

**Supplementary
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Fair Work Amendment Bill 2013

House of Representatives Standing Committee on Education and Employment

**Supplementary submission by the Industrial Law Committee of the Federal
Litigation Section of the Law Council of Australia**

17 May 2013

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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1. This supplementary submission has been prepared for the Law Council of Australia by the Industrial Law Committee of the Federal Litigation Section (the Committee).
 2. The Law Council of Australia is the peak national representative body of the Australian legal profession – it represents some 60,000 legal practitioners nationwide. Attachment A provides a profile of the Law Council. Attachment B lists the members of the Committee.
 3. The earlier submission forwarded on 10 May 2013 dealt with two aspects of the Fair Work Amendment Bill 2013. This supplementary submission addresses a third aspect of the Bill – the provisions in Schedule 3 that deal with bullying at work.

Stopping workers being bullied at work – Schedule 3, item 6

4. Schedule 3, item 6, proposes to address the issue of workplace bullying by granting to the Fair Work Commission (FWC) a new jurisdiction to hear applications by workers who allege they have been bullied at work. Legitimate policy questions arise as to whether the legislative approach proposed by the Bill is appropriate, being questions about which reasonable minds may differ. The Committee wishes to identify three of those policy issues.

Who will be covered by the new provisions

5. The first policy question is whether the jurisdiction should extend to the same or different types of workers and employers than those who otherwise fall within the jurisdiction of the FWC.
6. One of the most significant aspects of this proposed amendment concerning bullying is the introduction of the definition ‘*worker*’ which is to have the same meaning as in the *Work Health and Safety Act 2011* (Cth) – in other words, it extends to an individual who performs work in any capacity, including as an employee, a contractor, a sub-contractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.
7. The FWC does not presently have jurisdiction in respect of a range of those persons.
8. The proposed legislation would give rise to the potential for conflicting approaches to dealing with health and safety at work by different tribunals. Given cl 789FH, it would also create the potential of more than one action being taken arising from the same circumstances in different forums.
9. Whilst the provisions of the *Fair Work Act 2009* (Cth) apply to a wide range of workers, as drafted the amendments will apply to a narrower type of workplace than the rest of the Act. Pursuant to cl 789FD the provisions will only apply to the Commonwealth, Commonwealth authorities, businesses incorporated in or conducted in a Territory, and ‘constitutional corporations’. The latter are corporations within the meaning of s 50(xx) of the Constitution, that is ‘*foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth*’. There are a range of entities that are employers for all other aspects of the Fair Work Act but which will not fall within the categories of cl 789FD. These include for example, sole traders, partnerships, and corporations whose trading activities are insufficient to render them a ‘constitutional corporation’. The current approach will also mean that in some cases the difficult legal question of whether a particular corporation is a trading corporation will arise: *Bankstown Handicapped Children's Centre Association Inc v Hillman* (2010) 182 FCR 483.

Whether 'bullying' is determined objectively or subjectively

10. A second policy question is whether the definition of 'bullying' should be drafted in a manner that creates an objective or subjective test.
11. An attempt is made in cl 789FD(2) to exclude from bullying the concept of 'reasonable management action carried out in a reasonable manner'. That suggests an objective test is to be applied.
12. The Explanatory Memorandum to the Amendment Bill, however, introduces into the purported exclusion of bullying (reasonable management action), the subjective feelings of an individual. Paragraph 112 of the Explanatory Memorandum indicates that the actions by an employer:

'are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example), victimised or humiliated'.
13. An employee may, for example, feel humiliated because of criticism of his or her performance that was objectively reasonable. Paragraph 112 of the Explanatory Memorandum throws very significant doubt on the manner in which cl 789FD(2) should be interpreted.

Potential to apply to disputes about threatened dismissal

14. A third policy question arises as to the breadth of the orders that the FWC can make.
15. The Bill proposes vesting in the FWC power to make any order that the FWC considers appropriate (other than a pecuniary order) to prevent the bullying. That would include a power to make an order preventing an employee being dismissed.
16. It is not uncommon for there to be conflicting views as to whether action being taken by a manager over purported poor performance is reasonable and legitimate or unreasonable 'bullying' behaviour¹. The proposed provisions, if enacted, would permit employees who have been told that their work performance is inadequate and who believe that action to be unreasonable and 'bullying' to seek an order preventing disciplinary action, including dismissal, from taking place. Depending on the approach that the FWC takes to such matters, there is the real potential for the proposed provisions to be used to bring 'unfair dismissal' type proceedings upon a dismissal being threatened. There is also the potential to discourage employers from frankly discussing their views about performance issues with affected employees.
17. Further, given the extended definition of 'worker', it would extend a right to bring such 'threatened dismissal' proceedings beyond those who can bring unfair dismissal proceedings (i.e. employees) to other workers including contractors and even volunteers.
18. The Committee is of the view that as drafted the provisions in Schedule 3 may have some unintended consequences. The *Committee recommends further consideration be given to the following policy questions:*
 - a. Who should be subject to the provisions, and in particular:
 - i. Whether it is appropriate to extend the reach of the provisions beyond those workers over which the FWC presently has jurisdiction;

¹ In *Dickinson v Calstores* [2011] FWA 6858 at [123], Sams DP said: "I should say that it is becoming far too common these days for claims of bullying and harassment to arise in circumstances where an employer is merely seeking to manage the improvement of an employee's performance or conduct"; see too *Boyd v SPI PowerNet Pty Ltd* [2012] FWA 5962 at [24].

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- ii. Whether the provisions should apply to a narrower class of employers than those over which the FWC presently has jurisdiction;
 - b. Whether the definition of 'bullying' should be an objective or subjective test. (If it is to be an objective test, as cl 789FD(2) would appear to contemplate, then clarification should be provided in a Supplementary Explanatory Memorandum altering what is stated in paragraph 112 of the Explanatory Memorandum.)
 - c. Whether amendment is needed to avoid the potential consequences identified in paragraph 16 above.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian state and territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Profile of the Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia

The Industrial Law Committee of the Federal Litigation Section of the Law Council of Australia has the following members:

Ingmar Taylor SC (Chair), NSW Bar, Sydney

Peter Kite SC, NSW Bar, Sydney

Richard Bunting, Ashurst, Melbourne

Harry Dixon SC, NSW Bar, Sydney

Ross Jackson, Maddocks, Melbourne

Rachel Doyle SC, Victorian Bar, Melbourne

Jonathan Kirkwood, Victorian Bar, Melbourne

Liz Perry, EMA Legal, Adelaide

Joseph Wearing, Wearing Law, Adelaide

Rob Lilburn, Ashurst, Perth

Craig Green, Page Seager, Hobart

Erica Hartley, Herbert Smith Freehills, Perth

Gail Archer SC, WA Bar, Perth

Joanna Glynn, Corrs Chambers Westgarth, Brisbane

Amber Sharp, Marque Lawyers, Sydney

Geraldine Dann, Queensland Bar, Brisbane