McDonald [2016] FWC 300 (Fair Work Commission, Commissioner Hampton, 15 January 2016)

This was a decision of the Fair Work Commission (FWC) under section 789FC of the Fair Work Act 2009 (Cth) (the Act), which provides for an application under the Act for an order to stop bullying. The applicant was a volunteer at the Cooktown School of Art Society Inc (the society), and claimed that bullying behaviour had been directed at her over a period of five years, culminating in her exclusion from the society. The society raised jurisdictional issues in response, contending that it was not a constitutionally covered business under the Act, and that the applicant was not a worker under the Act.

The society conducts a gallery which displays and sells original art works from local artists in the Cooktown (South Australia) area. It also assists individual artists to improve their artistic skills through learning, sharing, exhibiting and selling their art. The society is a small, community-based nonprofit association made up of individual members who join the society, and is conducted by a small committee of management. The applicant is a local artist, and helped out at the society until 15 August 2015. Her membership was cancelled on 4 September 2015.

Generally, volunteers are not considered to be workers under the Act where an incorporated association is working for community purposes and the association (and any volunteers) do not employ at least one person as an employee to work for the association. The society has no employees at its gallery. All helpers are volunteers. However, volunteers who exhibit artwork benefit from a decreased commission payable to the society.

Meaning of 'worker' under the Act

The Act applies to workers. Section 789FC(2) provides:

For the purposes of this Part, worker has the same meaning as in the Work Health and Safety Act 2011, but does not include a member of the Defence Force.

Note: Broadly, for the purposes of the Work Health and Safety Act 2011, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

Meaning of 'bullied at work' under the Act

Section 789FD provides:

(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.

(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.

Meaning of ‘person who conducts a business or undertaking’

Consideration of the Workplace Health and Safety Act 2011 (Cth) (WHS Act) at section 5 leads to a definition of a person who conducts a business or undertaking. That definition at sub-sections 5(7) and (8) states:

(7) A volunteer association does not conduct a business or undertaking for the purposes of this Act.
(8) In this section, volunteer association means a group of volunteers working together for 1 or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

Section 4 of the WHS Act includes the following definition of volunteer:

‘volunteer’ means a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses)

In addition, the Workplace Health and Safety Regulations 2011 (Cth) provide as follows:

7(3) For subsection 5(6) of the Act, an incorporated association may be taken not to be a person conducting a business or undertaking if the incorporated association consists of a group of volunteers working together for one or more community purposes where:

(a) the incorporated association, either alone or jointly with any other similar incorporated association, does not employ any person to carry out work for the incorporated association; and
(b) none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the incorporated association.

Was the applicant a ‘worker’?

The applicant was found not to be a worker. She was a volunteer within section 4 of the WHS Act (at [32]–[33]):

…in general terms, a volunteer is someone who enters into any service of their own free will, or who offers to perform a service or undertaking for no financial gain. The commitments shared between the parties are usually considered moral in nature, rather than legal. Payments or benefits unrelated to hours of work or the actual performance of work will not normally by themselves imply that a person is an employee. In these circumstances, any payment or benefit can more aptly be described as an ‘honorarium’ or gift...The reduced commission payments as apparently operated for Mrs McDonald would not turn what is otherwise accepted to be a volunteer relationship into that of an employment contract.

Nor was the society a person conducting a business or undertaking (PCBU) (at [34]–[35]):
In order for Mrs McDonald to be a volunteer who is eligible to bring a s.789FC application, Mrs McDonald must be a volunteer for a PCBU, and not a volunteer in a voluntary association. In the circumstances of this matter, this requires consideration of the statutory parameters set out earlier in this decision and in particular, whether CSAS is a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association. I am satisfied that the CSAS fundamentally involves a group of volunteers working together for a community purpose. That is, the operation of the gallery and the encouragement, education and promotion of the local artists, by the local artists, for the benefit of the local community as undertaken by the CSAS, means that the Society is established for one or more community purposes. This satisfies the requirements of the PCBU exclusion in s.5(8) of the WHS Act.

The reduced commission arrangements were not considered to be payments made to workers. There were no workers involved in the society. Therefore, everyone involved was a volunteer. The society was not a PCBU, so the applicant could not be a worker under the Act. The FWC had no jurisdiction to decide the matter. However, the Commissioner pointed out that (at [52]):

I should also make it clear for the benefit of the parties that this decision does not mean that the removal of Mrs McDonald from membership of the Society was fair or reasonable and I have made no findings in relation to that issue or the conduct as alleged by any of the parties in the application and the responses. These are, for reasons set out above, not matters that fall within the scope of the FW Act in the circumstances of Mrs McDonald, but could be issues that may be resolved elsewhere.

The application was dismissed.

The case may be viewed at: [http://www.austlii.edu.au/au/cases/cth/FWC/2016/300.html](http://www.austlii.edu.au/au/cases/cth/FWC/2016/300.html)

**Implications of this case**

The bullying provisions of the *Fair Work Act 2009* (Cth) do not apply to volunteers in voluntary organisations engaged in community purposes. The Commissioner noted clause 26 of the Explanatory Memorandum to the Fair Work Act that stated:

26. The term ‘community purposes’ is not defined in the Bill [now the Act] but is intended to cover purposes including:

- philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity, and
- sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.