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# 1. Bullies are bad business - complex problem/simple solutions

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*Bullying, by its insidious nature, is a complex problem facing the mining industry. Thankfully, the tools to manage this problem are simple and effective if developed and implemented consistently*

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## 2. Introduction

That bullying is bad for business will be no surprise to members of the mining industry, or anyone in business for that matter. That bullying directly costs employers a whopping \$13 billion each year<sup>1</sup> may be unexpected.

The number and cost of bullying related complaints in the mining industry remains a difficult problem despite safety reforms and a change in society's attitude towards what is considered to be acceptable behaviour and the attempt to stamp out a lot of the "hazing" type of bullying that previously occurred. This stealthy, insidious and costly phenomenon manages to crawl under the radar and into every work environment office or site and across all levels of seniority.

Bullying impacts on the health and safety of individuals and others around them and, therefore, statutory obligations and hefty penalties designed to deter this unsafe behaviour exist for both employers and individuals. Importantly, while the causes of bullying are complex, the tools to manage this significant problem are, like all good tools, simple.

Members of the mining industry are accustomed to identifying hazards and risks and identifying and implementing control measures on a daily basis. This paper will demonstrate that a similar approach can and should be taken to bullying. Bullying in the mining industry can be addressed by starting with the basics - identifying the hazards and assessing risks and implementing control measures to eliminate them or manage them appropriately. To assist in this process, this paper will provide a discussion regarding:

- (i) recent and proposed changes to legislation and the impact on obligations in relation to bullying;
- (ii) recent bullying cases and what they mean for the mining industry;
- (iii) traps and pitfalls to avoid when conducting a bullying investigation; and

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<sup>1</sup> Productivity Commission Research Report 2010 - Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety, 287; Sheehan, M.J., McCarthy, P., Barker, M.C., and Henderson, M. 2001, A Model for Assessing the Impact and Costs of Bullying, Paper presented at the Standing Conference on Organizational Symbolism (SCOS), Trinity College Dublin. 30th June to 4th July 2001, Griffith University, Brisbane.

- (iv) how to manage bullying and harassment in the workplace.

Incidents of bullying need not, and, indeed, cannot be permitted to occur within the mining industry. It is hoped that this paper will inspire each member of the mining industry to take a proactive approach to eliminating bullying.

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### **3. Bullying - why is it such a problem?**

Bullying is a major problem for employers Australia-wide. It costs the economy \$14.8 billion and employers directly \$10.1 billion per year.<sup>2</sup>

Bullying can cause employers significant angst because it is a workplace hazard that is far harder to define, identify and investigate than physical hazards in the workplace. The insidious, subtle character of bullying means that it is often overlooked despite its prevalence in many workplaces. A Healthworks study of 325 companies indicated that 85 percent of employees have been bullied or seen others bullied. Bullying comes in many forms and can include the following behaviour:

- (i) yelling, screaming, abuse;
- (ii) insults, inappropriate comments to the individual or others about a person, their appearance or lifestyle;
- (iii) belittling opinions;
- (iv) constant criticism; and
- (v) isolating employees from their normal work interaction.

Bullying is a dynamic concept and is therefore difficult to define and identify. The Prevention of Workplace Harassment Code of Practice 2004, defines 'workplace harassment', encompassing bullying, as repeated behaviour, other than sexual harassment, by a person:

- (i) that is unwelcome and unsolicited;
- (ii) that a person considers to be offensive, intimidating, humiliating or threatening; and
- (iii) that a reasonable person would consider to be offensive, intimidating, humiliating or threatening.

Bullying does not include reasonable management action taken in a reasonable way by the person's employer in connection with the person's employment. Therefore, reasonable performance management or criticism regarding the failure to meet performance expectations are generally not within the sphere of bullying behaviour.

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<sup>2</sup> Productivity Commission Research Report 2010 - Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety, 287; Sheehan, M.J., McCarthy, P., Barker, M.C., and Henderson, M. 2001, A Model for Assessing the Impact and Costs of Bullying, Paper presented at the Standing Conference on Organizational Symbolism (SCOS), Trinity College Dublin. 30th June to 4th July 2001, Griffith University, Brisbane.

Bullying constitutes a significant risk for employers in terms of both direct and hidden costs. In addition to the costs of absenteeism, re-staffing and re-skilling associated with bullying, there are hidden costs such as costs incurred through reduced productivity in circumstances where workers remain in their jobs but are unable to function to their full capacity, management time consumed by dealing with and investigating bullying claims, providing support to victims<sup>3</sup> and the impact on a company's reputation.

Coupled with these financial costs are the legal costs associated with when bullying turns litigious including:

- (i) workers' compensation claims;
- (ii) workplace health and safety prosecution;
- (iii) workplace rights claims;
- (iv) unfair dismissal claims;
- (v) discrimination complaints;
- (vi) civil proceedings for breach of a statutory duty, failure to provide a safe place of work, or negligence;
- (vii) breach of contract claims; and
- (viii) even criminal assault claims, if bullying escalates into physical abuse.

Clearly, the extent of this risk means that members of the mining industry have a financial, as well as a moral imperative to address bullying.

Addressing bullying requires employers to implement systems to eliminate or at least minimise the risk of bullying and investigate and proactively manage any claims that arise. However, it is necessary to recognise that not all personal interactions that may give rise to stress and tensions necessarily constitutes bullying.<sup>4</sup> For example, supervisors may behave in a way that is 'unsettling' to staff, which may be merely inappropriate management style, rather than bullying.

This paper will examine the major legal risks faced by employers and employees, namely prosecution under employment or workplace health and safety (**WHS**) legislation.

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<sup>3</sup> Productivity Commission Research Report 2010 - Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety, 286.

<sup>4</sup> *Bann v Sunshine Coast Newspaper Company Pty Ltd* [2003] AIRC 915.

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#### 4. The impact of recent and proposed changes in legislation on obligations regarding bullying and harassment

There is no one piece of legislation which makes bullying unlawful. However, Australian legislation currently affords protection to employees from bullying at both a state and federal level, through a combination of legislation including:

- safety;
- discriminative; and
- criminal legislation.

In the Queensland Mining Industry this would include through a company's compliance obligations to manage their employees' exposure to risk under the Coal Mining Safety and Health Act 1999 (Qld) or the Mining and Quarrying Safety and Health Act 1999(Qld) (**Mining safety legislation**).<sup>5</sup>

There have also been recent changes in the legislation which create additional obligations on employers. At a federal level, the *Fair Work Act 2009* (Cth)<sup>6</sup> (**FW Act**) contains new provisions which are capable of penalising people involved in such inappropriate conduct and employers who do not take all reasonable steps to stop bullying occurring. The FW Act:

- (i) provides a prohibition on taking adverse action<sup>7</sup>, which includes dismissing an employee, injuring or altering an employee in their employment or discriminating against a person because they have exercised or not exercised a 'workplace right; and
- (ii) boosts existing anti-discrimination protection by prohibiting adverse action against an employee or a prospective employee on discriminatory grounds, including race, sex, age and physical or mental ability. This represents a general right not to be discriminated against and provides broader remedies for victims than under other discrimination legislation.

A 'workplace right'<sup>8</sup> includes, but is not limited to where a person:

- (i) has the benefit of, or has a role or responsibility under, a workplace law or a workplace instrument, including a certified agreement or modern award;

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<sup>5</sup> *Mining and Quarrying Safety and Health Act 1999 (Qld)*; *Coal Mining Health and Safety Act 1999 (Qld)*.

<sup>6</sup> *Replaced the Workplace Relations Act 1996 (Cth)*.

<sup>7</sup> ss 340-342 *Fair Work Act 2009 (Cth)*.

<sup>8</sup> s 341 *Fair Work Act 2009 (Cth)*.

- (ii) is able to initiate or participate in, a process or proceeding under a workplace law or workplace instrument, including, for example, a conference or court proceedings under the FW Act, protected industrial action, making, varying or terminating an enterprise agreement and making or terminating an individual flexibility agreement; or
- (iii) is able to make a complaint or inquiry:
  - A. for example, to Fair Work Australia or the Fair Work Ombudsman or other authority established under a workplace law (as defined); or
  - B. if the person is an employee - in relation to his or her employment.

While the legislation does not specifically mention bullying, it is often the case that bullying involves a discriminatory reason for example where a person is bullied because of their race, sex, sexuality, disability etc. Further, it is often the case that bullying is retaliation for a complaint made by the victim. As such bullying will often lead to adverse action or discrimination claims. Penalties under the FW Act for breaches are up to \$33,000 for corporations and \$6,600 for individuals for each offence.<sup>9</sup>

At the state level, significant changes in the regulation of bullying are also afoot. The Federal government in conjunction with the states are working towards harmonisation of state occupational health and safety laws across the country through the introduction of the *Model Work Health and Safety Act (Model Act)*. The Model Act is aimed at simplifying WHS laws in Australia by providing a model from which Australian States and Territories can adopt to replace their existing WHS laws. Therefore, Queensland's *Workplace Health and Safety Act 1995* would be replaced by legislation mirroring the provisions of the Model Act.

It remains to be seen how the mining industry will be regulated through the harmonisation process as there has been no formal position released by the State. The OHS Harmonisation task force recommendations, which were accepted by the States, stated that there would be no separate industry specific safety legislation except in exceptional circumstances. The Department has confirmed that there is (at this stage) no intention to repeal the Mining safety legislation, however, where possible provisions will be brought into line with the concepts in the Model Act.

The Model Act significantly increases the potential liability of employers and employees who breach their WHS obligations.

The Model Act prescribes increased maximum penalties for breaches of its three categories of offences,<sup>10</sup> which are graded to reflect the degree of recklessness of the duty holder and the seriousness of the risk or hazard involved.

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<sup>9</sup> s 539 *Fair Work Act 2009* (Cth).

<sup>10</sup> ss 31-33, *Model Work Health and Safety Bill*, as approved on 11 May 2010.

Type of offence	Max. fine for corporation	Max fine for individual
<b>Category 1</b> - Breach of a health and safety duty involving recklessness as to the risk of death or serious injury or illness without reasonable excuse	\$3,000,000	\$600,000 or 5 years imprisonment
<b>Category 2</b> - Breach of a health and safety duty which expose an individual to death or serious injury or illness (without recklessness)	\$1,500,000	\$300,000
<b>Category 3</b> - Other breaches of health and safety duties	\$500,000	\$100,000

Coupled with higher penalties, the Model Act also introduces more sentencing options for courts dealing with breaches of WHS obligations, such as community service orders and training orders. In addition, it places increased obligations on Executive Officers to proactively manage safety. We are yet to see how much of these changes will be implemented in the Mining safety legislation.

The continued recognition of bullying as a health and safety issue means employers need to be vigilant in meeting their WHS obligations and aim to eliminate bullying from the workplace, particularly in light of the more significant penalties.

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## 5. What recent cases mean for the mining industry

Recent Australian case law demonstrates the grave consequences that can flow from failing to prioritise the elimination of workplace bullying.<sup>11</sup> Fundamentally, the cases suggest that:

- (i) liability for bullying is wide, extending to employees and employers alike;
- (ii) bullying will not be tolerated;
- (iii) bullying is a foreseeable risk and therefore a reactive response is insufficient;
- (iv) there are both moral and financial incentives to eliminate workplace bullying.

The 2010 case of *MAP Foundation Pty Ltd*<sup>12</sup> reinvigorated community awareness about the potentially tragic consequences of workplace bullying. In this case, an 18 year old waitress, Brodie Panlock, was subjected to severe bullying at Café Vamp in Melbourne over a period in excess of 12 months. As a result of bullying comprising:

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<sup>11</sup> *MAP Foundation Pty Ltd - Melbourne Magistrates' Court, 8 February 2010; Bailey v Peakhurst & Recreation Club Ltd [2009] NSWDC 284; State of Queensland and Q-Comp (C/2009/42); Adam James Harley v Aristocrat Technologies Australia Pty Ltd [2010] FWA 62; Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] FCAFC 120.*

<sup>12</sup> Melbourne Magistrates' Court, 8 February 2010.

- (i) relentless insults and criticisms;
- (ii) taunting over a failed suicide attempt;
- (iii) holding the victim down while covering her with sauce; and
- (iv) "persistent and vicious" harassment,

Brodie committed suicide in 2006.

Three Café Vamp employees were fined \$45 000, \$30 000 and \$10 000 respectively for failing to take reasonable care for the health and safety of other employees under Victorian WHS legislation.<sup>13</sup> These fines were among the highest ever issued to individuals in Victoria. In addition, the café's owner and his company were fined \$250 000 for failing to maintain a safe working environment

This decision sends a clear message to employers, company officers and employees that allowing or participating in workplace bullying can have tragic consequences and attract significant penalties. Eliminating workplace bullying is an integral part of any employer's organisational WHS commitments, but is also necessary to ensure that tragedies of this type are not repeated.

The case of *Nationwide News Pty Ltd v Naidu & Anor*<sup>14</sup> further illustrated the risks associated with bullying. This case involved 'deliberate' and 'vindictive' abuse, including violent and financial threats and racial and sexual vilification over a period of 5 years. The victim was a security guard employed by ISS Security Pty Ltd (**ISS**), whose services were provided to Nationwide News Pty Ltd (**News**) under a services contract. The victim was, under the contract, required to carry out the services, directly for Mr Chaloner, a News employee. The Court found that Mr Chaloner required the victim to work extremely long hours, seek permission to go to the toilet, call work every day at his own expense during a Fijian holiday and do manual work for him during weekends. Consequently, the victim developed severe depression and a post-traumatic stress disorder.

News, was found to be vicariously liable in negligence for the conduct of Mr Chaloner and was ordered to pay **\$1.9 million** damages to the victim. Mr Chaloner was held to be the 'mind and will'<sup>15</sup> of News and News was therefore liable for the harm caused by him. This case shows how bullying can impact a person physically and emotionally which can result in significant compensation claims. There have been a string of such cases in the media recently, the most notable of course the DJs case, where the employee has claimed \$36 million dollars.

Additionally, whilst in this case, ISS who was a contractor to News and employed the victim, was not held to be liable, the case should serve as a warning to employers that their duties to provide a safe system of work for employees do not vanish when an employee is sent to work at another workplace.

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<sup>13</sup> *Occupational Health and Safety Act 2004 (Vic)*.

<sup>14</sup> [2007] NSWCA 377.

<sup>15</sup> *Nationwide News Pty Ltd v Naidu & Anor* [2007] NSWCA 377, [191].

Finally, a recent case of *Roger Keith Garrett v Shamrock Holdings (WA) Pty Ltd*<sup>16</sup> provides an insight into the consequences of failing to fully investigate bullying complaints. The case involved Roger Garrett (**Garrett**), who was working as a labourer at the construction of a mining camp near Karratha in Western Australia. Garrett was accused of bullying Brenda Lawrence (**Lawrence**) during a carpool with work colleagues. His employment was terminated and Garrett claimed unfair dismissal.

The Commission accepted that Garrett's actions towards Lawrence amounted to bullying. He was held to have bullied Lawrence by making snide comments, refusing to accept her reasonable direction to accept the transport provided and interfering with her doing her job. However, it was accepted that this had been an isolated incident.

The Commission determined that, although there was a valid reason for termination, the employer had conducted a deficient investigation, not given Garrett a real opportunity to respond to the allegations, relied on his responses when he was affected by alcohol, had accepted one employee's version of events without corroboration and not followed their procedures. In this way, the dismissal was held to be unjust and Garrett received compensation for his lost earnings.

Commissioner Williams commented that, had there been a full investigation and interview of the key witnesses, it is possible that the employer would have concluded that Garrett's behaviour did not warrant termination.

There still remains a notable reluctance to report and even to investigate incidences of bullying in the mining industry. Subsequently, the industry must be particularly proactive in its efforts to normalise the practice of reporting and investigating bullying so as to avoid a repeat of the unfortunate scenarios above.

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## **6. How to manage bullying and harassment claims in the workplace**

The first step to managing a bullying and harassment claim is to have a good bullying and harassment policy which should:

- educate as to what behaviour is unacceptable; and
- specifies the way that complaints are handled.

The role that education plays in tackling bullying is often understated. Employees need to be educated and regularly reminded about:

- (i) what does and what does not constitute bullying and harassment;
- (ii) the signs of bullying, including poor performance, tearfulness, changes in personality, increase in absenteeism and high turnover;
- (iii) their obligation to report bullying if they witness it or experience it personally, without fear of recrimination; and

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<sup>16</sup> [2009] AIRC 832.



- (iv) standards of conduct expected of employees and others in the workplace.

This policy should be communicated to employees to ensure that they are aware of the business's attitude that bullying is unacceptable and can result in severe penalties, including dismissal.

Once an effective policy and procedure is in place, it must be applied consistently and adhered to during the investigation process, lest employees lose confidence in the process.

A good bullying policy will clearly explain the steps involved in the investigation process, such as:

Step 1 → analyse the complaint and plan the required action;

Step 2 → respond to the complainant promptly regarding the employer's intended action and commitment to supporting the employee, including through the availability of an employee assistance program;

Step 3 → conduct the investigation and collect all relevant information and interview witnesses;

Step 4 → review the investigation report and whether further information is required;

Step 5 → conclude the findings of the investigation;

Step 6 → communicate the outcome of the investigation to all appropriate persons, including identifying any post-investigation action and close the investigation;

Step 7 - monitor the effectiveness of post investigation action and consider whether improvements need to be made to policies and/or procedures and/or whether further employee training is necessary.

At Step 1 of the investigation, human resources must firstly ask themselves whether a complaint has been made. Complaints do not have to be in writing. Comments such as "I am telling you as a friend," "I don't want to do anything about it," and "It's between us" should trigger the same response as a formal written complaint of bullying.

They must then consider whether the complaint involves unlawful conduct, whether legal advice is required, who/what will need to be investigated, what procedures need to be followed and whether an immediate response to the complaint in writing is required.

Having answered these questions, they must plan how to investigate the complaint including what documentation needs to be obtained and who needs to be interviewed, who the complaint needs to be reported to (given the need to preserve confidentiality), how a person's absence will be described (they should be described as being on leave) and who will need access to an employee assistance program.

Overall, this stage requires a review and consideration of the nature of the complaint, a determination of how to deal with the complaint (for example, through alternative dispute resolution or through internal or external investigation) having regard to the

employer's obligations, the policies and procedures set out in workplace policies, potential risks, the seriousness of the allegations, maintaining legal professional privilege and the risk of and liability in relation to litigious claims and the potential damage to the company's reputation.

Step 2 should always involve responding to the complainant promptly, maintaining a paper trail, writing a letter to the complainant and respondent in the matter to convey preliminary information about the investigation process and preparing confidentiality letters to be distributed to witnesses.

Step 3 involves collecting information. Witnesses should be notified about their confidentiality obligations and interviewed. A detailed paper trail will include interview notes and detailed particulars. During this time, both the complainant and persons involved should be kept updated and expectations should be managed.

Step 4 of the process requires review of the process so far. At this stage, human resources must ensure that all relevant witnesses have been interviewed, the respondent has had an opportunity to respond to all allegations and that the complainant has had an opportunity to respond to the respondent's explanation.

Step 5 represents the culmination of the investigation process. At this stage, the investigator must evaluate the allegations, the evidence that exists to support or refute the claims, the existence of corroborating evidence, the reliability of evidence and the credibility of witnesses. Following this, an assessment about whether any conclusions can be made or if further investigation is required. Conclusions must be made (even if it is that further investigation is required) and documented.

Step 6 of the investigation process involves communicating the outcome of the investigation and corresponding with the complainant, respondent, witnesses and other persons involved in the investigation about the conclusions drawn. It is at this point that any disciplinary action, warranted by the outcome of the investigation, should be taken. The investigation is not effectively closed.

Step 7 should not be overlooked. The employer should ensure that the steps involved in the investigation have been fully implemented. It should also review policies and/or procedures and consider whether further employee training would be useful. The situation at hand should be continuously monitored to avoid a reoccurrence of the problem.

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## **7. Traps and pitfalls to avoid when conducting a bullying and harassment investigation**

Conducting a bullying and harassment investigation can be a challenging exercise. The difficulties faced derive from the fact that:

- (i) bullying is emotive;
- (ii) confidentiality can be a problem and there is the potential for office/site gossip;
- (iii) people have entrenched behaviours and views about what does and what does not constitute bullying;

- (iv) complaints may be seen as trivial or an employee may fear being criticised for overreacting;
- (v) persons may not be trained to conduct an effective investigation;
- (vi) employees fear reprisal action, are concerned about job security and fear reputation damage.

In order to challenge bullying head on, employers must:

- educate their employees about what constitutes bullying and harassment;
- consistently re-enforce that bullying is not acceptable within the workplace;
- encourage reporting from individuals who both experience or witness bullying directly;
- engage employees and the unions to come up with solutions;
- strive for early intervention into complaints and manage them effectively to avoid any escalation of the problem.

Policies and procedures on reporting, investigation and management of a complaint need to be established and implemented to ensure that complaints are dealt with appropriately and expeditiously. This includes investigating the complaint and providing an initial response to the complainant and other appropriate persons and ensuring that they obtain all the facts and circumstances surrounding the complaint, not just the emotional responses.

Policies and procedures need to be consistently applied and evidencing each step in the investigation process is crucial to create a comprehensive paper trail and maintain confidentiality. Any lessons learned from dealing with a bullying complaint should also be analysed to determine whether the policy or procedures need to be improved or training or other measures need to be implemented to minimise the re-occurrence of bullying in the workplace.

Human Resources managers who do not undertake proper investigation of bullying complaints run the risk of significant criticism from the Courts, which can be potentially career limiting.

A recent and very public example of this is the case of *Harley v Aristocrat Technologies Australia Pty Ltd*.<sup>17</sup> In this case, Adam Harley (**Harley**) successfully claimed that he was unfairly dismissed by his employer and received 6 months' remuneration as compensation.

In the hearing of the matter Harley gave evidence that he had been subjected to bullying from his manager who he alleged targeted him for an unknown reason. He gave evidence that his manager had ignored him at functions, complained about minor facets of his performance, attempted to prevent him from taking leave at the last minute

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<sup>17</sup> [2010] FWA 62.

and criticised him for not meeting unattainable sales targets during difficult financial circumstances.

It was held that the company had failed in its duty to deal with the bullying complaint and that an investigation into Harley's complaints should have been undertaken. The Court found and specifically commented on the fact that the Human Resources Manager appeared to be uninterested in investigating complaints, or clueless as to how to conduct such an investigation. It was found that the Human Resources Manager had notified senior management that Harley's claims were unsubstantiated without conducting any interviews.

Compared with the flawed or non-existent investigation conducted in Harley, a good investigation will involve promptly responding to complaints, balancing conflicting interests, maintaining a paper trail, reinforcing confidentiality, complying with policies and procedures, affording natural justice and procedural fairness to employees and only acting upon findings of fact derived from an investigation.

During the investigation process, companies should take care not to:

- delay responding to a complaint;
- breach confidentiality;
- predetermine an outcome prior to completion of an investigation;
- evidence bias (for example, through comments to witnesses).

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## **8. Conclusion**

In reality, people, including those within the mining industry, are often reluctant to look into bullying. Their reluctance is usually because they seek to avoid opening Pandora's box and uncovering a greater underlying problem. However, adopting a proactive approach will eliminate the impact on the individual and other workers and create the right culture in the workplace.

If employers are committed to addressing bullying, have adequate policy and procedures in place to demonstrate this commitment and follow the designated process, they will reduce the instances of bullying and be in a strong position to defend any prosecution on the grounds of bullying.

Those conducting investigations into bullying in such a manner can rest assured that it is acceptable to find that:

- (i) there was insufficient detail provided by the complainant to enable an investigation to be undertaken or to make a finding on the matter; or
- (ii) an allegation of bullying was proven.

Bullying is undeniably a complex problem faced by the mining industry. However, it is surmountable.

So, when it comes to managing bullying in your workplace, remember to use all the tools available to you - a strong workplace bullying policy, a detailed investigation process, and a commitment to use these tools in a consistent manner.