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WORKPLACE BULLYING – PAST BEHAVIOUR RELEVANT IN FAIR WORK COMMISSION'S NEW JURISDICTION UPDATE

The Fair Work Commission's anti-bullying powers came into force on 1 January 2014 (see our previous update [here](#)). In a recent decision ([Application by Kathleen McInnes \[2014\] FWCFB 1440](#)), the Full Bench of the Commission has found that the new laws can apply to bullying that occurred before 1 January 2014.

THE CLAIM

On 9 January 2014, Ms Kathleen McInnes applied to the Commission for an order to prevent her from being bullied at work. The bullying in question occurred over a six-year period from November 2007 to May 2013. Importantly, Ms McInnes did not claim that she had been bullied after May 2013.

One of the respondents, Peninsula Support Services ("PSS"), objected to the application on the basis that the Commission was not empowered to deal with bullying that occurred before the anti-bullying laws came into effect. Allowing the application to

proceed, PSS argued, would give the new provisions retrospective operation.

THE DECISION

Under the anti-bullying provisions, the Commission can hear an application to stop bullying so long as it is satisfied that:

- the worker has been bullied at work by one or more individuals; and
- there is a risk that the worker will continue to be bullied at work.

The Commission rejected PSS's argument, finding that the new provisions did not prevent it from considering bullying that occurred prior to 1 January 2014.

The Commission explained that the new provisions were not directed at punishing past conduct, but rather at preventing future bullying behaviour. This is demonstrated, for example, by the Commission being specifically precluded from making an order requiring an employer to pay compensation to a

bullied employee. Instead, the Commission can only make an order that any future bullying stop.

Because of this focus on preventing future conduct, the Commission found that the anti-bullying provisions did not operate retrospectively and could capture bullying that occurred before 1 January 2014.

WHAT THIS MEANS FOR EMPLOYERS

Employees can seek a bullying order in relation to alleged bullying incidents that occurred in 2013 and earlier. This means the potential for bullying claims is broader. In the short term, it may lead to increased claims by employees who may have believed they were precluded from making claims for pre 1 January 2014 incidents.

MORE INFORMATION

For more information, please contact:



Rick Catanzariti
Partner
T +61 3 9274 5810
rick.catanzariti@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

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