;

- a proactive, onsite and ongoing education service targeting specific industries where bullying is known to be particularly problematic;

- resolution assistance services including information about how and when to engage mediation sessions between the workers concerned.

The Committee also made a series of recommendations to promote the training of managers to deal with workplace bullying matters, and the establishment of a trial mediation service for resolution of conflicts where there is a risk of bullying arising out of poor workplace behaviour. It also recommended improved co-ordination between WHS regulators.

While the Committee did recommend some changes to legislation, this was in fact a relatively minor aspect of the Committee's Report.

The Committee noted that workers in all Australian jurisdictions are protected against workplace bullying by a variety of existing legislative and regulatory frameworks.

These frameworks encompass Work Health and Safety law, criminal law, anti-discrimination law and industrial law as well as rights under common law and workers' compensation.

However, the Committee commented,

> '*none of these frameworks provide an 'all in one' response to workplace bullying; that is, none provide both universal protection and recourse. Thus, workers are left to navigate the overlapping frameworks, which can be frustrating and confusing for targets of workplace bullying. The variation across jurisdictions in each of these areas creates more confusion and frustration*.'

The Committee stated:

> *In recognition of the many calls from individuals who gave their personal accounts of bullying in the workplace, as well as a number of other stakeholders, the Committee supports the availability of a single right of individual recourse for all workers affected by workplace bullying'.*

The Committee noted concerns that the court process could be arduous and often too difficult for individuals to navigate their way around.

However, it considered that '*as this type of process is provided to workers seeking remedies in relation to other workplace disputes under the Fair Work Act and anti-discrimination laws'*, it might be appropriate to adopt a similar process in relation to workplace bullying.

The key features of the anti-bullying provisions

The anti-bullying provisions broadly implement the approach recommended by the House of Representatives Committee.

For example, the legislation essentially adopts the definition of bullying proposed by the committee. A worker is 'bullied at work' if - while the worker is at work - an individual or a group of individuals **repeatedly** behaves **unreasonably** towards the worker, or a group of workers of which the worker is a member, and that behaviour creates **a risk to health and safety**.

The legislation includes a specific provision that bullying does not include 'reasonable management action carried out in a reasonable manner'.

To be within the compass of the legislation the worker needs to be 'at work in a constitutionally-covered business'. Apart from those who work for the Commonwealth government, this essentially means the worker has to work in a Territory or for a constitutional corporation.

Any worker who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission for an anti-bullying order.

The definition of ‘worker’ is the broad one used in the Work Health and Safety Act 2011. This includes any individual who performs work in any capacity including as an employee, a contractor, a subcontractor, an out worker, an apprentice, a trainee, a student on work experience or a volunteer.

The legislation specifically allows an applicant for an anti-bullying order to pursue parallel actions under workplace health and safety laws. Nor are there any anti-double dipping provisions to stop someone pursuing an anti-bullying claim while pursuing remedies under anti-discrimination legislation or the general protections provisions of the Fair Work Act.

If the Commission is satisfied that the worker has been bullied and there is a risk that the bullying will continue, the Commission may make any order it considers appropriate to prevent the worker from being further bullied.

Importantly however, the Commission may not make an order requiring payment of a pecuniary amount.

The Commission must consider any known outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body; any procedure available to the worker to resolve grievances or disputes and/or any outcomes arising out of any such procedure.

It is worth underscoring a couple of these features.

First there must be a risk of further bullying. This means - in practice - that the worker must still be working in the same workplace where he or she has been bullied. If he or she has resigned or been dismissed

it is highly unlikely that the Commission would find that there was a further risk of being bullied.

Secondly, the Commission is unable to award compensation. In other words, anti-bullying orders are about enabling workers who have been bullied in the past to work in the future free from the risk of further bullying.

Applications so far under the anti-bullying provisions

In the first seven months since the legislation commenced, the Commission received 411 applications for anti-bullying orders.

The great majority of applications have come from employees, as opposed to the various other types of workers covered by the legislation.

Applications have most commonly been in relation to the worker's manager - though a sizeable minority of applications have concerned allegations of bullying by fellow workers.

Between one third and one half of all applications have come from workers employed by organisations with less than 50 employees, though I note that relatively few of these would meet the definition of 'small business' in the Fair Work Act.

The greatest number of applications has come from the clerical industry, with particularly large numbers also coming from educational services, health and welfare services, aged care, retail, and the banking, finance and insurance industry. However the Commission has received applications from just about every industry.

I've picked a few applications out at random, just to give you an idea of the types of applications being made.

The first one concerns a female applicant from a medium sized private sector business.

Neither the applicant nor the employer was represented.

The applicant alleged that she was being bullied by the acting HR Manager. In particular she alleged that she had been given one day's notice to a change in her working hours. She alleged that changes had also been made to her flexible working arrangements. She also disputed the way she was being paid for public holidays, claimed that she was not being properly reimbursed for vehicle maintenance and had been prevented from travelling inter-State to meet with colleagues.

The employer's response was that it was simply seeking to ensure that the applicant only worked the hours she was contracted for, wanted her to cease working from home as this was proving inefficient, and wanted the applicant to seek prior approval from her manager before incurring expenditure, including on travel, as well as comply with company policy with regard to the private use of private vehicles.

The applicant complained that the HR manager's directions were causing her to have overwhelming feelings that the workplace had become hostile. She was experiencing high levels of anxiety, muscle tension throughout her body including jaw clenching and headaches, constant and revolving fearful thoughts, sleeplessness and a sense of fear about attending the workplace.

The applicant alleged that the company had failed to investigate a complaint she had made about the alleged bullying. The employer on the other hand said it had engaged its industry association to conduct an investigation - which was in train at the time the complaint was lodged with the FWC.

The applicant tendered her resignation before the matter was listed by the FWC - which effectively put an end to the matter.

The second example concerns a female head of a department at a non government school.

The applicant was represented by her union, and the employer was represented by a law firm.

The applicant alleged 21 instances of bullying over a period of four years. Her allegations included complaints about decisions concerning her department being made without consulting her, disputes about how to roll out a new curriculum, and being publicly chastised in emails.

The teacher had written to her employer alleging that she had been bullied. No investigation had been conducted as the employer considered that the teacher had failed to articulate the basis of her claims. It had however tried to resolve the matter using an independent mediator.

As is quite common with anti-bullying applications, the teacher had also lodged a workers' compensation claim.

The matter has been listed for a conference before the FWC.

The third example concerns a female public servant.

She was not represented.

She complained that she had been displaced as part of a departmental reorganisation and was being pressured to take a voluntary redundancy. She said that all her tasks had been redistributed to others and she had been sitting at his desk for almost 5 months without work. She claimed she had been given a bad referee report by her supervisor because of racial discrimination. This meant she could not get other jobs in the Department.

She said she was 'mentally very stressed'.

The applicant's manager said there had been a workplace reorganisation as a result of Machinery of Government changes.

These changes resulted in the functions that were undertaken in the applicant's previous team being no longer required. Due to increasing budgetary constraints no alternative position had been found for the applicant.

The manager said that the option of a voluntary redundancy had been discussed with the applicant as part of a departmental process available to all employees. The manager claimed that when the applicant said that she was not interested in taking a voluntary redundancy she accepted her decision. She denied pressuring her to take a voluntary redundancy.

The matter was dealt with in a conciliation conference and as far as I am aware has not gone any further.

The approach of the Commission

Interestingly, there has as yet not been a single case where the Commission has granted anti-bullying orders, apart from one where the orders were by consent.

While this to some extent reflects the newness of the legislation, it is also indicative of the general approach of the Commission, which has been to try and resolve matters informally, through the use of conciliation and/or mediation.

This is consistent with the general approach of the Commission to resolving employment disputes. However this emphasis on conciliation is particularly apposite with anti-bullying cases.

Given the nature of the legislation, the only cases that have any prospect of success are where the worker is either still engaged in the workplace where the alleged bullying occurred or has a prospect of returning there - perhaps after a period off work on personal leave or workers' compensation.

The need to maintain a reasonable relationship between the applicant and the employer - and in many cases between the applicant and fellow workers is critical.

The mere fact of making an application for an anti-bullying order is likely to put such relationships under strain. Conducting the type of hearing that would normally be required before one could consider making a contested anti-bullying order has the potential to impose even more stress on the relevant relationships.

In our experience, most applicants understand this at least as much as employers. They generally prefer to resolve matters informally and by agreement if at all possible. Of course, one feature of this approach is that there is usually no formal finding that bullying either has or has not occurred.

The focus is typically on how all those involved can work together in the future. Consistent with the intent of the legislation, monetary compensation has generally not been a feature of settlements - much to the displeasure of some applicants (and perhaps their lawyers!).

Most members are taking a graduated approach to anti-bullying matters, dealing with them initially in an informal way, exploring options and potential resolution and proceeding to hearings only where appropriate.

A reasonably high number of matters have been resolved through these initial stages, partly because the kinds of orders that can be made by the Commission are preventative and may be considered by the employer to be constructive and good HR practice and partly because the prospect of the parties giving evidence against each other is a daunting prospect that is likely to further strain existing relationships.

In some cases applications have been referred for mediation by FWC staff conciliators - though most matters have been dealt with by Commission members.

Most resolutions have involved agreements about future behaviour, adoption of revised or new policies and grievance arrangements; revised employee reporting or administrative arrangements at the workplace and protocols to deal with any future issues.

The Commission's approach is to provide as much helpful information as possible about the jurisdiction on the website - with the aim, amongst other things, of alerting potential applicants about what is - and is not - involved (for example, the inability to obtain financial compensation).

There is a small anti-bullying unit that contacts applicants and confirms their willingness to proceed. A copy of the application is given to the employer and the alleged bully. The unit provides information on the process to all parties. It also identifies obvious jurisdictional problems. A preliminary report is given to the Panel Head who then allocates a matter, usually to an individual member of the Commission.

A number of applications are finalised very early in the process. This could be due to factors such as the applications being incomplete, the applications having been made in the wrong jurisdiction for the remedies sought, or where there is clearly no jurisdiction.

A small number of applications have been formally dismissed on jurisdictional grounds - for example, on the grounds that the relevant workplace was not a constitutional corporation ([2014] FWC 1395).

A small number of matters have gone to a hearing. These tend to be where the employees concerned want some kind of formal vindication. The types of hearings that have been conducted have been similar to those the Commission normally conducts in the case of unfair dismissal arbitrations.

There have so far been only a small number of decisions following such hearings. In all of the decisions so far the Commission has

dismissed applications on the ground that no bullying has occurred. (e.g. [2014] FWC 3940).

Some further decisions on merit (and potentially orders) are expected soon.

Where to from here?

The appalling damage that can be caused by bullying in the workplace has been well documented. As a society we cannot turn a blind eye to the issue.

There can be no doubt that the best approach is to prevent bullying occurring in the first place. The next best approach is to 'nip it in the bud' as early as possible.

Given the costs legal action imposes on all those involved it should clearly only be used as a 'last resort' when either prevention or early resolution has failed.

There is clearly a lot of merit in the House of Representatives Committee's recommendation to establish a service to provide advice, assistance and resolution services to employers and workers.

In the meantime, the Commission intends to draw on our experience to develop a good practice guide concerning relationships between people at work - to help prevent bullying and where it occurs to help resolve it quickly at the workplace level.

It should really go without saying these days that organisations need good policies outlining how people are to treat each other at work.

They also need internal grievance procedures. Employee Assistance Programs and harassment contact officers may also be helpful. Organisations should monitor grievances and use internal grievance procedures to identify problem areas or issues.

However the best grievance procedures are the ones that are rarely used.

I believe the key to tackling bullying in the workplace lies with line managers.

Line managers must have the authority to resolve people management issues.

At the same time, line managers must be held accountable when they fail to treat people fairly and appropriately.

Organisations certainly need to provide training in people skills to their line managers.

But in my view training can only get you so far. In my experience there are some people who - no matter how much you train them - are just incapable of treating people in the right way.

What this suggests is that organisations who **genuinely** wish to minimise the risks associated with workplace bullying should give priority to interpersonal skills when deciding who to appoint to managerial positions.

Conclusion

To sum up, the new anti-bullying provisions should be seen as part of a broader individual employment rights revolution. However, given the economic social and psychological costs of pursuing legal processes, it is best for all concerned if bullying can either be prevented or at least dealt with quickly at the workplace level.

The Commission does its best to try and resolve anti-bullying matters informally, usually by getting agreement on matters such as future conduct - though the potential for formal orders remains.

The Commission is planning to draw on its experience to provide guidance to organisations about how to minimise the risks arising from bullying.

In the meantime however it is important that organisations have appropriate policies and procedures in place. But the most important thing is to ensure that you have the right line managers; that you give them the right authority and training; and you hold them to account when they fail.

Thank you.