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INTRODUCTION

[2.10] The general protections are located in Part 3-1 of the Fair Work Act 2009 (FW Act), introduced in 2009 by the FW Act. The provisions were described in the Explanatory Memorandum as a consolidation of provisions which were scattered throughout the previous legislation. However, this is the first time there is a part of the legislation devoted to individual rights and protections which are wider in scope than the previous freedom of association and unlawful termination protections. Unfair dismissal claims still represent the majority of claims made to the Fair Work Commission but there has been a steady increase of general protections claims since the FW Act was introduced in 2009. There were almost 3000 claims lodged with Fair Work Australia (as it was then) in the 2011-2012 year. There has also been a steady stream of decided cases involving the provisions, particularly the adverse action protections. This chapter will briefly note how the current Act has changed the rights that pre-existed the Act. It will then provide an overview of some of the more important cases that have been decided under the present provisions. The focus of the discussion is on the "workplace rights" provisions, particularly the complaints and inquiries protection in s 341(1)(c)(i). There is also an examination of the High Court decision in Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 86 ALJR 1044; 290 ALR 647; (2012) HCA 32. Most of the cases cited here are noted in the annotations to the FW Act in this volume.

OVERVIEW

[2.20] Part 3-1 is made up of a miscellaneous array of protections which apply to all types of workers, including contractors; they also apply to prospective workers. The adverse action protections are those which are dependent on the finding that a person has engaged in adverse action as defined in s 342. They include the workplace right protections (ss 340, 341), the industrial activities protections (ss 346, 347), and the discrimination protections (s 351). Most of these protections existed in some form in the Workplace Relations Act 1996 but the FW Act has expanded the scope of some of the protections significantly. The primary changes introduced by the Act include:

- expanding the range of prohibited conduct by introducing a discrimination element to adverse action in s 342(1);
- expanding the range of prohibited conduct which may impact upon contractor relationships by extending the meaning of adverse action in s 342(1), see Construction, Forestry, Mining and Energy Union v Victoria [2013] FCA 445 at [109]–[165];
- expanding the discrimination claims to include all adverse action rather than confining the claims to instances of dismissal from employment in s 351; and
- the introduction of new rights protecting workers against victimisation through the workplace right protection.

[2.30] The other protections in Part 3-1 which are not based on adverse action are listed below. Next to each section is the closest equivalent section in the Workplace Relations Act 1996 as amended by the Work Choices legislation. In many instances, the provisions in the FW Act are different to the predecessor section; this is particularly important when relying on case law decided under previous legislation:

<table>
<thead>
<tr>
<th>Current Provision FW Act</th>
<th>Closest Equivalent Workplace Relations Act</th>
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</thead>
<tbody>
<tr>
<td>coercion: ss 343, 348</td>
<td>ss 400, 789</td>
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<tr>
<td>undue influence or pressure: s 344</td>
<td>ss 400(3)– (6A), 245A(2)</td>
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<tr>
<td>misrepresentations: ss 345, 349</td>
<td>ss 401(1), 790, 791</td>
</tr>
<tr>
<td>inducements relating to membership: s 350</td>
<td>s 794</td>
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The General Protections and Adverse Action: Four years on

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<tr>
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</thead>
<tbody>
<tr>
<td>absence because of illness or injury: s 352</td>
<td>s 659(2)(a)</td>
</tr>
<tr>
<td>bargaining services fees' demands: s 353</td>
<td>s 801</td>
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<tr>
<td>discrimination against an employer: s 354</td>
<td>s 804</td>
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<tr>
<td>sham arrangements: ss 357 – 359</td>
<td>ss 900 – 904</td>
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[2.40] All of the protections in Part 3-1 are subject to a reverse onus: s 361. Further, it is sufficient that one of the reasons is the prohibited reason for the conduct complained of, for a contravention to be made out: s 360. The previous legislation also contained similar provisions to ss 360 and 361. See discussion in Board of Bendigo Regional Institute of Technical and Further Education v Barclay [2012] 86 ALJR 1044; 290 ALR 647; [2012] HCA 32 at [49] per French CJ and Crennan J. The court also has a wide power to “make any order the court considers appropriate”, once a contravention is proven: s 545. This includes the power to award compensation for hurt and humiliation: Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd [2011] 193 FCR 526; 205 IR 392; [2011] FCA 333 at [441] and Transport Workers’ Union of Australia (NSW) v No Fuss Liquid Waste Pty Ltd [2011] FCA 982 at [23]. The previous legislation expressly prohibited such awards: see s 665(2), Workplace Relations Act 1996 (Cth). In addition to this, a court may also make pecuniary penalty orders under s 546.

ADVERSE ACTION

[2.50] The concept of “adverse action” is central to the operation of three of the major protections in Part 3-1: workplace rights, industrial activities and discrimination. It defines the conduct which is prohibited for the purposes of these three broad protections. Therefore, the conduct complained of must fall within the scope of the “adverse action” definition. The term “adverse action” was introduced by the FW Act. However, the first three phrases which are contained under column 2 in the table at s 342(1), have been part of federal industrial relations laws since at least 1914. That is (a) dismissal; (b) injury to employment and (c) prejudicial alteration of the employee’s position. The fourth phrase, (d) discrimination between employees, was introduced by the FW Act.

DISCRIMINATION

[2.60] The proper construction of the fourth limb of adverse action concerning discrimination has received some consideration in the courts to date. It appears that the courts are hesitant to unduly restrict discrimination in the FW Act. The principles decided under anti-discrimination statutes will not be imported into the FW Act without qualification. Gordon J in Klein v Metropolitan Fire and Emergency Services Board [2012] FCA 1402 at [88]–[102], provides one of the few judgments that has given an in-depth consideration to the proper construction of the phrase relating to discrimination in adverse action. Her Honour refused to restrict the phrase to direct discrimination and it includes claims based on indirect discrimination [97]. Her Honour also said that the FW Act does not “preclude discrimination on the broadest of grounds”, [101]. In Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697 at [39]–[44], Katzmann J questioned the validity of importing the reasoning in Purvis v New South Wales (Department of Education and Training) (2003) 217 CLR 92; 78 ALJR 1; 202 ALR 133; [2003] HCA 62 for the purposes of the FW Act; nevertheless, her Honour accepted that “discriminate in this context means ‘treat less favourably’”: [41], [43]. In Hodgkinson v Commonwealth (2011) 248 FLR 409; 207 IR 129; [2011] FMCA 171, the Court rejected an argument that the meaning of discrimination in the Disability Discrimination Act 1992 (Cth) should be used to interpret discrimination for the purposes of the FW Act: [141]. See also Wolfe v Australian and New Zealand Banking Group Ltd [2013] FMCA 65 at [83].

[2.70] There is a long history of cases which interpret the first three phrases, particularly “injury to employment” and “prejudicial alteration” The protections in the FW Act grew out of the victimisation offences which were introduced to support trade union security. The provisions only applied to common law employees for most of the last century. However, in 1992 the victimisation offences were amended so that they also applied to contractors: see s 334(7B) Industrial Relations Act 1988 (Cth) amended by s 17, Act No 109 of 1992. See Bromberg J in Construction, Forestry, Mining and Energy Union v Victoria [2013] FCA 445 at [136]–[142]. In 1996, with the advent of the Workplace Relations Act 1996 (Cth), the offences provisions were relabelled “freedom of association” and a further provision was introduced to protect the right not to join a union, namely s 298L(1)(b) Workplace Relations Act 1996. This provision was added to the existing grounds of protection relating to trade union security. The provisions also were
"enforced through a civil penalty regime which replaced the criminal offence regime that had been in place since 1904": Barclay at [52] per French CJ and Crennan J.

The rest of the discussion on "adverse action" will focus upon the case law concerning "injury to employment" and "prejudicial alteration".

INJURY TO EMPLOYMENT

The relevant phrases in the adverse action table at s 342(1) are "injures the employee in his or her employment" and "injures the independent contractor in relation to the terms and conditions of the contract". The quotation most often cited is from the High Court decision of Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) (1998) 195 CLR 1; 72 ALJR 873; 79 IR 339 (hereafter "Patrick's") at [4], [18] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ, where it was stated that it "includes injury of any compensable kind".

See Australian and International Pilots Association v Qantas Airways Ltd (2006) 160 IR 1; [2006] FCA 1441 at [13];[14]; Unsworth v Tristar Steering and Suspension Australia Ltd (2008) 175 IR 320; [2008] FCA 1224 at [23]; Klein v Metropolitan Fire and Emergency Services Board [2012] FCA 1402 at [84]; Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (2012) 202 FCR 244; 216 IR 451; [2012] PCAFC 63 at [30], [74]. However, most of these cases do not closely consider the phrase "injuries of a compensable kind". Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd (2011) 201 IR 441; 63 AILR 101-316; [2011] FMCA 58 at [25]-[29] is one of the rare recent decisions where the authorities are considered. Raphael FM at [29] made the observation that "[the lack of recent authority on the distinction between 'injury' and 'prejudicial alteration' is perhaps explained by the practice of pleading both categories of adverse action; for any action taken by an employer that constitutes an injury in employment will necessarily alter the position of the employee to his or her prejudice." [Emphasis added].

At [27], quoting Ellicott J in Squires v Flight Stewards Association of Australia (1982) 2 IR 155 at 164, the Court stated it is not only "...financial injury or injury involving the deprivation of rights which the employee has under a contract of service... [it is] applicable to any circumstances where an employee in the course of his employment is treated substantially differently to the manner in which he or she is ordinarily treated and where that treatment can be seen to be injurious or prejudicial." At [28] the Court further stated that it can be any "deprivation of one of the more immediate practical incidents of employment". These statements suggest that "injury in employment" is very wide, but is not unlimited in scope.

The courts have, however, identified instances where the injury traverses into the terrain of "prejudicial alteration", as the examples below show. Injury beyond legally compensable injury has been held to include:

- issuing warnings under a disciplinary code: Construction, Forestry, Mining and Energy Union v Coal & Allied Operations Pty Ltd (No 2) (1999) 94 IR 231; [1999] FCA 1714 (Branston J);
- renegoting on an assurance: Childs v Metropolitan Transport Trust (1981) 29 AILR 24 (Smithers J); Kimpton v Minister for Education (Vic) (1996) 65 IR 317; 40 AILR 3-381 (North J);
- corporate restructuring reducing the solvency of the employer: Patrick's; and

PREJUDICIAL ALTERATION

Prejudicial alteration is the broadest category "which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question": Patrick's at [4] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ. See also Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (2012) 202 FCR 244; 216 IR 451; [2012] PCAFC 63 at [21]-[40]. The relevant phrases in the adverse action table at s 342(1) are "alters the position of the employee to the employee's prejudice" and "alters the position of the independent contractor to the independent contractor's prejudice".

"Prejudicial alteration" has been given such a wide interpretation that it was able to catch the restructure of companies within the Patrick group which resulted in the threat of the future security of the employers' employment. As a result of the restructure, the companies which employed the employees did not have sufficient assets to pay employment entitlements. This was considered a prejudicial alteration of employment, even though there was no direct affection or alteration of the employees' legal rights or obligations. The central point being that the restructure meant the future employment of the employees was...
less secure. This was sufficient for the High Court to find that there was a prejudicial alteration of the employees' positions. The High Court however restricted the concept by stating that the prejudicial alteration of the employee's position must be "real and substantial rather than merely possible or hypothetical": Patrick's at [18] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ. This means that an indirect or consequential alteration of the employee's position which results from action taken by the employer may still be a prejudicial alteration as long as it is "real and substantial". See Community and Public Sector Union v Telstra Corporation Ltd (2001) 107 FCR 93; 104 IR 195; [2001] FCA 267 (CPSU v Telstra) at [17]-[18]. There may also still be a prejudicial alteration of employees' positions even if there is no injury to the employees. This was illustrated in the CPSU v Telstra decision where an email which constituted an instruction to discriminate against employees on awards or certified agreements was still a prejudicial alteration, even though the email was not acted upon. As a result of the email, the employees' positions on awards and certified agreements were considered less secure. The prejudicial alteration was viewed by the Court as real or substantial rather than hypothetical or merely possible: [19]-[20]. Furthermore, "liability arises where the conduct is directed at a number of ascertainable employees as well as against a particular employee": [21]. See also Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (2012) 202 FCR 244; 216 IR 451; [2012] FCAFC 63. In Australasian Meat Industry Employees' Union v Belanda Pty Ltd (2003) 126 IR 165; [2003] FCA 910, North J "held that the disappointment of an expectation of re-employment, even where there was no legal right to re-employment, was an alteration of an employee's position to his prejudice": Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697 at [31].

The decisions demonstrate that there is a wide spectrum of conduct which can be caught by the "prejudicial alteration" limb of "adverse action". It can potentially capture almost any detriment to the "advantages enjoyed by the employee" before the conduct in question, if it is done for one of the prohibited reasons in ss 340, 346 or 351, and as long as the detriment is real or substantial.

[2.130] The concept does have limitations. The courts have held that the following is not a "prejudicial alteration of employment" or was otherwise not "adverse action":

• A decision not to readvertise a position internally so that an employee could apply for the position during a redeployment period did not amount to a prejudicial alteration of the employee's position. The decision to advertise externally was made on the basis that there were no suitable candidates internally. Further, the employee did not experience a deterioration of the advantages associated with his position as he would not have been able to apply for the position in the first place: Wolfe v Australian and New Zealand Banking Group Ltd [2013] FMCA 65 at [84].


• A letter sent to a manager of a store outlining examples of the manager's poor performance, failure to follow established policies and procedures in relation to overtime and leave and a statement relating to possible future disciplinary action was not a prejudicial alteration of the employee's position: Ramos v Good Samaritan Industries (No 2) [2011] FMCA 341 at [57],[71] upheld on appeal Ramos v Good Samaritan Industries [2013] FCA 30.

• A subjective decrease in an employee's job satisfaction is unlikely to be an injury or prejudicial alteration: Hammond v Department of Health (1983) 6 IR 371 at 375 (IR Commission of NSW in Court Session, Full Bench).

• A failure to make persons redundant, so depriving them of redundancy entitlements, has been held not to be an injury or prejudicial alteration: Unsworth v Tristar Steering and Suspension Australia Ltd (2008) 175 IR 320; [2008] FCA 1224 at [22]-[23] (Gyles J).

WORKPLACE RIGHTS

[2.140] The "workplace rights" protections are located in ss 340 and 341 of the FW Act. The organisation of the provisions in the present form was introduced by the FW Act. The previous provisions were contained in the "freedom of association" (Pt 16) and "industrial activities" (s 448) parts of the Workplace Relations Act 1996 (Cth). The FW Act also introduced the term "workplace right". The "workplace right" protection is likely to be the "adverse action" claim most frequently raised by applicants. The threshold question of whether the facts of a case demonstrate that a workplace right issue arises is not difficult to show. However, there have been cases where applicants have been unsuccessful in this respect.
The following cases are examples of “workplace rights” claims which have been rejected by the courts:

- In Barclay v Board of Bendigo Regional Institute of Technical and Further Education (2011) 191 FCR 212; 203 IR 312; [2011] FCAFC 14, the employee was unsuccessful in his claim based on breach of his “workplace rights”. The employee, Mr Barclay, based his argument on the application of a grievance procedure clause in a workplace agreement. The court found that the procedure was not triggered and therefore there was no exercise of a workplace right: [68].

- In Bayford v Maxxia Pty Ltd (2011) 207 IR 50; [2011] FMCA 202, s 14A of the Equal Opportunity Act 1995 (Vic) could not be used for the basis of a “workplace right” claim because there was no evidence that the employer triggered the procedure contained in the s 340(1)(b) was unsuccessful. The provisions also protect workers where they have asked a third party to assist them in relation to the exercise of that right: s 340(2).

THE "WORKPLACE RIGHT" PROTECTION: SECTION 340

[2.150] The provisions protect workers from victimisation for possessing or exercising a workplace right or proposing to exercise that right: s 340(1)(a). The provisions also protect workers in situations where action has been taken against them to prevent them from exercising their workplace rights: s 340(1)(b). See Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuits Limited (2010) 188 FCR 221; (2010) 198 IR 143; [2010] FCA 770 where an argument based on s 340(1)(b) was unsuccessful. The provisions also protect workers where they have asked a third party to assist them in relation to the exercise of that right: s 340(2).

THE MEANING OF A "WORKPLACE RIGHT": SECTION 341

[2.160] A "workplace right" is widely defined in s 341. It is defined in accordance with three broad categories in s 341(1). The first is entitlements to the benefit of workplace laws, instruments or orders made by an industrial body. This protection has a long history and can be traced back to the first Constitution and Arbitration Act 1994 (Cth). See Greater DAudenong Clermont City Council v Australian Meat Processors' Union (2001) 112 FCR 232; 111 IR 121; [2001] FMCA 349. The FW Act has extended the meaning to include an entitlement to the benefit of workplace law as defined in s 12. It is paragraph (d) of the definition which gives the protection a wide reach. The definition includes any statutory law which regulates the employment relationship. It does not include rights under contracts, but a statutory law may still be one that regulates the employment relationship even though it also regulates other relationships for example, the Equal Opportunity Act 2010 (Vic); see Bayford v Maxxia Pty Ltd (2011) 207 IR 50; [2011] FMCA 202. The definition of "workplace instrument" does not extend to common law contracts: Barnett v Territory Insurance Office (2011) 196 FCR 116; [2011] FCA 968. A workplace right also includes a role or responsibility under a workplace law, workplace instrument or order made by an industrial body. See Jones v Queensland Tertiary Admissions Centre Ltd (No 2) (2010) 186 FCR 22; 196 IR 241; [2010] FCA 399 where it was held that Ms Jones' role as a bargaining representative during enterprise bargaining negotiations was a role or responsibility under a workplace law.

[2.170] The second broad category is protection from victimisation for the initiation of, or participation in, a process or proceeding under a workplace law or instrument: s 341(1)(b). The process or proceedings are listed at s 341(2). Examples of the process or proceedings include a conference conducted or hearing held by the FW; court proceedings under a workplace law or instrument; a protected action ballot order and protected industrial action. Processes or proceedings which are not expressly noted are covered by s 341(2)(k). This was the basis for finding that Ms Jones had an additional workplace right in Jones v Queensland Tertiary Admissions Centre Ltd (No 2) (2010) 186 FCR 22; 196 IR 241; [2010] FCA 399 where her role as a bargaining representative also gave her the right to participate in enterprise negotiations as it was a process or proceeding under s 341(2)(k).

COMPLAINTS AND INQUIRIES

[2.180] The third broad category within the meaning of a “workplace right” is complaint and inquiries in s 341(1)(c). The first protection, s 341(1)(c)(i) was included in the previous Workplace Rights
Relations Act 1996 (Cth) as s 793(1)(j), as to which see Dowling v Fairfax Media Publications (2008) 172 FCR 96; 176 FCR 96; [2008] FCA 1470. However, the second protection s 341(c)(ii) is new and was introduced by the current Act. This provision appears very wide on its face. It protects employees when they make complaints or inquiries in relation to their employment. It does not require a complaint or inquiry to be made to a “competent administrative authority” as was previously the position in the Workplace Relations Act 1996 (Cth) s 659(2)(e). The complaint or inquiry can now be made directly to an employee’s employer and receive protection. Early decisions approached construction of the provision by accepting that the protection was triggered once a complaint or inquiry was made to a person of authority working for the employer without in-depth analysis of the words “in relation to his or her employment”. See Australian Licensed Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd (2011) 193 FCR 526; 205 IR 392; [2011] FCA 333; Ramos v Good Samaritan Industries (No 2) [2011] FMCA 341 upheld on appeal Ramos v Good Samaritan Industries [2013] FCA 30; Hodkinson v Commonwealth (2011) 248 FLR 409; 207 IR 129; [2011] FMCA 171; Stevenson v Airservices Australia [2012] FMCA 55. In Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697 at [60]-[64] Katzmann J stated “in s 341(1)(c)(ii) the requisite relationship between the complaint or inquiry with the employee’s employment may be direct or indirect”: [64]. Her Honour accepted that a complaint made by the employee at the request of another employee could still be caught by the protection as the complaint related to conditions which also impacted the first employee’s conditions of employment [70]. The complaint concerned common conditions of employment which impacted upon both employees. At [70] Katzmann J said:

The fourth complaint relates to the issue of shift breaks. In June 2011, Mr Lambeth made a complaint to Mr Bushby that another employee had been asked to return to work after a 10-hour break instead of a 12-hour break. He made the complaint on behalf, and at the request, of that employee. Plainly the complaint or inquiry related to her employment and, specifically, to the conditions of her employment. But that does not mean that it did not also relate to Mr Lambeth’s employment. She performed the same work on the same panel as Mr Lambeth. The conditions of her employment were also the conditions of his employment. While on this particular occasion she was being asked to return to work after a 10-hour break, on another occasion it could have been him. For this reason the complaint or inquiry was in relation to Mr Lambeth’s conditions of employment as much as it was in relation to hers.

[2.190] The Federal Magistrates’ Court decision of Harrison v In Control Pty Ltd [2013] FMCA 149 (Harrison) is one of the few cases to date that have given an in-depth consideration to the proper construction of the provision: see at [47]-[83]. The Court more narrowly construed the scope of the protection. The Court confined the words “in relation to his or her employment” to matters regarding the “the applicant’s employment or ... to matters concerning either the terms of the contractual relationship or, as otherwise governed by the statutory framework”: [75]. The Court rejected an argument by the applicant that the section should be widely construed so that the complaint or inquiry does not need to be addressed to any specific person or body to attract the protection of Pt 3-1. In the Court’s view this would render the provision “so wide as to be almost meaningless”: [71]. The Court said that the substantive aspect of the complaint or inquiry would have to “engage the jurisdiction of a body having the capacity under a workplace law to seek compliance” otherwise the ambit of the section would be “too far reaching” and beyond the objects of s 336: [71]. The case involved complaints involving what were essentially managerial matters. The Court said that “none of the matters raised by the applicant directly concerned his employment” and therefore the section did not apply: [80]. The decision therefore, confines the operation of the section to complaints or inquiries regarding an employee’s employment terms and conditions, the source of which can be found in statute or contract. It remains to be seen whether this interpretation will be adopted in future decisions.

[2.200] The requirements of the section are therefore not met merely when an employee makes any complaint or inquiry to a person of authority within their workplace, rather the complaint or inquiry must concern the employee’s employment. The earlier cases involved complaints or inquiries which directly concerned the employee’s terms and conditions of employment, such as payment, overtime and performance issues. Therefore, there was no real dispute that the complaints or inquiries related to their employment. The Harrison decision is one of the few cases that involves complaints or inquiries which concern managerial decisions. The decision suggests that matters considered to be within the scope of managerial prerogative should not come within the criteria of the provision in s 341(1)(c)(ii).

[2.210] The following tentative principles can be identified from the decisions to date:
- It seems to be settled that the complaint or inquiry may meet the criteria of s 341(1)(c)(ii) if it is directed to the employer. See Harrison v In Control Pty Ltd [2013] FMCA 149 and Hodkinson v Commonwealth (2011) 248 FLR 409; 207 IR 129; [2011] FMCA 171.
• The words "in relation to his or her employment" confine the operation of the section to complaints or inquiries that concern the employee’s terms and conditions of employment which arise from statute and/or contract. See Harrison v In Control Pty Ltd [2013] FMCA 149.

• The relationship between the specific complaint or inquiry and the employee’s employment may be indirect in that it is made on behalf of a co-worker, provided that the substance of the complaint or inquiry is a common term or condition of employment. See Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697.

• The substantive content of the complaint or inquiry requires the engagement of the jurisdiction of a body having the capacity under a workplace law or instrument to seek compliance with that law or instrument. See Harrison v In Control Pty Ltd [2013] FMCA 149.

• An employee’s responses to a disciplinary process may not amount to a complaint about her employment. See Hodgkinson v Commonwealth (2011) 248 FLR 409; 207 IR 129; [2011] FMCA 171.

**BOARD OF BENDIGO REGIONAL INSTITUTE OF TECHNICAL AND FURTHER EDUCATION (BRIT) V BARCLAY**

[2.220] The most significant decision relating to Pt 3-1 to date is Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 86 ALJR 1044; 290 ALR 647; [2012] HCA 32. The case is important because it examines the causation element of the protections. In order to establish a contravention of the adverse action provisions the reason for the action must be "because" of one of the proscribed grounds in ss 340, 346 and 351. The High Court essentially adopted the previous construction of equivalent provisions in the predecessors to the current FW Act. The reason for the action must not only be one of the reasons but it must be an immediate or operative reason for the action to found a contravention of Pt 3-1.

[2.230] The case involved a sub-branch president of the Australian Education Union (AEU), Mr Barclay, who also worked as a senior teacher at the Board of Bendigo Regional Institute of Technical and Further Education (BRIT), BRIT was to undergo an audit by the Victorian Registration and Qualifications Authority. If an institute fails such an audit this could jeopardise their status as an education provider. Mr Barclay sent an email to AEU members who worked at BRIT to inform them that some members had been approached by fraudulant documents relating to the audit. He warned the members in the email to refuse to do anything fraudulent. A few days later Dr Harvey, the Chief Executive Officer of BRIT, was given a copy of the email. She was concerned about the impact of the email on the reputation of BRIT. She was also concerned the email was sent without the issues contained in the email being directed to management and she took issue with Mr Barclay’s refusal to provide particulars of the allegations. She ignored Mr Barclay’s duty to keep the confidences of the union members. This duty was acknowledged by the High Court at [30] per French CJ and Crennan J. Dr Harvey also considered Mr Barclay’s conduct to be a breach of the Code of Conduct for Victorian Public Sector employees. She suspended Mr Barclay and denied him access to his computer and the BRIT premises pending an investigation into Mr Barclay’s actions.

[2.240] The primary judge, Tracey J, decided for BRIT. The court accepted Dr Harvey’s evidence that she did not act against Mr Barclay because of his union activities. She "stated that she would have taken the same action in similar circumstances against another person who was neither a member nor an officer of the AEU"; [28] per French CJ and Crennan J. The primary judge said that the correct approach is to determine why the employer took the action against the employee. In answering this question the High Court confirmed that "evidence from the decision-maker which explains why the action was taken is relevant.... if there is ... evidence which persuades the court that it acted solely for a reason other than one or more of the impermissible reasons...then it will make a good defence"; [31] per French CJ and Crennan J. The primary judge concluded that Dr Harvey was a credible witness in this regard. The decision was appealed to the Full Federal Court and the Court reversed the decision, finding for Mr Barclay. The majority of the Court said that the test was to focus upon the real reason for the taking of the action. The Court must search for what actuated the conduct; not for what the employer thinks he or she was actuated by. Where this is "unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question".

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The General Protections and Adverse Action: Four years on

[2.250] The High Court unanimously reversed the Full Court’s decision and affirmed Tracey J’s decision. The High Court rejected the Full Federal Court’s interpretation of the causation test and said that the proper test is whether action has been taken because of a proscribed reason. The Court said that the proscribed reason must be an immediate or operative reason for the conduct: [62] per French CJ and Crennan J, [104] per Gummow and Hayne JJ, [140] per Heydon J. The Court rejected any notion that the test is objective or subjective although in order to assess the reason for the employer action the employer’s subjective intent is central: [44], [121], [126]. The High Court accepted that Mr Barclay’s actions and his position in the union were “inextricably intertwined” with the action taken against him but this did not mean that adverse action was necessarily engaged in by BRIT in suspending Mr Barclay: [61] per French CJ and Crennan J. The High Court however did not disturb the wide interpretation given by the majority of the Full Federal Court to s 346(a). The protection relating to the status of being or a union member or official also includes “activities carried out as an incident of membership” or, “activities incidental to being an official”: Barclay v Board of Bendigo Regional Institute of Technical and Further Education (2011) 191 FCR 212; 203 IR 312; [2011] FCAFC 14, at [37]-[40] per Gray and Bromberg JJ. The approach adopted by North J in Australasian Meat Industry Employees’ Union v Belandra Pty Ltd (2003) 126 IR 165; [2003] FCA 910 was followed.

[2.260] The High Court has made the search for the reason for the treatment against an employee alleging “adverse action” simple. All that is required is that the Court assesses the reason given by the primary decision-maker as to why the employee was treated adversely. If the Court accepts the credibility of the primary decision-maker, as occurred in the Barclay decision, then there is no breach of the Act. However the Court emphasised that, as happened in the earlier High Court decision of General Motors-Holden’s Pty Ltd v Bowling (1976) 51 ALJR 235; 12 ALR 605, if there was no direct evidence given by the primary decision-maker of the reason for the action then it would be very difficult to displace the presumption created by the reverse onus in s 361: [45] per French CJ and Crennan J. Further, direct evidence from the primary decision-maker, although credible, may be discredited or outweighed by other contradictory evidence.

[2.270] In National Tertiary Education Union v Royal Melbourne Institute of Technology [2013] FCA 451 Gray J decided the employer must not only give direct evidence from the decision-maker as to the reason(s) for the action but, it also must refute that the proscribed reasons formed any part of the reasons for acting against the employee: [6]-[7], [131]. In this case the primary decision-maker gave evidence of the reason for making the employee redundant but it did not give evidence refuting the alleged proscribed reasons raised by the National Tertiary Education Union in their statement of claim. In His Honour’s view this meant that the employer had not discharged the onus under s 361. Although the High Court did not directly address the issue in Barclay, Gummow and Hayne JJ at [128] noted:

there is a distinction between discharging the onus of proof and establishing that the reason for taking adverse action was not a proscribed reason, there is [however] nothing to suggest that the conclusions drawn by the primary judge, and the findings and reasons upon which these were based, did not take this into consideration. As Lander J concluded, if the reasons for the conclusions and the facts for which they were formulated are not challenged, then the contravention of s 346 cannot be made out.

CONCLUDING REMARKS

[2.280] The general protections in Pt 3-1 aim to provide strong protection for workers, this is demonstrated by the reverse onus of proof provision in s 361 which is designed to make it easier for applicants to succeed in their claims: Barclay at [86] per Gummow and Hayne JJ. However, there are some clear restrictions to the provisions. The Barclay decision exposes the limitations of using the subjective intent of an employer as the basis for finding liability to attract the protection of Pt 3-1. The reasons for the action can be unreasonable, unfair or even irrational as long as they do not involve a proscribed ground. If the primary decision-maker is a reliable or credible witness then (subject to the other evidence) a court may be bound to find there is no contravention under Pt 3-1. Two recent decisions illustrate this point effectively, Wolfe v Australian and New Zealand Banking Group Ltd [2013] FMCA 65 (Wolfe) and Begley v Austin Health [2013] FMCA 68 (Begley). In both cases the court criticised the employer for their treatment of the employee. In the Wolfe case the court criticised the way the redundancy process was handled as it was lacking in transparency at [99]. In the Begley case the court expressed sympathy to how the employee was “treated extremely shabbily by the organisation to which she had given almost two decades of faithful service”: [393]. However there was evidence in both cases to show that the reason for the treatment was not because of a proscribed ground to find a contravention of Pt 3-1. If the general
protections aid employees in situations where they have been treated unfairly or unreasonably, this is a mere incidental by-product of the protections. The central focus is the protection of workplace rights, freedom of association and workplace discrimination as provided in s 336. This does not necessarily guard against unfair or unreasonable treatment by an employer. This is still the province of the unfair dismissal laws, in respect of dismissals only.