13 WENTWORTH

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THE LAW AND LORE OF WORKPLACE BULLYING

WORKPLACE LAW SYMPOSIUM

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A CLEAR LEGISLATIVE PURPOSE

In its 2012 report "Workplace Bullying: We Just Want it to Stop" the House of Representatives Standing Committee on Education and Employment recommended that the *Fair Work Act* be amended to include provisions for the Fair Work Commission to make orders to stop workplace bullying.

The Committee recommended that the anti- bullying jurisdiction should be based on a definition of bullying:

> "Workplace bullying is repeated, unreasonable behaviour directed towards a worker or group of workers, that creates a risk to health and safety."

That definition of workplace bullying was at the heart of the Committee's report. The Committee saw it as having two roles.

First, it would be the basis for the new jurisdiction to be exercised by the Fair Work Commission: a jurisdiction directed at providing a simple and quick mechanism for workers adversely affected by bullying to obtain orders that would prevent a continuation of bullying conduct.

Secondly, and as reflected in its first recommendation the Committee saw the definition as providing a single national definition of bullying to be promoted for use across jurisdictions and workplaces – in employment, work health and safety and workers compensation contexts.

The Committee was clear in identifying the purpose behind its simple and clear definition: on the one hand it was built on concepts which "are relatively consistent across jurisdictions, and are fundamentally quite conservative in nature when they are properly applied."[1] That is, the Committee saw the definition as picking up and applying the learning from work health and safety and workers compensation jurisdictions.

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[1] House of Representatives Standing Committee on Education and Employment: "Workplace Bullying: We Just Want it to Stop" (**We Just Want it to Stop**) at [1.50].

On the other the Committee recorded that the cases that had been pursued in the Courts in Australia to that time were all of physical bullying[2] and it was necessary for the definition to cover conduct which created purely psychological hazards so that the law could develop to provide protection from psychological injury just as it did from physical injury.[3]

In that way the Committee articulated a definition which they saw as providing a framework which would see the careful development of an anti-bullying jurisprudence directed to protection of workers from psychological hazards.

The Committee's recommendations were accepted. As the Minister explained in the Explanatory Memorandum for the *Fair Work Amendment Bill 2013* which introduced Part 6.4B to the *Fair Work Act*

> "[108] This definition reflects the definition of workplace bullying that was recommended in the Workplace Bullying We Just Want it to Stop Report. The Committee considered the existing definitions used by State, Territory and Federal jurisdictions and expert evidence and concluded that there were three criteria that were most helpful in defining bullying behaviour – the behaviour has to be repeated, unreasonable and cause a risk to health and safety.
>
> [109] The Committee went on to note that repeated behaviour refers to the persistent nature of the behaviour and can refer to a range of behaviours over time and that unreasonable behaviour is behaviour that a reasonable person having regard to the circumstances may see as unreasonable (in other words it is an objective test). This would include, but is not limited to, behaviour that is victimising, humiliating, intimidating or threatening."

The result is found in Section 789FD of the *Fair Work Act 2009* which provides:

> **When is a worker bullied at work or sexually harassed at work?**
>
> (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] We Just Want it to Stop at [1.15].
[3] We Just Want it to Stop at [1.5] and [1.6].

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(2A) A worker is sexually harassed at work if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker.

(3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business.

LEGISLATIVE PURPOSE SIDETRACKED

The approach of the Commission to this jurisdiction to date is accurately captured in the terms of the Commission's Bench Book:

Definition of bullying

See Fair Work Act S.789FD(1)

Workplace bullying occurs when:

- *an individual or group of individuals repeatedly behaves unreasonably towards a worker or group of workers at work,*

AND

- *the behaviour creates a risk to health and safety.*

Reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

…

Examples of bullying

Depending on the nature and context of the conduct, bullying behaviours can include:

- *the making of vexatious allegations against a worker*
- *spreading rude and/or inaccurate rumours about an individual, and*
- *conducting an investigation in a grossly unfair manner.*

In Amie Mac v Bank of Queensland Limited and Others the Fair Work Commission indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were:

> *"… intimidation, coercion, threats, humiliation, shouting, sarcasm, victimization, terrorizing, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination."*

The following behaviours could also be considered as bullying, based on cases heard in other jurisdictions:

- *aggressive and intimidating conduct*
- *belittling or humiliating comments*
- *victimisation*
- *spreading malicious rumours*
- *practical jokes or initiation*
- *exclusion from work-related events, and*
- *unreasonable work expectations.*

Effects of bullying

Workplace bullying often results in significant negative consequences for an individual's health and wellbeing.

The following consequences are indicative and will not be relevant to all victims of workplace bullying:

- *depression*
- *anxiety*
- *sleep disturbances*
- *nausea, and*
- *musculoskeletal complaints and muscle tension.*

However after the anti-bullying laws proof of actual harm to health and safety is not necessary provided that a risk to health and safety created by bullying behaviour is demonstrated.

[citations omitted]

It may be accepted that that form of guidance by example may be useful to members of the Commission deciding cases in a jurisdiction intended to provide simple and quick remedies.

When adopted, the approach in the Bench Book risks stultifying the development of jurisprudence in cases of psychological injury for which the House of Representatives Committee had aimed – and risks incorrectly the dismissal of claims based on behaviours which create hazards of psychological harm. It does so because of a heterodox approach to the assessment of the reasonableness of behaviour which underpins the categorical approach.

THE REASONING IN MAC

The approach set out in that Bench Book is substantially based on the reasoning of Hatcher VP in *Mac v Bank of Queensland Limited* when the Vice President considered the meaning of "Unreasonable behaviour" in which he commenced by quoting Hampton C in *Re SB*:[4]

> [88] In Re SB 10, the Commission (Hampton C) discussed the requirement for repeated unreasonable behaviour in the following terms:
>
> ……
>
> '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."
>
> [89] I respectfully agree with those statements, but I would add three further observations about the interpretation and practical application of the expression "repeatedly behaves unreasonably" in s.789FD(1)(a). First, the expression falls within a definition provision. The function of a legislative definition, as was pointed out by McHugh J in *Kelly v R*, is not to enact substantive law, but to provide aid in construing the statute. A definition provision is therefore not to be interpreted in isolation and thereby given a meaning which negates the evident policy or purpose of a substantive enactment. Part 6-4B has the evident purpose of establishing a mechanism by which the bullying of workers at work may be stopped. In interpreting, and applying, the expression "repeatedly behaves unreasonably" as it appears in s.789FD(1)(a), the concept of repeated unreasonable behaviour is not to be approached in a manner which divorces it from that purpose. The subject matter is bullying at work, and that must be borne steadily in mind in any consideration as to whether particular behaviours are

[4] [2015] FWC 774 recently approved and applied in *Greenall v Queensland* [2021] ICQ 19.

unreasonable for the purpose of s.789FD(1)(a). A consideration of unreasonable behaviour which loses sight of the objective and subject matter of Part 6-4B may lead to the provisions not achieving their intended purposes, or being used for a purpose that was not intended.

[90] The second observation is that unreasonableness and its converse, reasonableness, are familiar legal concepts applicable in a range of diverse contexts. In *Giris Pty Ltd v Federal Commissioner of Taxation* Windeyer J said: "It is, of course, true that, as a measure in fact of time, space, quantity and conduct, reasonableness is a concept deeply rooted in the common law...". Where, in an anti-bullying case such as this one, the requisite repeated unreasonable behaviour towards the workers is said to be constituted by or include unreasonable discretionary managerial decisions directed to that worker, some useful guidance may be obtained in assessing whether the definitional standard in s.789FD(1)(a) is met from decisions concerning judicial review of administrative discretionary decision-making. In *Minister for Immigration and Citizenship v Li* the High Court considered the standard of unreasonableness applicable to such decision-making. The plurality (Hayne, Kiefel and Bell JJ), in considering the well-known formulation of unreasonableness stated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*, said that the legal standard of unreasonableness "should not be considered as limited to what is in effect an irrational, if not bizarre, decision - which is to say one that is so unreasonable that no reasonable person could have arrived at it". They concluded their analysis by saying: "Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification". That formulation provides a useful yardstick for the application of the provision in a case such as this one.

[91] The third observation is that in order for conduct to be reasonable, it does not have to be the best or the preferable course of action. In *Bropho v Human Rights & Equal Opportunity Commission*, in interpreting the word "reasonably" as it appeared in s.18D of the Racial Discrimination Act 1975 (Cth), French J (as he then was) said:

> "[79] ... It imports an objective judgment. In this context that means a judgment independent of that which the actor thinks is reasonable. It does allow the possibility that there may be more than one way of doing things 'reasonably'. The judgment required in applying the section, is whether the thing done was done 'reasonably' not whether it could have been done more reasonably or in a different way more acceptable to the court."

…..

> [99] Ms Mac's case involved the proposition that Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke and Ms Newman had bullied her at work - that is, either individually or as a group had repeatedly behaved unreasonably towards her - in placing her on a PIP and in commencing to implement the PIP. However the overall nature of Ms Mac's case in this respect was somewhat elusive. It was not suggested by her that the identified individuals were acting with malice or sinister intent, or had conspired in some way to cause detriment to Ms Mac. During a longueur in the hearing, I attempted to draw up a list of the features at least some of which one might expect to find in a course of repeated unreasonable behaviour that constituted bullying at work. My list included the following: intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination. However no instance of behaviour of this nature has been alleged against Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke or Ms Newman in the Points of Claim. Although Dr Jetnikoff's report, from which I have earlier quoted, indicated that Ms Mac had reported to him some perception on her part of victimisation and targeting by Ms Van Den Heuvel, that did not feature in the evidence that Ms Mac gave at the hearing.

The first thing to be said about that reasoning, is that Hampton C was undoubtedly correct in stating that the assessment of whether behaviour is unreasonable involves an objective test having regard to all the relevant circumstances applying at the time.

What flows from that and what Hatcher VP seeks to address with his three "further observations" is how is the enquiry into "relevant circumstances" to be structured and confined so that it is manageable?

I will first address what seems to me to be the correct answer to that question and then consider why Hatcher VP's approach was in error.

THE CORRECT CONSTRUCTION OF THE DEFINITION

As the High Court has repeatedly told us the task of construing a statutory provision involves discerning the meaning of the actual text of the provision read in proper context and with regard to the provision's purpose.[5]

The following is to be noticed about the text of s.789FD.

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[5] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47]; *FCT v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [14] and [35] – [40].

First, it only applies to a worker in a constitutionally covered business and only applies to an employer to the extent that the employer conducts a constitutionally covered business. The definition of "constitutionally covered business" not only limits the businesses covered by reference to Commonwealth heads of power it also limits the business by reference to the definition of "business or undertaking" in the national uniform Work Health and Safety Acts. That is a powerful contextual indication that the provision is to operate conformably with the Work Health and Safety Acts.

Secondly, unlike the majority of provisions in the Fair Work Act the definition does not apply to employers and employees as such, but rather to workers at work. The definition is expressly blind to the various contracting and employment arrangements which might be found within a single workplace.

That is a clear structural indication that the "behaviours" which are the subject of the section are those that happen "at work" rather than being concerned with the conduct of the employer-employee relationship. While the two fields of discourse of "worker at work" and "employee in employment relationship" overlap they are not synonymous.

Thirdly, the subject matter of the definition is "behaviour". That is "the way in which one acts or conducts oneself, especially towards others." The subject matter is not "conduct" but rather "behaviour." Behaviour is communicative conduct, but rarely will uncommunicated conduct be behaviour. Behaviour being communicative, rarely will an assessment of its content without a consideration of its manner involve an accurate assessment of *behaviour* as such.

Fourthly, the behaviour which is the subject of the definition is behaviour which creates a risk to health and safety. It is the creation of such a risk which brings behaviour within the concerns of the definition. That consideration points again to the operation of the definition being conformable with the national work health and safety laws. It also points strongly to the substantive purpose of the definition: which is to impose duties to avoid risks to health and safety. That is clear legislative context to the content of the word "unreasonably."

Thus the text of s.789FD read in context, in my opinion, articulates clearly a standard of conduct well known to the law. Whether behaviour towards a worker at work is unreasonable is to be assessed by reference to the risks to health and safety of that worker which may be created by that behaviour.

The question asked is whether, by reference to the risks to health and safety which may be created by the behaviour, is that behaviour reasonable or unreasonable? That is the standard long understood as underpinning the law of negligence. As Alderson B said 171 years ago in *Blythe v Birmingham Waterworks Co:*[6]

[6] (1856) 11 Exch. 781 at 784; 156 ER 1047 at 1049.

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
>
> It has been accepted that the content of the ordinary common law duty of care is a duty to exercise reasonable care and skill or to take reasonable steps to avoid risk of harm to a person to whom the duty is owed. The degree of standard of care required varies with the risk involved. Those who engage in inherently dangerous operations must take precautions not required of persons engaged in routine activities. This involves no departure from the standard of reasonable care for it predicates that the reasonable man will take more stringent precautions to avoid the risk of injury arising from dangerous operations."

That statement was approved and applied by Mason J in *Kondis v State Transport Authority*[7] in reasoning towards the modern formulation of an employer's non-delegable duty of care.

Viewed from the perspective of that long history of the common law's consideration of employers' behaviour, behaviour may be unreasonable, depending upon the risks which it might create (and which ought reasonably be foreseen), because:

(a) reasonable steps have not been taken to avoid the risks; or

(b) measures to avoid the risks have been taken (for example an anti-bullying policy has been promulgated) but have not been followed; or

(c) the behaviour, including merely the manner of conduct, is behaviour which a reasonable person would avoid; or

(d) a reasonable person would not engage in the behaviour, including merely by reference to its manner, without first having done some other thing which has not been done.

In each case the framework for the analysis is not a characterisation of the conduct as having bullying characteristics or otherwise. The identification of the risks to health or safety of the individual worker which exist in the particular workplace and which ought reasonably be foreseen provide the starting point and framework for the assessment of reasonableness: behaviour is unreasonable when it incurs a risk which ought reasonably be avoided.

That construction is consistent with, and in my opinion reinforced by, the terms of sub-section 2 which provides that sub-section 1 does not apply to **reasonable**

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[7] (1984) 154 CLR 672 at 679 to 680.

management action carried out in a reasonable manner. First, what is excluded is not reasonable management decisions but rather reasonable management action. That provides context to support the construction that sub-section 1 and its reference to behaviour is concerned with communicative conduct in the workplace and not with uncommunicated decisions made in the employment relationship. Secondly, it is not sufficient to fall within the carve out in sub-section 2 that management action be reasonable. It must also be carried out in a reasonable manner. It makes no sense to ask of management action whether it is being conducted "in a reasonable manner" divorced from the detailed facts concerning the workplace and the individual worker.

For example, an employer who has decided to demote an employee might undoubtedly take management action which is reasonable by communicating that decision to the employee and consequently adjusting the payroll. There are no doubt a myriad of variables concerning the form of communication, the personnel engaged in the communication, when it occurs, who is present and what form of support is available to the worker.

Which of those manners will be reasonable in any particular case must turn on the particular risks to the health and safety of the particular worker and how they might be reduced as far as is reasonably practicable.

The Work Health and Safety Context

The House of Representatives Committee referred to Safe Work Australia's "Guide for Preventing and Responding to Workplace Bullying" which was then in draft, as did the Minister in his second reading speech for the Bill which introduced s. 789 FD.

That Guide, in section 2 adopts precisely the analytical framework used by the common law in formulation of what the negligence standard of care requires by commencing with the identification of the nature and scale of risk. That is, the Guide, like the common law starts by looking to the risks to workers, and assesses what is reasonably required of those in her or his workplace by reference to those risks:

> *2 PREVENTING WORKPLACE BULLYING*
>
> *There is a risk of workplace bullying wherever workers have contact with other people, including co-workers, supervisors, clients and other visitors to the workplace. There may not be obvious signs of bullying at the workplace but this does not mean it is not occurring. Workplace bullying is best dealt with by taking steps to prevent it before it creates a risk to health and safety:*
>
> > *Research indicates that there are a number of factors which may increase the risk of workplace bullying occurring. The following characteristics could help alert to potential WHS risks in the workplace:*
> >
> > - *presence of work stressors –*
> >
> > - *high job demands*

- *limited job control*
- *organisational change, such as restructuring or significant technological change*
- *role conflict and ambiguity*
- *job insecurity*
- *an acceptance of unreasonable workplace behaviours or lack of behavioural standards, and*
- *unreasonable expectations of clients or customers.*

- *leadership styles –*
  - *autocratic behaviour that is strict and directive and does not allow workers to be involved in decision making*
  - *behaviour where little or no guidance is provided to workers or responsibilities are inappropriately and informally delegated to subordinates, and Guide for Preventing and Responding to Workplace Bullying Page 12 of 30*
  - *abusive and demeaning behaviour that may include inappropriate or derogatory language, or malicious criticism and feedback. …*

MAC IS UNPERSUASIVE

As I indicated earlier, in my opinion Hatcher VP was correct in *Mac* in identifying the need to focus and constrain the enquiry as to "behaves unreasonably" so that it might be practically addressed.

However in each of his three "further observations" Hatcher VP appears to me to have erred in identifying the appropriate limiting factors.

That is first because his construction proceeds too narrowly by reference to the phrase "repeatedly behaves unreasonably" without addressing the other significant and powerful indicators of context found within s.789FD to which I have referred above. Thus, while Hatcher VP acknowledged in passing that reasonableness as a concept is deeply rooted in the common law he did not address at all the express connections between the definition in s.789FD and work health and safety law and the express link between the behaviour the reasonableness of which was to be assessed and the causing of risks to health and safety. He consequently omitted altogether any consideration of the law of negligence and its deep and rich consideration of reasonableness of conduct in the workplace giving rise to clearly articulated standards of care extending but not limited to the employer's non-delegable duty.[8]

[8] *Kondis v State Transport Authority* (1984) 154 CLR 672.

Secondly, Hatcher VP's reliance in his first "further observation" on the reasoning of McHugh J in *Kelly v R* to construe the definition provision of s.789FD purposively is, with respect, heterodox. McHugh J's whole point in *Kelly v R* is that definition provisions are not to be construed as substantive enactments. To the contrary substantive provisions of legislation are construed with the aid of reading into them the words provided by a definition provision; and it is substantive provisions to which a legislative purpose might be ascribed.

By the device of that heterodox reasoning Hatcher VP construes the phrase "repeatedly behaves unreasonably" by reference to the subject matter of "bullying at work". The logic appears to be that the assessment of whether behaviour is unreasonable can be informed by asking whether the behaviour is of a nature which may be "bullying". That reasoning, with respect, puts the cart before the horse. It is the definition in s. 789FD when read into the substantive provisions of Part 6-4B which provides the criteria for determining whether conduct constitutes bullying at work. Those criteria cannot be sensibly construed by reference to the answer to the question posed by them. If the logic is not wholly circular, it is an approach which poses a question incapable of answer other than by assertion.

In his second observation Hatcher VP referred to the concept of reasonableness being deeply rooted in the common law but made no reference at all to the law of negligence. Rather, Hatcher VP's reference to the common law was to that of judicial review of unreasonableness constituting jurisdictional error. That is a most inapposite analogy. The law of jurisdictional error is concerned with the supervision of governmental power and focuses solely on whether or not a decision maker has exceeded the power conferred on him or her by legislation.

It will be the rare case where the question whether a managerial decision exceeds the power conferred on a manager will be a meaningful let alone useful question.

It is to be recalled "behaviour" is not to be equated with "conduct". Rather, "behaviour" is communicative conduct. That is, conduct communicated to the worker. It may be that the communication of a managerial decision, or the execution of a managerial decision will constitute behaviour but it will be the rare case where the making of the decision itself will be "behaviour". That is, the section does not raise any question of managerial power: it asks whether behaviour was reasonable.

Further, to answer an enquiry that a managerial decision is beyond power may well compel the answer that the behaviour based on that decision is unreasonable, but the converse cannot possibly apply. That is, behaviour, even if incorporating a managerial decision within management power may be unreasonable when all the circumstances of the case and in particular the risks to health and safety of the individual employee are taken into account.

For example, management may have the express authority to direct a warehouse employee to continue working and not take what would otherwise be a rostered break.

Whether or not the implementation of that decision by requiring the worker to work through the break was unreasonable behaviour would undoubtedly be affected by whether the manager concerned knew or ought to have known that by reason of the ill health of the worker's child the worker had not slept the night before. The analysis will rarely be helped by considering the extent of management's authority.

More importantly, the law of judicial review is concerned exclusively with the decision maker's authority. Hatcher VP's reliance on that law diverts attention from the correct starting point tendered by the section. The section is divorced from the employment contract which could be the only source of "authority." The section focusses on workers at work. It is the the risks to the health and safety of workers at work which is the subject of the section.

Indeed it is only because the starting point of Hatcher VP's analysis is the scope of authority of management that his third observation becomes pertinent. It is undoubtedly correct to say that a test of reasonableness imports an objective judgment and necessarily contemplates the possibility that there may be more than one way of doing things "reasonably".

But that is not the test posed by the section. The section asks the question whether behaviour is "unreasonable". The common law of an employer's standard of care provides a well-established framework for answering that question. It is not a question of whether there is more than one way of doing things reasonably, or whether some other behaviour is reasonable.

The common law starts with the conduct which has in fact occurred and asks by reference to the risks to health and safety caused by that behaviour, and all other relevant circumstances, was it reasonable? There is nothing in the text or context of the section which indicates any different approach is called for by the section.

Test the matter this way. Assume there are 3 ways in which a supervisor might give effect to a decision which will adversely affect a worker; and that one of those ways will create a risk of psychological injury. If the supervisor adopts the way which risks injury the existence of any other way to achieve the same objective is relevant: but only to show that the way chosen was unreasonable because it incurred a reasonably avoidable risk. The existence of a second way that did not incur such a risk is of no consequence in the analysis.

The difficulty in Hatcher VP's analysis is highlighted by his dispositive paragraph at [99], which is the paragraph the content of which drives the content of the Bench Book.

He firstly asks whether any of the individuals said to have engaged in unreasonable behaviour acted with malice or sinister intent or had conspired to cause detriment. Hatcher VP does not explain how any of those questions of unambiguously subjective

states of mind could possibly be relevant in the application of a purely objective test. They are irrelevant.

Yet, those subjective states of mind being absent, the reasoning proceeds by reference to a list of behaviours which might be found in any course of conduct constituting bullying at work. The effect of the reasoning is that because the conduct that occurred did not fit within that list it was not bullying.

The list relied upon is formulated without reference back to any standard of what may constitute "behaving unreasonably." It is evidently based upon the heterodox deployment of the reasoning in *Kelly v R*: and thereby the reasoning descends to mere assertion- what is unreasonable behaviour is determined by what it is that the Tribunal understood to be bullying conduct; and because it is not within the list of bullying conduct, it is not unreasonable and therefore not bullying.

THE CONSEQUENCES OF THE BENCH BOOK APPROACH

I earlier asserted that the approach in the Bench Book risks stultifying the development of jurisprudence in cases of psychological injury and also risks incorrectly the dismissal of claims based on behaviours which create hazards of psychological harm. Let me expand.

Consider by way of example workplaces in high stress service industries: for example trading desks in financial services. They are marked by numerous of the work stressors identified by Safe Work Australia: high job demands, strict hierarchical structures with necessarily overarching reporting and control systems, very limited job control, regular and substantial organizational fluidity and workplace cultures driven by the aggregation of groups of highly skilled ambitious and financially incentivised individuals accustomed to very direct communication styles.

In some circumstances the common law would identify that configuration of workplace characteristics as presaging very high levels of risk of psychological injury to workers. In assessment of the reasonableness of behaviour in that context the common law would require the implementation of extensive and sophisticated risk control measures and would assess individual conduct which results in psychological injury by reference to a relatively high standard because of the obvious and substantial risks involved.

On the construction which appears to me to be the correct construction of the provision it would be the failure of individual leaders to meet those high standards, including by engaging in various workplace behaviours without appropriate risk mitigation strategies being in place, which might readily be found to constitute "behaving unreasonably" within the meaning of s.789FD.

But because that type of workplace is not of a kind that often features in the consideration of industrial Tribunals and because the risks of injury arise from a form of interaction at work which may be uncommon when viewed at the economy wide

level the behaviours which may give rise to those risks do not comfortably fit within the categorical approach adopted in *Mac* and reproduced in the Bench Book.

Further, these are the very kinds of cases in which starting from the question of the scope of managerial authority inverts the analysis and risks the wrong answer. In many such workplaces the authority of senior management will necessarily be very wide. That might be a reason (depending on the detailed facts) for concluding that the scope of action which may constitute reasonable management action will be wide: but it provides very strong reasons to think that the standard of behaviour required to reach the standard of "reasonable manner" will be high: precisely because of the level of risk that exists in such a workplace.

It is that form of case that the House of Representatives Committee had in mind in articulating the definition with its objective that it would lead to a development of jurisprudence concerned with protection from psychological injury. It is the very fact that the law will impose higher standards of reasonableness in assessing behaviour in situations where risks are higher which provides the doctrinal basis for the development of the law which the Committee understood would be the result of its recommendations. That is a doctrinal basis that has been stable for 170 years and there is every reason to think it is the basis for the drafting of the law as enacted.

In *Kirk v Industrial Court* (NSW)[9] Hayden J warned of the dangers of specialist Tribunals departing from appropriate judicial standards of fairness and the rule of law.

The Fair Work Commission has a system of appeals within the Commission and is of course subject to judicial supervision by the Federal Court and pursuant to s.75 of the Constitution.

However anti-bullying applications can never result in financial remedies and consequently it is the very rare application that has significant economic value. It is rare for anti-bullying applications to reach the Full Bench much less the Courts. As a result, it is improbable that the approach to the anti-bullying provisions set out in the Bench Book and as found in the decision in *Mac* will become subject to any consideration at a level of the judicial hierarchy higher than the Full Bench of the Commission.

In all of the reported cases of the Commission's consideration of the anti-bullying provisions there does not appear to have been any systematic or detailed consideration of the reasoning in *Re Mac*. If the publication of this paper encourages or results in that consideration it is to be hoped that the outcome will be more in line with both the text and context of the Act and the stated objectives of the House of Representatives Committee which was responsible for drafting its core concepts.

[9] (2010) 239 CLR 531 at 589 [122].

In any event, there are good reasons for the Commission to reconsider the terms of the Bench Book's guidance.