

Our ref: Industrial Law Committee

22 April 2013

Committee Secretary
House Standing Committee on Education and Employment
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By Post and Email to: ee.reps@aph.gov.au

Dear Committee Secretary

Fair Work Amendment Bill 2013

Thank you for providing the Society with the opportunity to comment on the *Fair Work Amendment Bill 2013* (the Bill).

We note we have been unable to conduct an in-depth analysis of the Bill. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified. We limit our comments to Schedule 3 of the Bill – anti-bullying measure.

1. Issues for further clarification

We are of the view that the bullying provisions do not provide sufficient clarity regarding a number of matters, including:

- a) *Who can be / is an appropriate respondent to an application under section 789FC?*

In this respect it is not clear where applications are to be made against:

- the worker's employer/relevant person conducting a business or undertaking (PCBU); or
- the alleged individual perpetrator(s) of the bullying conduct; or
- both parties.

We recommend that section 789FC be amended to clarify who the application can be / is to be brought against.

From a practical perspective, we would suggest that in most cases it will be appropriate to include both the alleged perpetrator(s) of the bullying conduct as well as the relevant employer/PCBU as parties to the application – as without the

participation of both of those parties it will be difficult for the FWC to have a clear understanding of the issues involved and identify ways to resolve the complaint.

b) *Who is entitled to be heard in relation to an application under section 789FC?*

This will partly be determined by the answer to issue (a) but we consider that in all cases both the alleged individual perpetrator and the relevant employer/PCBU should have a right to be heard in relation to the application (irrespective of whether they are a party to the application). This is particularly important if they are likely to be subject to an order under section 789FF.

In the event that section 789FC is amended to make it clear that both the alleged individual perpetrator(s) and the relevant employer/PCBU will be parties to the application, then no further amendment would be required to cover off the above issue (as the right to be heard would flow from being a party to the application).

However, if section 789FC is not amended in this fashion, we would recommend the insertion of an express right for an alleged perpetrator and/or the relevant employer/PCBU to be heard in relation to an application (even where they are not a party to the application).

c) *Who does the FWC have the power to bind in respect of an order made under section 789FF?*

At present the FWC's power to make an order under section 789FF is not limited to orders in respect of the parties to the application.

We would expect that in most cases, in order to prevent bullying conduct from continuing, the FWC will be required to make an order which binds not only the individual perpetrator(s) but also the relevant employer/PCBU. This will not be problematic where both the individual perpetrator and the relevant employer/PCBU are parties to the application (but will be where only one of them is a party).

It is contrary to the principles of procedural fairness and natural justice to empower the FWC to make orders that would affect a person or entity that is not a party to the application. We recommend that section 789FF be amended so that the FWC is only empowered to make orders binding the parties to the application.

2. **Prerequisites for making an application**

There may also be utility in setting prerequisites that must be met in order for a worker to be eligible to make an application. In this respect we would suggest that (similar to section 229(4) of the *Fair Work Act 2009* (Cth)) there be a requirement for a worker to:

- notify their employer/relevant PCBU of the complaint of bullying; and
- give their employer/relevant PCBU a reasonable opportunity to take action to address the complaint;

before an application can be made under section 789FC.

Such prerequisites would provide businesses with an opportunity to resolve the issue without the need for third party intervention and could also assist in the resolution of issues at an earlier stage and in turn reduce the level of disputes in this area.

Thank you for considering our comments on this issue.

Yours faithfully

Annette Bradfield
President