Fair Work Act Amendment and Bullying Update

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Outline

• Recent changes to the *Fair Work Act 2009* as a result of the *Fair Work Amendment Bill 2013*.
• Focus on anti-bullying provisions.
• Interaction between *Fair Work Act 2009* and various OHS/WHS acts.
• Abbott’s plans.
Fair Work Amendment Bill 2013

• The Bill passed through the Senate on Thursday 27 June 2013.

• On Friday 28 June, the Bill received Royal Assent. It is now law.
Changes to the *Fair Work Act 2009*

- Improved family friendly measures.
- Protection of penalty rates.
- Improved right of entry provisions.
- Technical amendments.
- The ability for FWC to deal with bullying complaints.
Family Friendly Measures

Special Maternity Leave
• Employees who use unpaid special maternity leave will not use any unpaid parental leave.

Concurrent Parental Leave
• Concurrent parental leave is now 8 weeks, up from 3.

Transfer to a Safe Job
• Pregnant employees with less than 12 months’ service are protected.
Family Friendly Measures Cont.

Flexible Working Arrangements
• More employees can now request flexible working arrangements.

Changes to Rosters or Working Hours
• Modern awards and enterprise agreements must include a requirement that employers consult about changes to rosters and hours.
Protection of Penalty Rates

Modern awards must provide a fair and relevant minimum safety net of terms and conditions taking into account:

• the need to provide remuneration for employees:
  – working overtime; or
  – working unsocial, irregular or unpredictable hours; or
  – working on weekends or public holidays; or
  – working shifts.
Right of Entry

The changes mean better access to:

• Lunchrooms; and
• Remote workplaces.

FWC can deal with disputes about frequency of entry to hold discussions.
Technical Amendments

• FWC can mediate, conciliate, make a recommendation, express an opinion in a conference.
• Consent arbitration for general protections dismissals and unlawful termination.
• 21 days (reduced from 60) to apply for relief for unlawful termination.
• Fixing cross references, punctuation etc.
Bullying: *Fair Work Act* Definition

Part 6-4B—Workers bullied at work
Ss 789FA – 789FL

S 789FD When is a worker *bullied at work*?

A worker is *bullied at work* if:
(a) while the worker is at work in a constitutionally-covered business:
   (i) an individual; or
   (ii) a group of individuals;
repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
(b) that behaviour creates a risk to health and safety.
Other Definitions

• WorkSafe Victoria says:
Workplace bullying is characterised by persistent and repeated negative behaviour directed at an employee that creates a risk to health and safety.

• WorkCover NSW says:
Bullying at work is repeated, unreasonable behaviour directed towards a worker, or a group of workers, that creates a risk to their health and safety.
What was the Labor Government’s intention?

The anti-bullying amendments are part of the Government’s response to the House of Representatives Standing Committee on Education and Employment report Workplace bullying “We just want it to stop”.
Commencement Date

The anti-bullying measures commence on 1 January 2014.
Who Can Apply?

- A person, or group of people, who reasonably believe they are being bullied at work may make an application to the FWC for an order to prevent the bullying.
- Applies to ‘workers’ in constitutionally-covered businesses.
- Generally does not apply to Defence Force personnel or national security and Australian Federal Police operations.
Is this Bullying?

A worker in a book store is treated by her boss in the following ways:

• a book is thrown at her head;
• the boss sneers at the employee;
• the boss tells her he will sack her;
• the boss swears at her;
• she is told not to question the boss’s reasons and to stop asking questions;
• the boss belittles and demeans her;
• she is left out of workplace activities;
• the boss constantly reminds her of errors and mistakes.
What is not Bullying?

S 789FD(2)

Reasonable management action carried out in a reasonable manner is not bullying.
Is this Bullying?

- A worker is told by a number of managers that her work is not up to scratch and needs to be changed.
- The worker refuses to comply with the managers’ directions.
- The worker’s direct manager commences formal performance management of the worker.
- The worker alleges she is stressed out as a result.
- The worker swears at a colleague and is dismissed from employment.
The Process

1. Make an application to the FWC: s 789FC.

2. FWC to **start** to deal with applications within 14 days: s 789FE.

   FWC may start to inform itself of the matter under s 590, it may decide to conduct a conference under s 592, or it may decide to hold a hearing under s 593.

3. FWC may make orders: s 789FF.
What Orders can FWC make?

FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

FWC must take into account:

(a) any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and

(b) any procedure available to the worker to resolve grievances or disputes—that procedure; and

(c) any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and

(d) any matters that the FWC considers relevant.
Interaction between the FW Act and OHS/WHS Legislation

S 789FH Actions under work health and safety laws permitted

Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied at work, then section 115 of the Work Health and Safety Act 2011 (and corresponding provisions of corresponding WHS laws) would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying.

Section 789FH removes that prohibition.
Interaction continued...

What effect does a FWC order have in relation to WHS/OHS prosecutions in court?
Abbott’s Plans

• It must be clear that a worker has first sought help and impartial advice from an independent regulatory agency.

• The provisions will cover the conduct of union officials towards workers and employers.
Summary

• The family friendly changes and some technical and changes commenced on 1 July 2013.
• All other changes – including the anti-bullying provisions start on 1 January 2014.
• Much of this could change under the Abbott Liberal government.