



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Employment:JDgl806488

12 December 2013

The Hon. Justice Iain Ross AO
President
The Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

By email: futuredirections@fwc.gov.au

Dear Justice Ross,

Amended Fair Work Commission Rules 2013 and new draft forms for the anti-bullying jurisdiction

I am writing to you at the request of the Law Society's Employment Law Committee ("Committee"). The Committee is pleased to have the opportunity to review the draft amended Fair Work Commission Rules 2013 and new draft forms issued by the Fair Work Commission ("Commission") on 5 December 2013, in relation to the new anti-bullying jurisdiction.

1. Amended Fair Work Commission Rules 2013

It is unclear to the Committee why the Commission will not be required under rule 45 to serve on a person documents lodged with an anti-bullying application in addition to serving the application itself. The Committee notes that the Commission is required to serve any documents lodged with an application for unfair dismissal, general protections and unlawful termination. In the Committee's view, all materials lodged with an anti-bullying application should be similarly served with the application, unless there are particular reasons for withholding them. To do otherwise may hamper the ability of the employer and respondent to adequately respond to the application.

On page 83, Schedule 1, "Instructions as to service", there appears to be a typographical error in relation to Form F74. The Committee suggests that in column 3, the word "to" should be replaced with the word "in", so as to read "Response from a person against whom bullying has been alleged in an Application..."

2. Form F72 – Order to stop bullying

The Committee suggests that the form could be further enhanced by inserting two new sub-questions in question four, "Bullying policy or grievance or dispute resolution procedure". To ascertain whether the worker has made a complaint to the employer, the Committee suggests that a question along the following lines could be inserted as new question 4.1:

- 4.1 Have you made a complaint to your employer/principal about the bullying outlined in this application?
- Yes
- No

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The Committee suggests that a question along the following lines could be inserted as new question 4.2, to obtain further details of any complaint already made and any response given to date:

- 4.2 If you have made a complaint to your employer/principal, please attach a copy of the complaint and/or describe details of the complaint below (eg when you made the complaint, to whom, how (eg verbally or in writing), what you said, how it has been dealt with etc)

Existing questions 4.1 and 4.2 would then become questions 4.3 and 4.4 respectively.

3. Form F73 – Response from an employer/principal to an application for an order to stop bullying

The Committee suggests that the heading of question five, "Performance management and/or disciplinary action" is too limited. The exclusion in new s 789FD(2) of the *Fair Work Act 2009* for "reasonable management action", is arguably potentially wider than performance management or disciplinary action. On that basis, the Committee suggests that the heading of question five be amended, or that an additional question be included in this question which enables the employer to identify other forms of "reasonable management action". In the Committee's view consideration should also be given to including this as a ground for a jurisdictional objection in question 6.2.

4. Form F74 – Response from a person against whom bullying has been alleged to an application for an order to stop bullying

On page 4 of the form, above the box for employer/ principal details, the following question appears:

Is your employer/principal the same as the employer/principal who employs or engages you?

Yes—Go to question 1

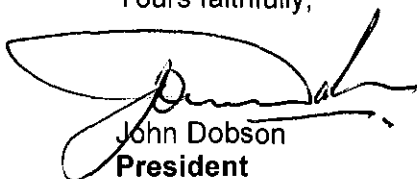
No—Please complete the details below for your employer/principal

Should this question instead read "Is your employer/principal the same as the employer/principal who engages the worker who made this application?"

In question 3.1, there appears to be a typographical error, "raise" should be replaced with "raised", so as to read "Has your employer/principal and/or the worker raised any concerns about your alleged behaviour?"

The Committee commends the Commission for the creation of these new forms to assist parties in the new anti-bullying jurisdiction which commences next year. Any queries in relation to this letter can be directed to Gabrielle Lea, Policy Lawyer for the Employment Law Committee on: gabrielle.lea@lawsociety.com or on (02) 9926 0375.

Yours faithfully,



John Dobson
President