



FairWork  
Commission

# National Anti-Bullying Jurisdiction of the Fair Work Commission – **What we now know**

**IRST Annual Conference  
11 October 2019**

**Commissioner Peter Hampton  
National Practice Leader – AB Jurisdiction**

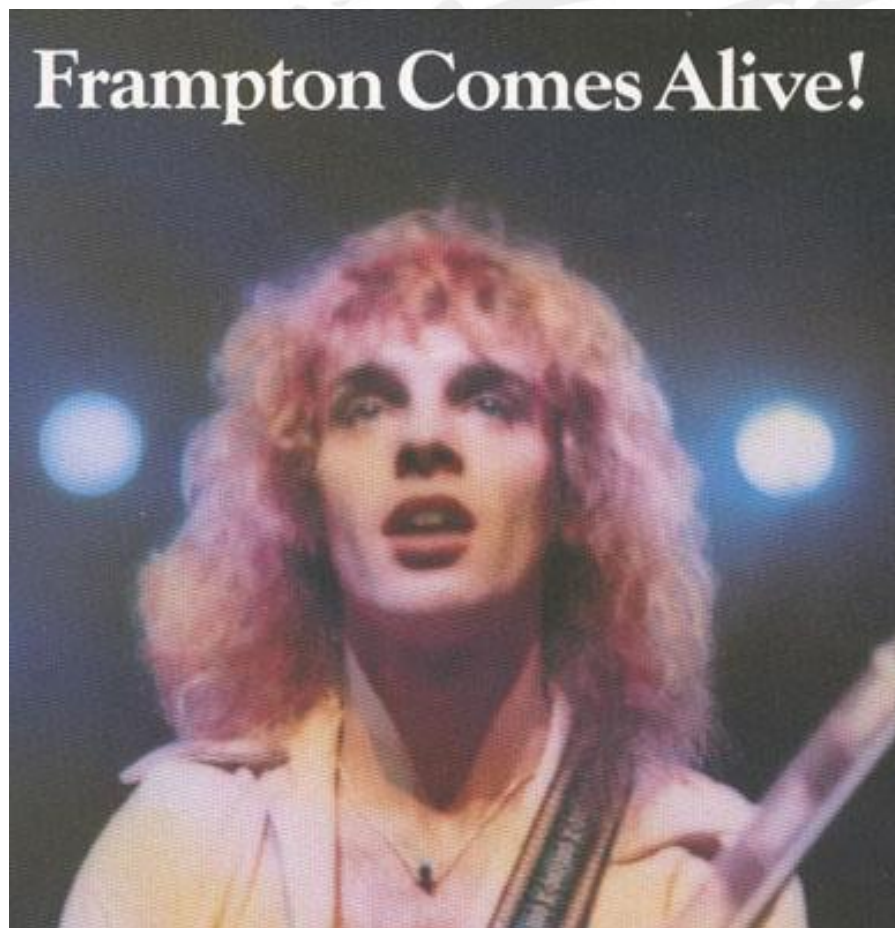
# United States Secretary of Defense Donald Rumsfeld - February 12, 2002

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“... as we know, there are **known knowns**; there are things we know we know. We also know there are **known unknowns**; that is to say we know there are some things we do not know. But there are also **unknown unknowns** – the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.”

# Before??

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# Outline – what we know after 5 years

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- **Settled case law on most of the key elements of the anti-bullying jurisdiction**
- **Who has applied and in what circumstances**
- **What have been the outcomes and when**
- **What is the form of resolutions and Orders**
- **What can we learn?**
- **New developments**

# 789FD When is a worker bullied at work?

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(1) A worker is bullied at work if:

(a) while the worker is at work in a

constitutionally covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member;

and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1)

does not apply to reasonable management action carried out in a reasonable manner.

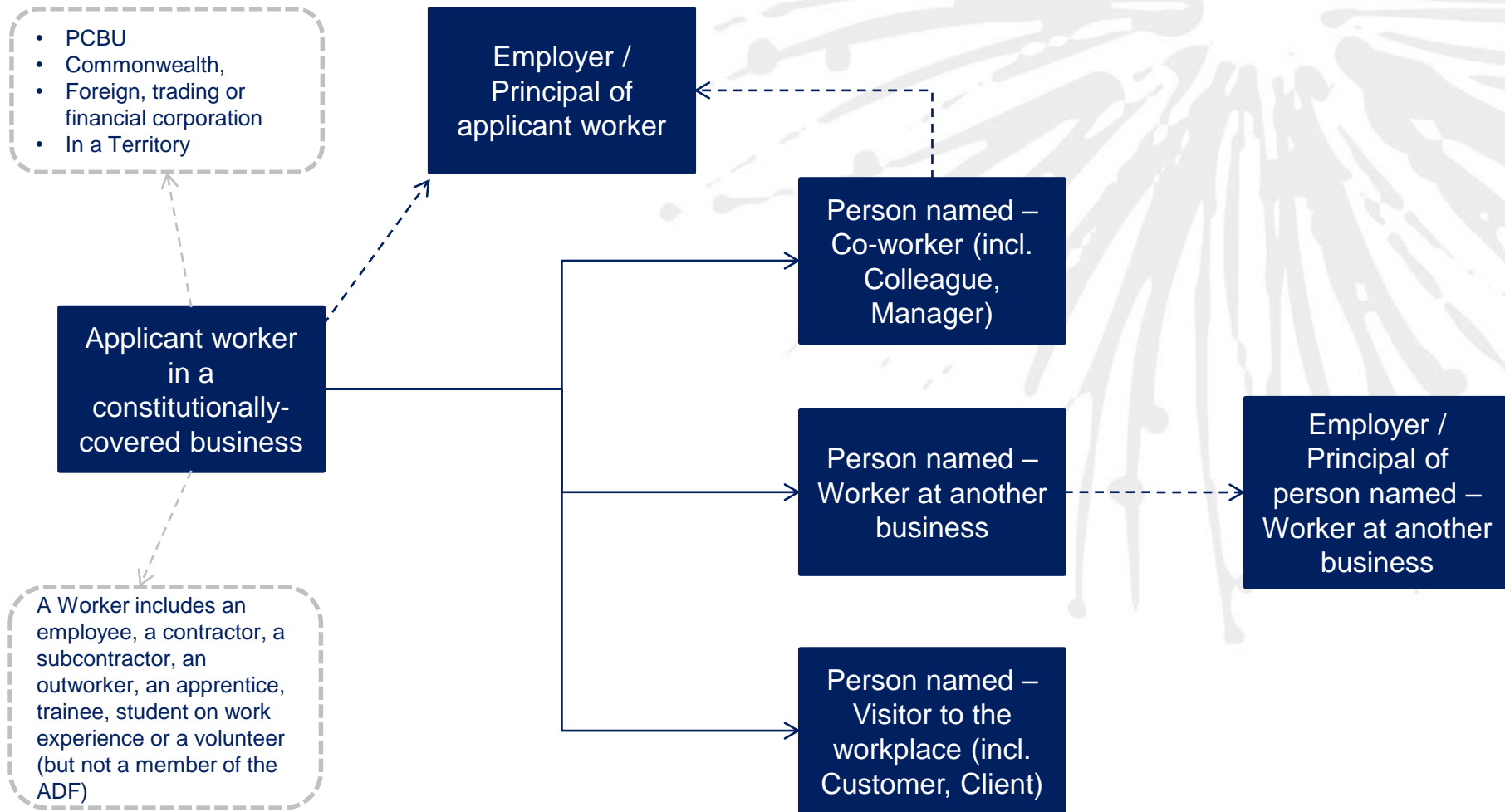
# Orders to stop bullying – s.789FF

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- Focus of **any order** is on stopping the conduct and enabling mutually safe and productive working relationships to resume
- To **make an order** – there must **also** be a risk of further bullying of the **applicant** by the **individual(s) concerned** and the Commission must also consider workplace processes and any outcomes
- Orders binding upon applicant, individuals named, their employers/principals and enforceable by the Federal Court
- The role and power of the Commission is essentially **preventative and is not compensatory or punitive**
- Interim Orders may be made – s.589



# Key Parties in an AB matter



# Meaning of Bullying Conduct – s.789FD(1)

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- *Ms SB [2014] FWC 2104 - Amie Mac v Bank of Queensland Ltd et al – [2015] FWC 774*
- Persistent unreasonable behaviour but might refer to a range of behaviours over time.
- More than one occurrence, not necessarily the same specific behaviour.
- “Unreasonable behaviour” - viewed objectively - behaviour that a reasonable person, having regard to all of the circumstances, would consider to be unreasonable.
- Must be a causal link (substantive) between the behaviour and the risk to health and safety when viewed in a common sense and practical way.
- The ordinary meaning of ‘risk’ is exposure to the chance of injury or loss. In the sense used in this provision, the risk must also be real and not simply conceptual.



# Reasonable management action taken in a reasonable manner – s.789FD(2)

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- *SB [2014] FWC 2104 – GC [2014] FWC 6988 - Amie Mac v Bank of Queensland Ltd et al – [2015] FWC 774*
- S.789FD(2) is not so much an "exclusion" but a **qualification** - bullying conduct must of itself be unreasonable. It also emphasises the right of management to take reasonable management action in the workplace.
- The provision comprises three elements:
  - the behaviour (being relied upon as bullying conduct) **must be management action**;
  - it must be **reasonable** for the management action **to have been taken**;
  - and
  - the management action must have been **carried out in a manner that is reasonable**.
- **An objective assessment of the action in the context of the circumstances of those involved at the time.**

# Observations about bullying conduct

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## Types

- Conflict escalation (most common)
- Predatory bullying
- Victimisation of a whistle blower
- Normalised unreasonable conduct
- Sexual harassment, discrimination
- “Pranks”
- Mobbing
- Upwards bullying

## Context

- Performance management
- Disciplinary action
- Workplace change – roles, workload, loss of ‘control’
- New Management
- Individual rogue behaviour (less common)

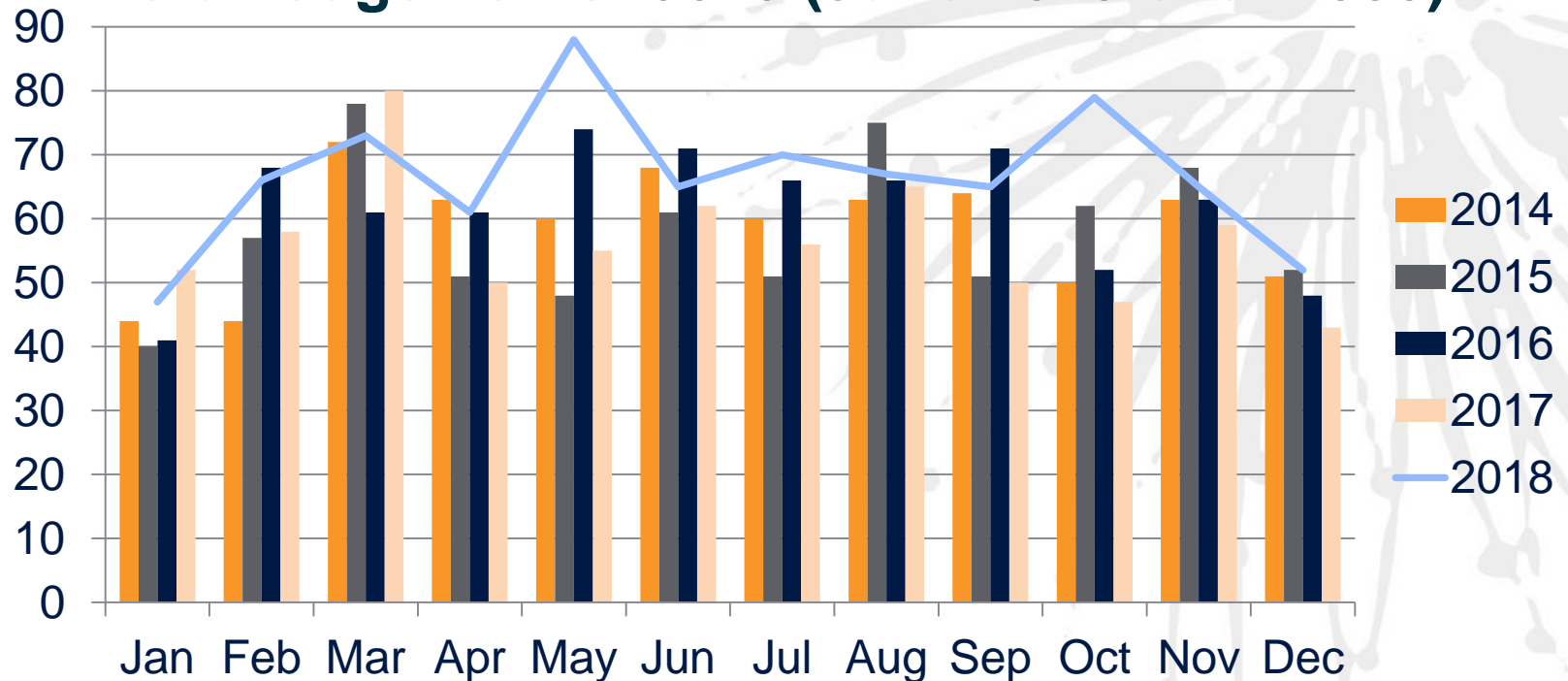
# Case management process

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- Early and direct engagement with parties prior to service of documents
- High levels of information for parties
- “Triage” and streaming of matters according to their own circumstances
- ADR where appropriate
- Preventative focus - Preserve the relationships – not promoting settlements with \$ to exit workplace
- Hearings appropriate for the parties and issues

# Enquiries and Lodgements 2014 – 2018

**Total lodgements: 3613 (June 2019 over 4000)**

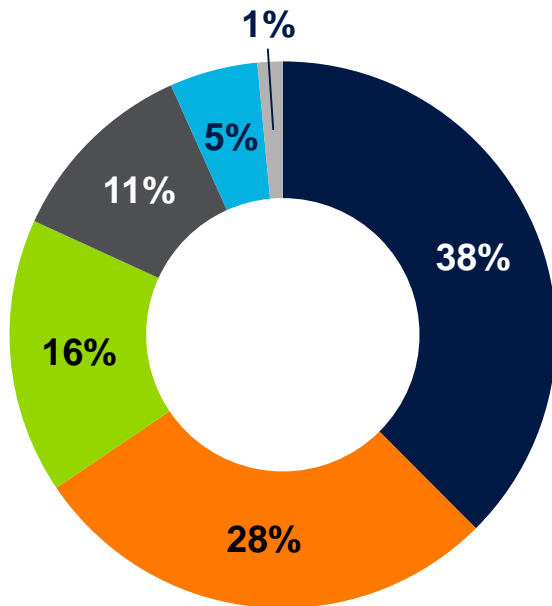


**2014 Lodgments: 702**  
**2015 Lodgments: 694**  
**2016 Lodgments: 742**  
**2017 Lodgments: 677**  
**2018 Lodgments: 798**

**AB unique website hits (Yearly Average): 159,081**  
**Helpline calls answered (Yearly Average): 6,480**

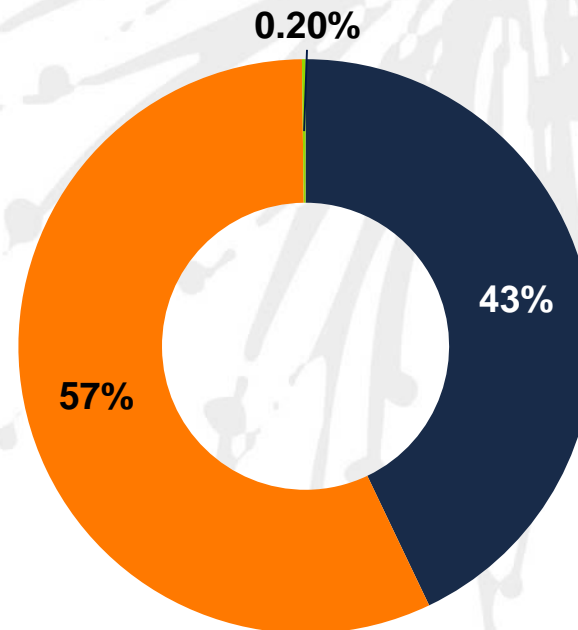
# Demographics – The worker

## Age of worker



- Aged 30 to 45
- Aged 46 to 59
- Unknown
- Aged 20 to 29
- Aged 60 and over
- Aged 15 to 19

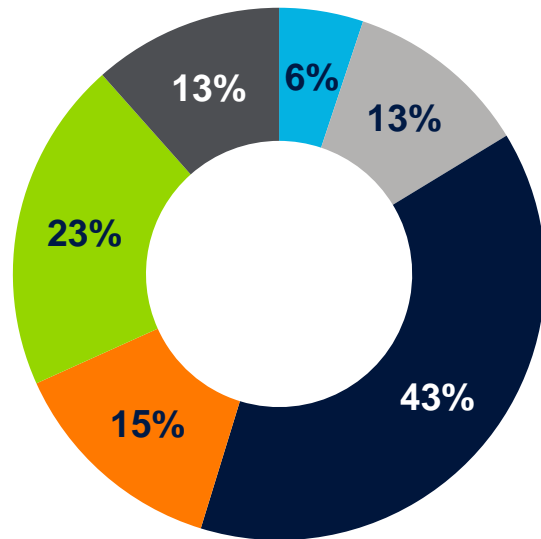
## Gender



- Male
- Female
- Other, Unknown, Collective Applications

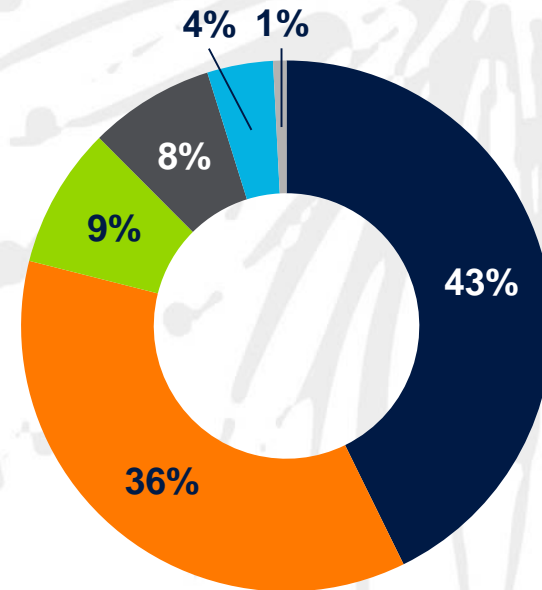
# Demographics – The worker

## Length of Service



- <6 months
- >6 and <12 months
- >12 months <5 years
- >5 years <10 years
- >10 years
- Unclear in application

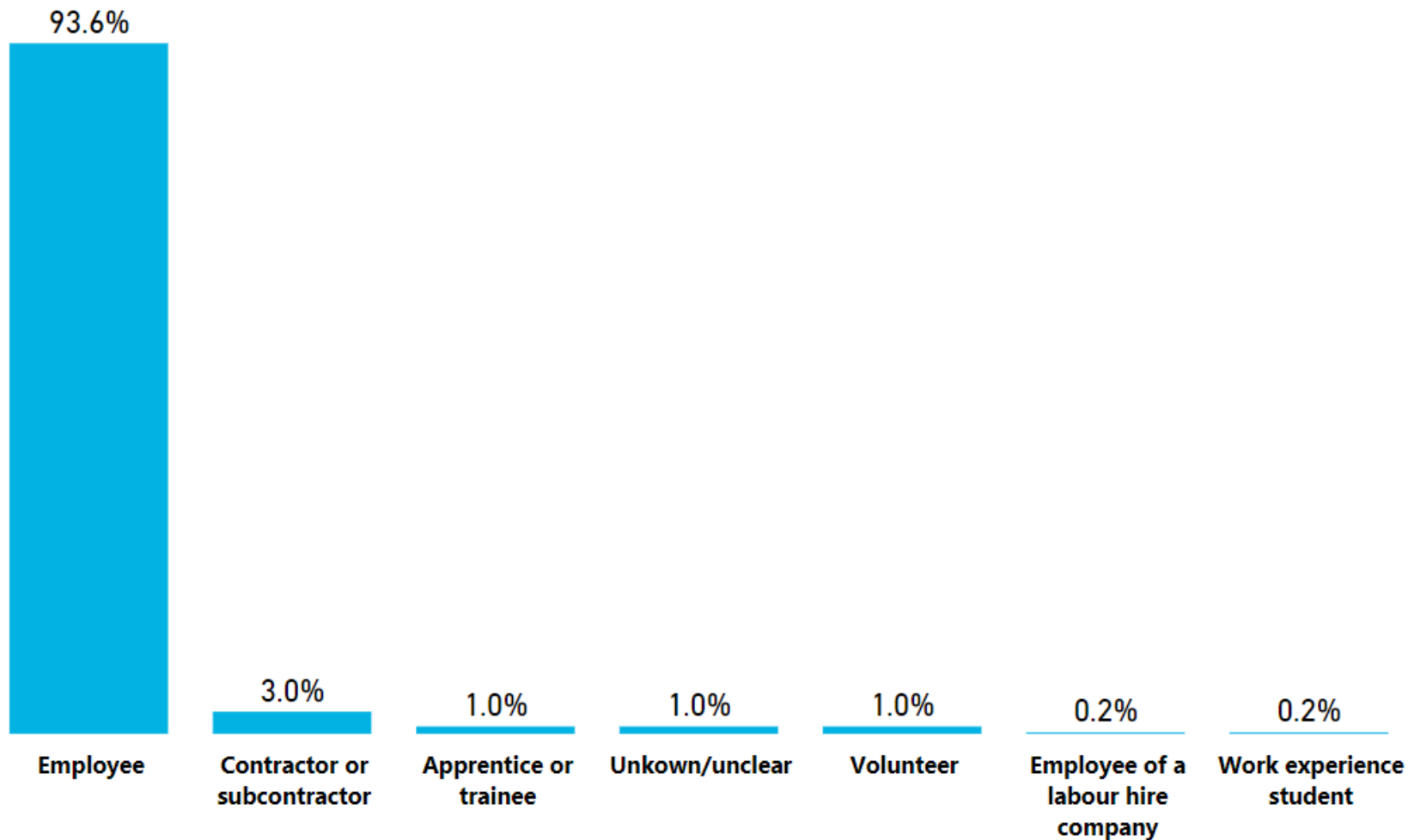
## Actively at work



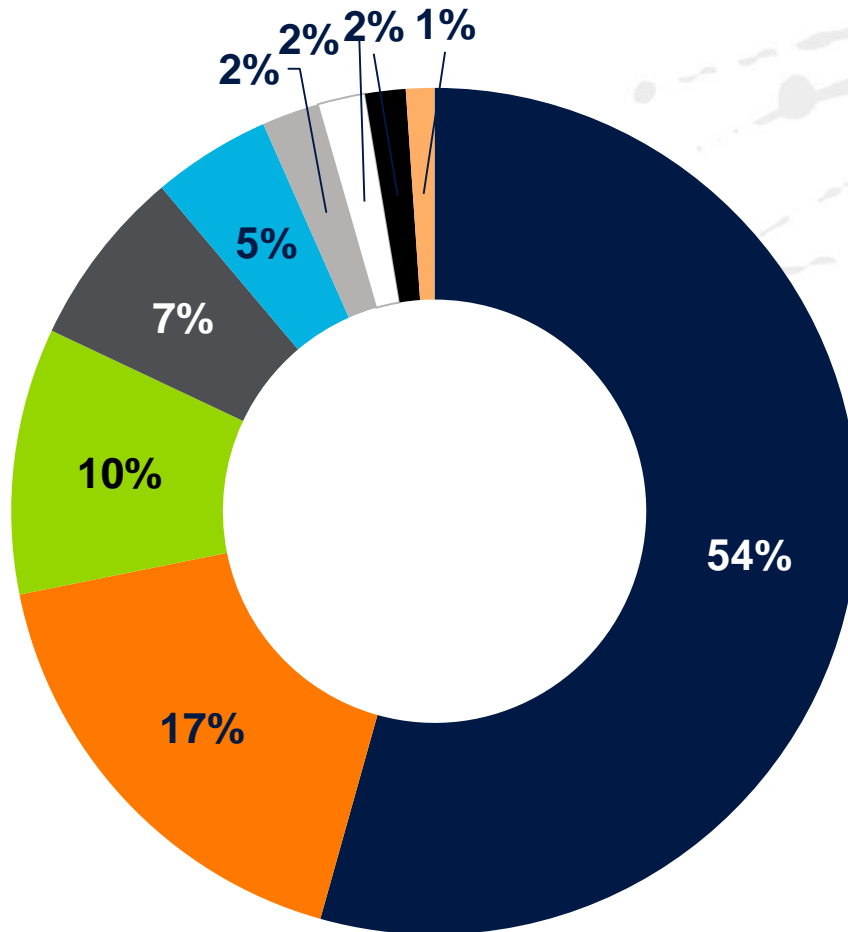
- Yes
- No - leave - short term
- No - leave - long term
- No - app no longer working for EP
- Unclear in application
- No - Holidays



# Demographics – Type of Worker



# Demographics – Individual cited

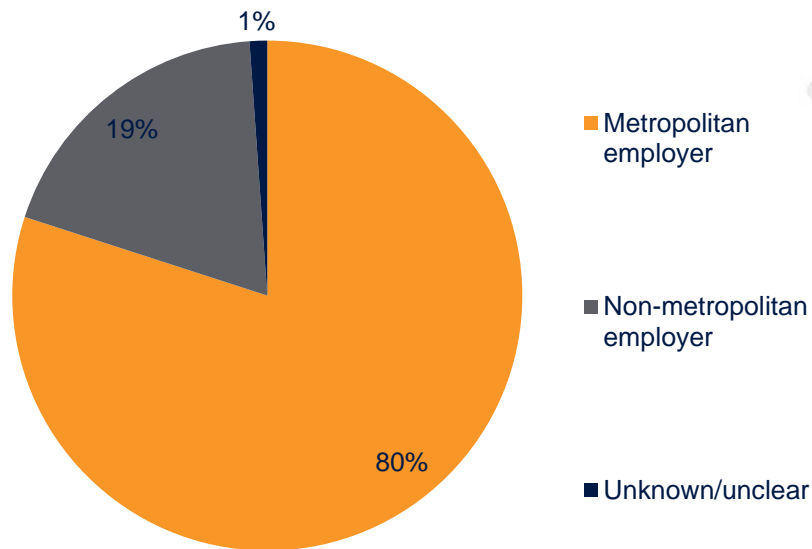


## Applicant alleges bullying against

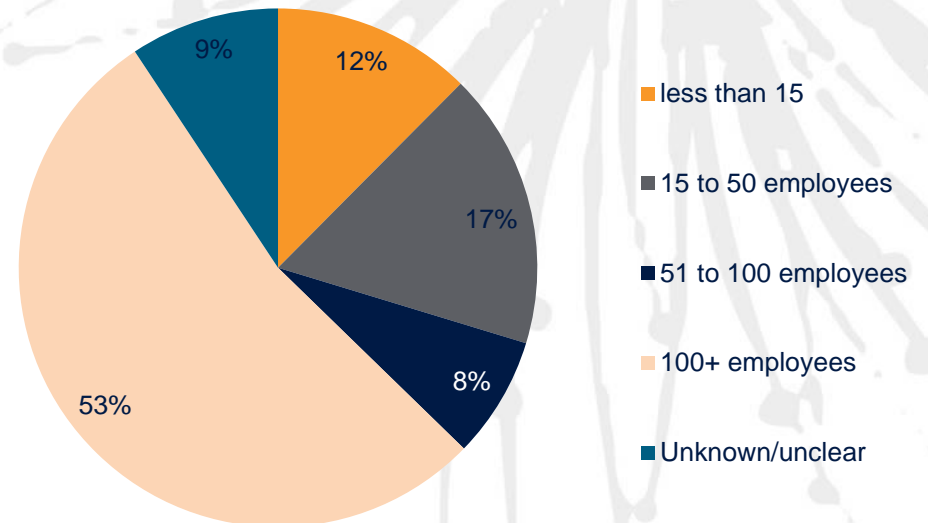
- Bullying by manager
- Bullying by managers (1+)
- Bullying by other worker
- Bullying by group of workers
- Bullying by other individual
- Unknown/unclear
- Bullying from Board
- Unclear in application
- Bullying from below

# Demographic – employer

## Location of employer

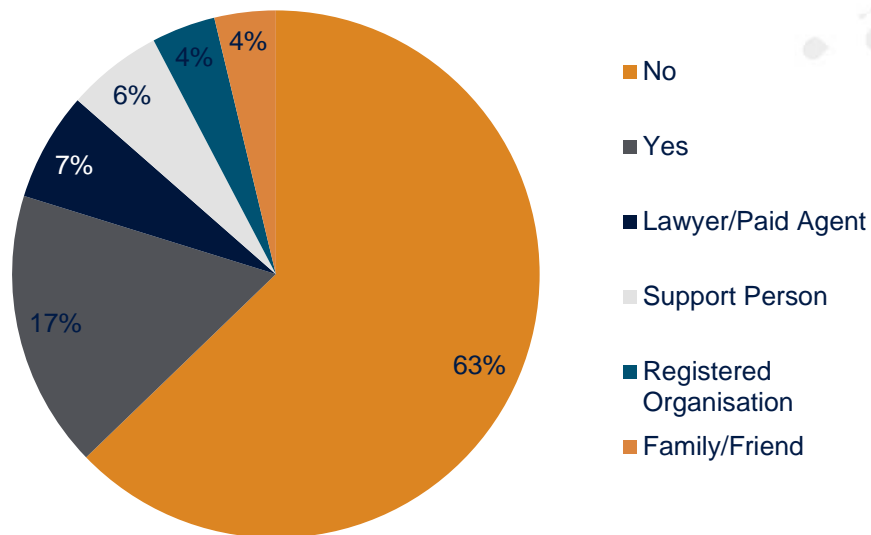


## Number of employees

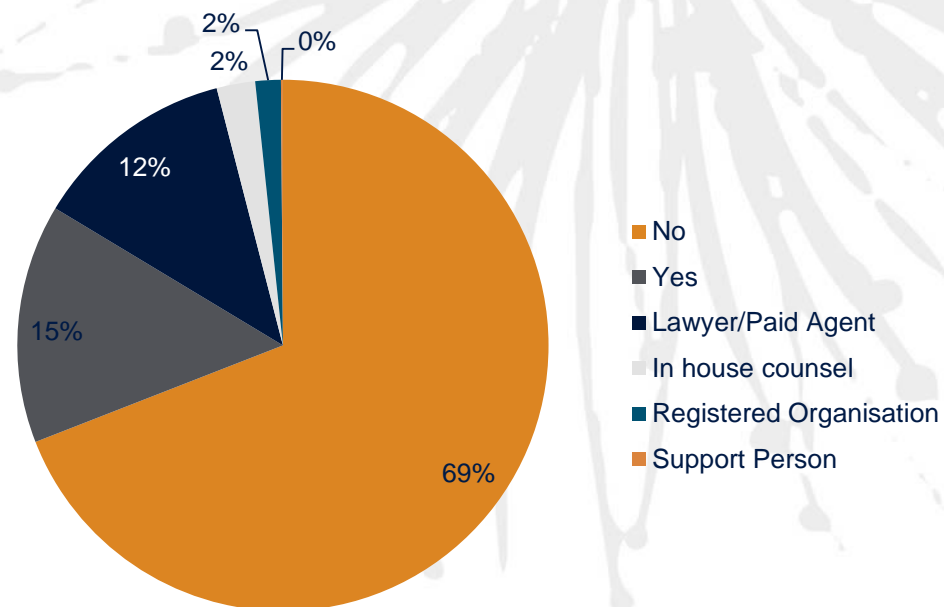


# Demographics – representation (conference/hearing)

## Applicant represented

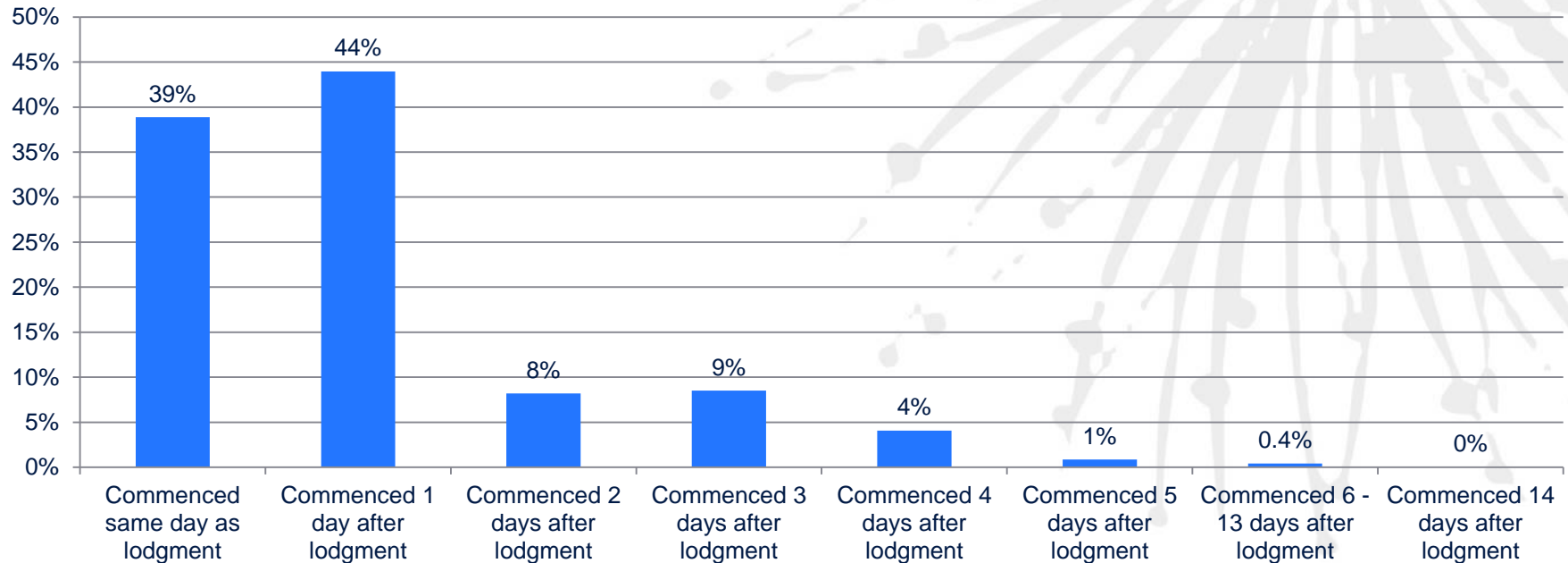


## Employer/Principal Represented



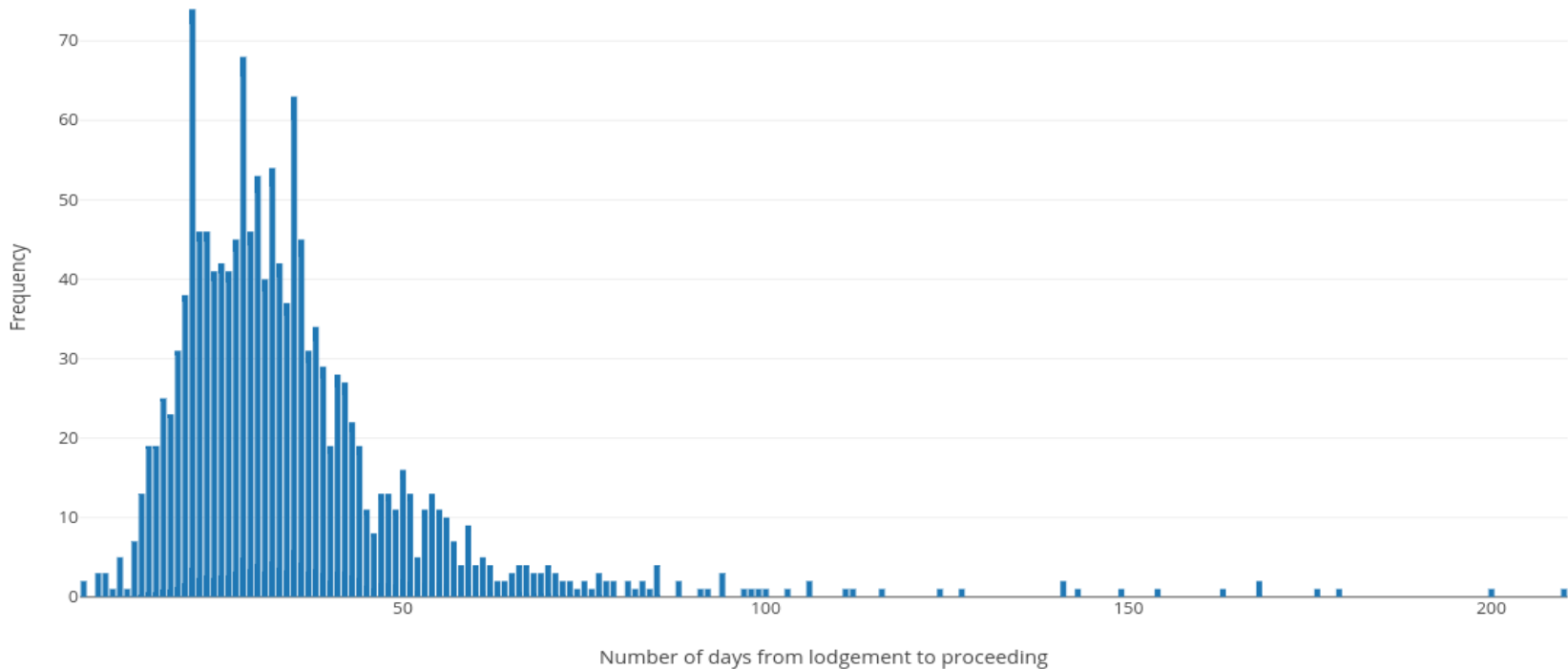
# Commence to deal with matters

## Days from lodgment to Commencement



# Overall timeliness to substantive hearing/conference 15/16FY – 16/17FY

Lodgment to Proceeding



Average: 35 days

Mean: 30 days

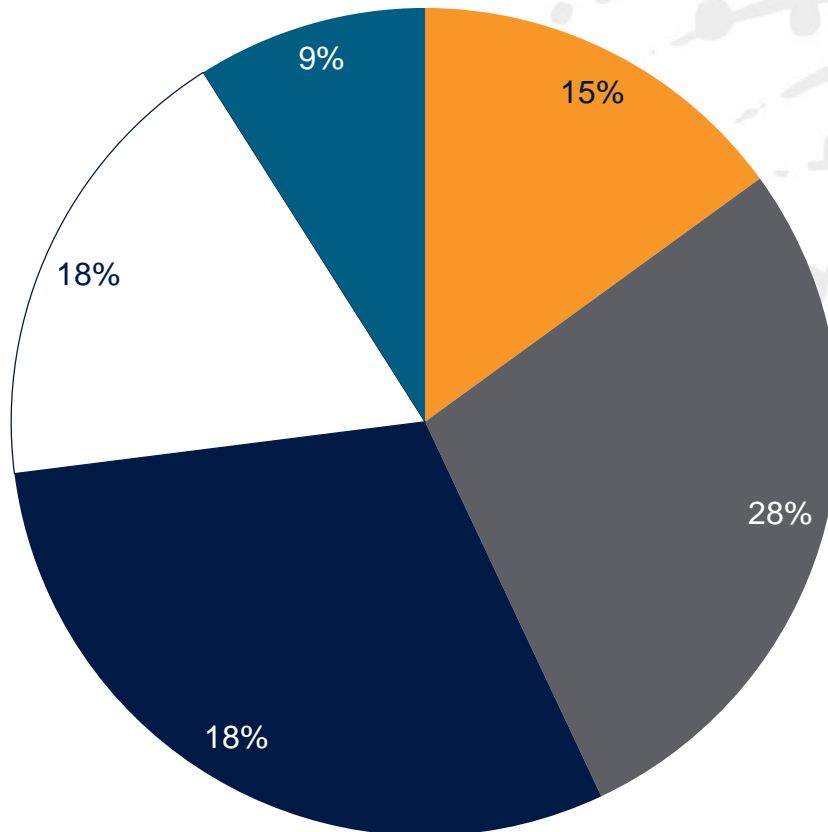


# Overview of experience so far

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- 700 to 800 applications a year – nationally (4000 to June 2019) – **80** of these involve Tasmanian-based workers
- Relatively high settlement and withdrawal rates
- Limited number of orders – not necessarily typical of applications filed or indicative of the impact of the jurisdiction
- Most complaints against “managers”
- Majority of workers from businesses with more than 50 staff
- Main industries – health and welfare services, clerical, educational services, retail, hospitality
- Increasingly applicants not actively at work (on leave or workers compensation)
- Relatively low levels of legal representation

# Stage matters finalised: 2014 – 2018



- Applications withdrawn prior to proceedings (555)
- Applications withdrawn early in case management process (963)
- Applications resolved during the course of proceedings (1038)
- Applications withdrawn after conference (627)
- Applications finalised by decision (294)

# Matters falling out early in the process

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- During initial triage:
  - A: Applicant left workplace and not intending to return
  - B: Not comfortable with service of the application on employer and/or individual named
  - C: Misunderstanding of the Commission's powers
- Before National Practice Leader – Hampton C
  - A and C
  - Satisfied with the response – taken seriously and investigation to be conducted
  - Interim arrangements deal with the issues

# Matters dealt with by Members

(including National Practice Leader)

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- Dismissed: non-application, jurisdiction or merit – 10%
- Formally Resolved by agreement – 40% (conservative estimate of resolutions)
- Closed without **formal** agreement (including discontinuances where applicant satisfied with the response) – 48%
- Final Orders have been made in **19** matters

# Resolutions and Orders

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- Recognise that bullying conduct may just involve a rogue individual but this is the exception
- Cultural norms and expectations set much of the context
- Apply a hazard elimination and management approach
- Like any human factors WHS risk:
  - Recognise that individuals will not always follow procedures and act appropriately
  - Recognise that different workers will have different tolerance for others behaviour
  - Single standard responses are unlikely to be effective

# Orders and resolutions

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Requiring the individual or group to stop the behaviour

Regular monitoring of behaviours by an employer

The provision of information, additional support and training to workers  
Role clarity and reporting arrangements

Review of the employer's bullying policy

Compliance with an employer's bullying policy



# Orders – why so few?

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- Applicant and person named must be in the workplace relationship when orders made
- Serious matters are often dealt with by employers directly upon receipt of application and often before any substantive proceedings
- Must be a future risk – prevention measures developed and/or individual party no longer in workplace
- Not all claims have substantive merit
- Not all workplaces covered – some have robust internal systems
- Relatively high proportion of formal or informal settlements
- Some applicants are unable to stay the course – even in the context of the facilitative process and inquisitorial nature of determinative procedures
- Limited representation – little recourse to interim orders

# What can we learn about the FWC process?

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- The jurisdiction may not be appropriate for all cases of workplace bullying
- Triage is effective – for all parties
- The Commission conducts the process having regards to the circumstances of **all** the parties (**applicant** worker, workplace and **individuals named**) and its statutory function
- We make no assumptions and avoid labels – the applicant may be the unreasonable party
- Time between lodgement and first conference is critical – early action and awareness is highly desirable
- Applicants/individuals named with mental health issues are a factor
- Applicants absent from workplace prior to application or leaving the workplace during the process – including dismissal – are a significant issue

# What can we learn about the FWC process? (cont.)

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- Tension between determinative proceedings and the desire to achieve a long-term workplace resolution
  - **Genuinely consensual resolutions may be more enduring in some cases**
  - **Cultural change and management commitment are difficult to prescribe**
  - **Adversarial proceedings may put further pressure upon working relationships**
  - **BUT – “investigation” and conciliation also takes a toll and sometimes better to deal with the primary role to determine the applications**
- Significant community awareness and actions taken by the business community
- Need to be more collaborative with return to work schemes
- Deal with the broader causes and proper prevention and management of workplace bullying as a WHS risk

# What can we learn – for workplaces?

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- **Leadership and culture trumps token policies**
- Responses to allegations need to be proportionate and relevant – build confidence in the internal processes
- Conduct investigations (where required) independently and with care – be clear about the outcomes
- Don't assume that mediation between the individuals is always appropriate
- Adopt a risk management approach to prevention
- Recognise that recovery support may be required for all parties
- For employers - recognise that when an AB application is brought, both the applicant and the PN are likely to be your employee and let this inform your response

# General propositions

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- The earlier and more informally complaints are dealt with – the more likely it is that there will be appropriate working relationships in place at the end of the process
  - **BUT**
    - Not appropriate in cases of “aggravated” bullying
    - Not an excuse to ignore or discount allegations
    - Capacity to escalate matters through a formal procedure is important
    - Not always desirable result - sometimes the “bully” should be removed
- Early assessment/investigation and control measures are highly desirable
- Concentrate on future behaviour not just on relationships

# Department of Employment – Post Implementation Review - February 2017

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- The individual right of recourse to the FWC is readily accessible to those eligible to apply and the FWC has helped clarify important issues for businesses, workers and the community as a whole.
- The review found that the new right of recourse to the Commission has resulted in some positive cultural change in workplaces. It has encouraged businesses to more proactively engage in preventing bullying by for example, requiring staff to undergo management training, putting anti-bullying policies in place and devising internal processes to resolve bullying complaints promptly.
- The considerations and findings of the PIR reflected the contested and complex nature of the anti-bullying jurisdiction however ultimately supported the retention of the jurisdiction as there was, on balance, a net benefit to the community.

<http://ris.pmc.gov.au/2017/02/09/changes-fair-work-act-2009>



# New Developments

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- Virtual tours on website
- Additional training and resources for Members and staff to assist parties with mental health issues
- Revised Benchbook
- Extended the pro-bono advice scheme for all parties including small businesses
- Preventative based information sessions

# Further information

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- FWC website [www.fwc.gov.au](http://www.fwc.gov.au):
  - AB Benchbook - discussion of the key legal concepts
  - AB Case Management Model
  - AB Guide
  - Rules and forms
  - Annual and Quarterly reports

Virtual tours also available on the Commission's website or via YouTube:

<https://www.youtube.com/watch?v=TqRV8CrwNFE>



# Questions

# Worker

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- Same meaning as s.7 of the WHS Act 2011
  - ✿ “a worker is a person who carries out work in any capacity for a person conducting a business or undertaking, including any of the following (examples listed)” - *Balthazaar* [2014] FWC 2076
- Broad coverage of work and relationships intended including volunteers - *Bibawi v Stepping Stone Clubhouse* [2019] FWC 1314
- *Legge* [2019] FWC 5874
- *Adamson* [2017] FWC 1976

# Constitutionally covered business - S.789FD

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- Applies to **constitutionally-covered business**:
  - A person conducts a **business or undertaking (PCBU)** within the meaning of the *WHS Act 2011* and is either:
    - A constitutional **corporation** (trading or financial);
    - The Commonwealth or a Commonwealth authority;
    - A body corporate incorporated in a Territory;
    - The business of undertaking is conducted principally in a Territory or a Commonwealth place
  - **“Constitutional corporation”** (trading or financial) assessed having regard to the need for a corporate status (Pty Ltd, Ltd, Inc) and the nature and degree of their activities
    - Pasalskyj [2015] FWC 7309*
    - McInnes [2014] FWC 1395*
    - Dr Kwee Lim v Trade & Investment Queensland [2016] FWCFB 6615*
    - Thurling [2019] FWCFB 3740*
    - Roads and Maritime Services [2018] FWCFB 5772*
- Jurisdiction relies upon the **corporations power** (for non C/W bodies)
  - Amzalak [2016] FWC 6590; A.B. [2014] FWC 6723*

# At work

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- **Full Bench** - *Bowker, Coombe and Zwarts v DP World and The Maritime Union of Australia* [2014] FWCFB 9227
- **Issue** – whether alleged unreasonable conduct occurred whilst at work; use of social media as a part of alleged conduct.
- **Decision** - The Full Bench said:
  - Requires temporal connection between the conduct and the worker being at work
  - “at work” means performing work or engaging in employer-authorized or permitted work activities (such as being on a meal break or accessing social media while performing work)
  - being “at work” is not limited to the confines of a physical workplace
  - individuals who engage in unreasonable behaviour towards a worker need not be “at work” at the time they engage in that behaviour
- **Note** – matter remitted to single Member to hear evidence and each case determined on its own merits.



# Meaning of Bullying Conduct – s.789FD(1)

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- *Ms SB [2014] FWC 2104 - Amie Mac v Bank of Queensland Ltd et al – [2015] FWC 774*
- Persistent unreasonable behaviour but might refer to a range of behaviours over time.
- More than one occurrence, not necessarily the same specific behaviour.
- “Unreasonable behaviour” should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable. That is, the assessment of the behaviour is an **objective test having regard to all the relevant circumstances applying at the time**.
- Must be a **causal link between the behaviour and the risk to health and safety. The behaviour does not have to be the only cause of the risk, provided that it was a substantial cause of the risk viewed in a common sense and practical way.**
- A risk to health and safety means the possibility of danger to health and safety, and is not confined to actual danger to health and safety. The ordinary meaning of ‘**risk**’ is **exposure to the chance of injury or loss**. In the sense used in this provision, the risk must also be real and not simply conceptual.

# Reasonable management action taken in a reasonable manner – s.789FD(2)

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- *SB [2014] FWC 2104 – GC [2014] FWC 6988 - Amie Mac v Bank of Queensland Ltd et al – [2015] FWC 774*
- S.789FD(2) is not so much an "exclusion" but a **qualification** which reinforces that bullying conduct must of itself be unreasonable. It also emphasises the right of management to take reasonable management action in the workplace. The provision comprises three elements:
  - the behaviour (being relied upon as bullying conduct) **must be management action**;
  - it must be **reasonable** for the management action **to have been taken**;
  - and
  - the management action must have been **carried out in a manner that is reasonable**.
- Determining whether management action is reasonable requires **an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time**.



# Future risk of bullying – s.789FF(1)(b)(ii)

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- *Atkinson v Killarney Properties Pty Ltd* [2015] FWCFB 6503 - GC [2014] FWC 6988 - P.K. [2015] FWC 562 – *Obatoki v Mallee Track Health & Community Services and Others* – [2015] FWCFB 1661 – Dr Ng [2019] FWC 3055
- The Commission must be satisfied that there is a risk that the **(applicant) worker** will continue to be bullied **at work by the individual or group** (found to have bullied the applicant)
- May require consideration of whether an applicant will no longer be at work with the relevant individual or group and whether there is a reasonable prospect of that occurring in some capacity as a worker in the future
- Has the risk been removed?
- Not always appropriate for the FWC to dismiss a s.789FC application where an employee is dismissed from their employment. Depending on the circumstances in each case there may be a number of relevant considerations, including the prospect of reinstatement through other proceedings, which could warrant the FWC dealing with a s.789FC application notwithstanding the dismissal of the employee

# Caveats

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- The demographic and outcome statistics used in this paper are unaudited, preliminary figures and should be taken to be indicative only
- The formal statistics on the anti-bullying jurisdiction are issued by the General Manager as part of the quarterly and annual reporting process
- Nothing in this presentation should be taken to be advice or the formal position of the Commission on any matter
- Not commenting upon policy – this is a matter for the Legislature