



Bodies Corporate Potentially Liable for Bullying of Contractors

AUTHOR // LAURA GERCKEN

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A recent Fair Work Commission decision demonstrates how far the *Fair Work Act 2009* (Cth) bullying jurisdiction extends, which will have serious ramifications for Bodies Corporate, committee members and individual lot owners.

THE FACTS

The Applicant was employed by a body corporate manager, XMR Ltd (“XMR”), which had a contract to provide caretaking and letting services to Bodies Corporate. The Applicant was employed by XMR as the onsite manager of a resort complex, but was also a resident owner of one of the lots in the complex and a director of the company.

The Applicant alleges that he was bullied by a number of individuals who were also residents and/or owners within the building complex. Some of the individuals were also members of the management committee of the Bodies Corporate.

The bullying conduct complained of involved:

- ongoing use of threatening, intimidating and derogatory language towards the Applicant;
- shouting and otherwise abusive language; and
- threats of violence and other actions, including grabbing or snatching at the Applicant’s property.

It is alleged that the above conduct occurred on more

than one occasion, including during committee meetings of the relevant Bodies Corporate.

THE FAIR WORK PROCEEDINGS

The Applicant applied to the Fair Work Commission for a “stop bullying order”. The individuals who were alleged to be the instigators of the bullying conduct, and the relevant Bodies Corporate were named as respondents to the application.

In order for the Fair Work Commission to make a stop bullying order, it must be satisfied of the following:

1. the applicant is a “worker”;
2. the alleged bullying behaviour must have taken place whilst the applicant was at work in a constitutionally covered business; and
3. there is a risk that the worker will continue to be bullied at work.

The two critical issues in this decision were whether the applicant was a “worker” and whether he was “at work” in a constitutionally covered business.

WAS THE APPLICANT A WORKER?

In the context of the Fair Work Act’s anti bullying laws, the definition of a worker is the same as the definition contained in the *Work Health and Safety Act 2011*, which

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includes an employee or contractor carrying out work for a person conducting a business or undertaking (“PCBU”).

In responding to the claim, the Bodies Corporate suggested that because they had a contract with XMR, it was XMR who was responsible for the Applicant’s health and safety. The Bodies Corporate went further and suggested that they were not a PCBU and therefore the Applicant was not a “worker” under the Fair Work Act.

The Commission did not accept the Bodies Corporate’s arguments and found that because the Applicant was an employee of XMR, and that XMR was a PCBU, then the Applicant was a “worker” under the Fair Work Act.

WAS THE APPLICANT AT WORK?

The Commission also found that the Applicant was at work in a constitutionally covered business.

The relevant point that the Commission relied upon was that XMR, who employed the Applicant, was the relevant constitutionally covered business (ie the Bodies Corporate did not need to be the relevant constitutionally covered business) and that the notion of being “at work” extends beyond the employer’s place of business.

In other words, because the Applicant was performing his duties as part of his employment with XMR (a constitutionally covered business) while at the resort complex, the resort complex became the Applicant’s workplace; and therefore he was entitled to protection from bullying while at that workplace.

IS IT APPROPRIATE FOR THE BODIES CORPORATE TO BE RESPONDENTS TO THE FAIR WORK APPLICATION?

The Bodies Corporate and the individuals named as the alleged offenders contended that they should not properly be considered as parties to the Fair Work proceedings.

While there was no contractual relationship between the Applicant and the Bodies Corporate, or the individuals named, the Commission found that the Bodies Corporate and the individuals were appropriate respondents to the application.

The Commission relied on the intention of the Fair Work Act’s anti bullying laws, which is to protect workers from bullying conduct by any individuals in the workplace. The individuals engaging in the alleged bullying conduct do not need to be workers: for example they could be customers of the business, or in this case, residents of the complex where the Applicant performed his duties.

WHAT DOES THIS MEAN?

The Fair Work Commission’s decision has serious ramifications for Bodies Corporate, committee members

and individual lot owners because it means that they can be included as respondents to Fair Work proceedings where a worker seeks a stop bullying order (even where that worker is not themselves employed by the Bodies Corporate and/or has no contractual relationship with the parties accused of bullying conduct).

The Fair Work Commission can only make an order to prevent the bullying conduct from continuing, it cannot make an order that any monetary sum is paid so this should provide some relief to Bodies Corporate and lot owners.

However, the Bodies Corporate and any individuals will still be required to devote time and expense in responding to such Applications, and will need to comply with any orders made. If a party doesn’t comply with a stop bullying order, they can then be ordered to pay penalties up to \$10,800 for an individual or up to \$54,000 for a body corporate for each breach of the orders.

HOW CAN BODIES CORPORATE MINIMISE THE RISK OF AN APPLICATION?

In order to minimise the risk of being included in an application for a stop bullying order, Bodies Corporate should be mindful of how they (and their employees, if any) interact, both in person and through correspondence, with workers onsite. This may also have potential complications for contractual issues between Bodies Corporate and resident management companies.

Bodies Corporate and individual committee members will have to carefully consider the wording of Remedial Action Notices issued to resident managers under the BCCMA and their Caretaking and Letting Agreements to ensure that the contents of the notice do not trigger allegations of bullying.

Also, as the issuance of Remedial Action Notices are generally perceived as being a fairly adversarial step in any case, individual committee members must be mindful of their prior and subsequent conduct towards the resident manager, when interactions may be somewhat tense and emotions high.

If Bodies Corporate become aware of potential issues with workers onsite, then steps should be taken to immediately diffuse the situation. If the Bodies Corporate find that there are long term and systemic issues (perhaps due to difficult residents) then it may be necessary to implement policies (to deal with resident’s conduct towards workers on site), or even change the bylaws to require residents to act reasonably towards workers.

This then allows the Bodies Corporate to action any breaches of the bylaws. Changing the bylaws is obviously a drastic step, and probably only necessary as a last resort.

POTENTIAL RAMIFICATIONS OF WORKPLACE HEALTH AND SAFETY ISSUES

The Fair Work Commission's decision may have ramifications for the workplace health and safety issues that plague the strata industry, specifically whether Bodies Corporate are a PCBU.

The Commission touched upon some of the exclusions to a PCBU, which includes a strata title body corporate that is responsible for common areas used only for residential purposes, but, unfortunately, did not make an ultimate finding as to whether the Bodies Corporate fell under this exclusion.

This demonstrates that the issue remains live and may be considered further by Tribunals in future decisions.

Bodies Corporate and residents also need to be careful that their interactions with workers do not endanger themselves or others. This responsibility arises under the

Work Health and Safety Act which provides that any person at a workplace (which will include Bodies Corporate and residents) must take reasonable care for their own health and safety and ensure that their acts or omissions do not adversely affect the health and safety of other persons. This will include bullying conduct, but will also extend to any behaviour that poses a risk to health and safety.

FUTURE UPDATES

It is important to note that the Fair Work Commission is yet to determine whether there has in fact been any bullying conduct and if so, what orders should be made. It will be interesting to see the nature of any orders against the Bodies Corporate, noting their somewhat limited ability to control members and tenants.

ClarkeKann will provide an update when those orders are made.

FOR MORE INFORMATION, PLEASE CONTACT:



JAMES NICKLESS //
Partner

T 61 7 3001 9237

E j.nickless@clarkekann.com.au



LAURA GERCKEN //
Lawyer

T 61 7 3001 9262

E l.gercken@clarkekann.com.au