

ALLA & CLARS SEMINAR

19 April 2016

PRESENTER: Commissioner Leigh Johns ,Fair Work Commission

CHAIR: Professor Marilyn Pittard, Monash University and Vice-President, ALLA

IN CONCLUSION:

Dr Graham Smith, Clayton Utz

Ms Emma Goodwin, Office of Fair Work Ombudsman



FairWork
Commission

The anti-bullying jurisdiction two years on: sleeping tiger or Y2K bug of workplace relations - and other recent developments

Australian Labour Law Association
CLARS, Monash University, Faculty of Law
Commissioner Leigh Johns

19 April 2016

Outline – the inside view

- The Anti-bullying jurisdiction – two years of experience
 - The numbers
 - What has the Commission done with them
 - How have they concluded
- Adverse action claims – consent arbitration
- Work vs Private life
- Questions

I am here to help BUT!

- Cannot provide advice
- Information is general
- There is no substitute for taking legal/professional advice
- The views are my own and not to be taken to be those of the FWC
- FWC members are all individuals
- Don't quote me!

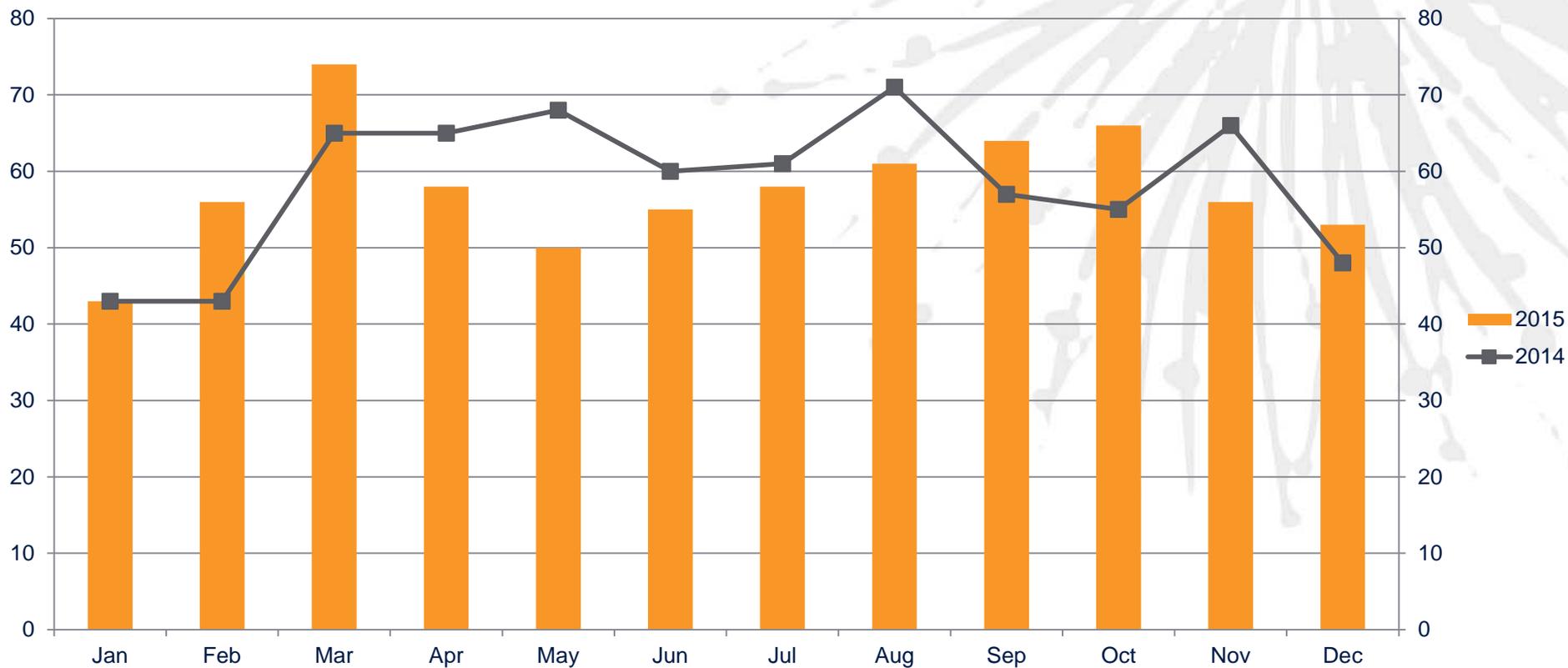
Anti-bullying jurisdiction

Factors to be considered:

- Whether the individual is a ‘worker’
- Constitutionally-covered business
- At ‘work’:
 - Bowker Coombe, Zwarts v DP World Melbourne Limited t/a DP World Ors [2014] FWCFB 9227
- Repeated unreasonable behaviour
- Risk to health and safety
- Reasonable management action

Enquiries and Lodgements 2014 - 2015

Total Lodgments: 1396





Anti-bullying – The typical applicant

- An employee
- Between 30 – 60 years of age
- 55/45- female/male
- Employed > 12 months

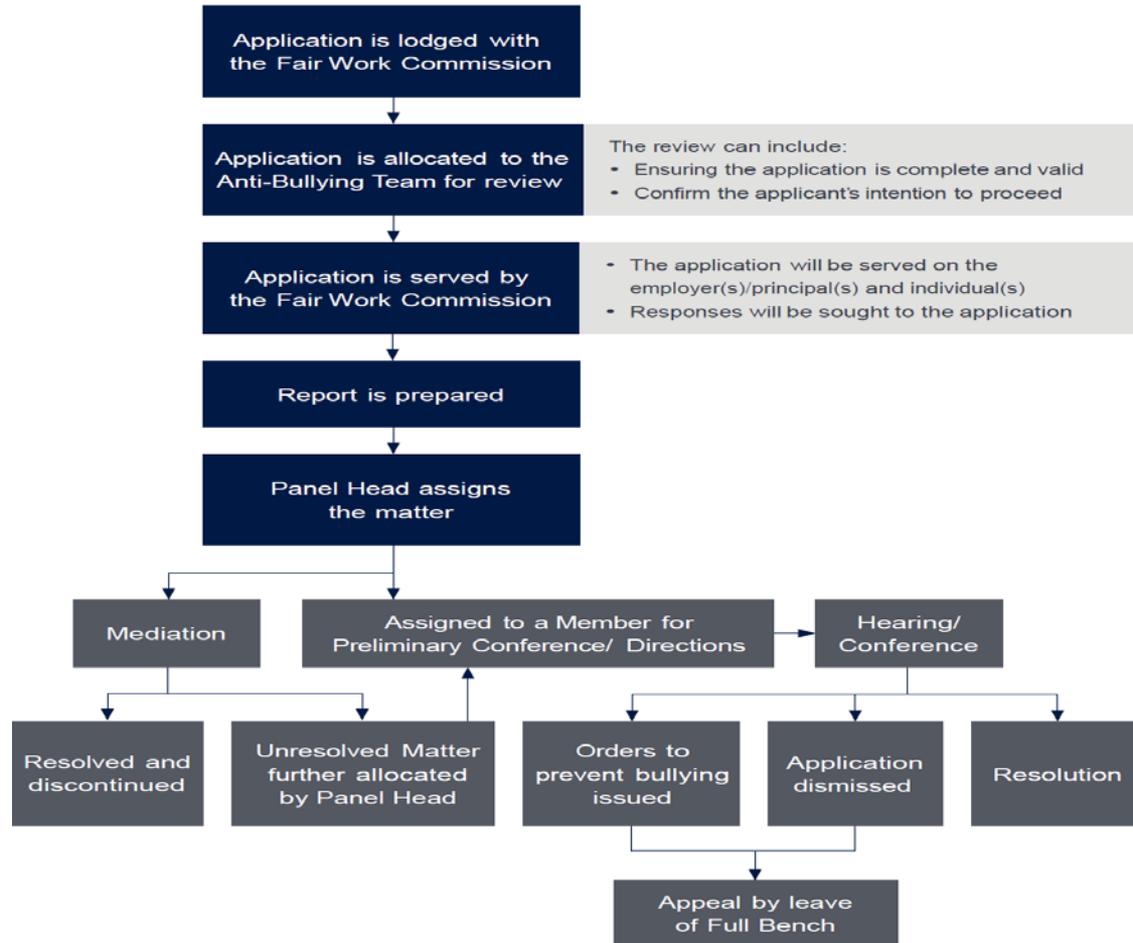


Anti-bullying – The typical respondent

- A manager
- > 100 employees
- Metro region
- Top 5 Industries:
 - Clerical Industry
 - Retail Industry
 - Health and Welfare Services
 - Social, Homecare and Disability Services
 - Educational Services

How the jurisdiction operates

The Process



Over all results of anti-bullying applications at the FWC

- Withdrawn prior to mediation/hearing: 24%
- Withdrawn following mediation/hearing (prior to decision): 23%
- Resolved by agreement between parties: 16%
- Resolved by mediation/conciliation: 14%
- Application withdrawn: 14%
- Jurisdictional objection upheld: 7%
- Applications granted by Commission: 1%
- Dismissed by Commission: 1%



General Protections

- Pilot of telephone conciliations by FWC conciliators – 75% resolution by agreement. Consent arbitrations
- Commenced 1 January 2014
- Only applicable in dismissal matters – s. 365 of the Fair Work Act
- 15 applications, only 1 decision
- *Neil Keep v Performance Automobiles Pty Ltd* [2014] FWCFB 8941, per Ross J, Wells DP, Lee C
- Converting applications



Employment issues - Drug Testing

- Construction, Forestry, Mining and Energy Union-Construction and General Division v Port Kembla Coal Terminal Limited [2015] FWCFB 4075
- Sharp, Owen v BCS Infrastructure Support Pty Limited [2015] FWCFB 1033



Employment issues – Use of social media

- Sharon Bowker, Annette Coombe, Stephen Zwarts v DP World Melbourne Limited, Maritime Union of Australia (Victorian branch) and others [2014] FWCFB 9227 (19 December 2014)
- Linfox Australia Pty Ltd v Glen Stutsel [2012] FWAFB 7097

Rose v Telstra

- Separation between home and work is now less pronounced.
- Out of hours conduct must be:
 - Viewed objectively
 - Likely to cause serious damage to the relationship between employee and employer
 - Damage the employers interests
 - Incompatible with the employees duty as an employee