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AN UPDATE ON "ADVERSE ACTION" ACTIONS UNDER SECTION 340 OF THE FAIR WORK ACT[1]

PRESENTED BY JIM PEARCE, DENMAN CHAMBERS[2]

A. INTRODUCTION

Provisions prohibiting an employer from taking adverse action against an employee because he or she is an officer or member of an industrial association, have existed in federal industrial relations legislation in Australia since the enactment of the *Conciliation and Arbitration Act* 1904 (Cth)[3]. However comprehensive adverse action provisions were first introduced in 1996 in Part XA of the *Workplace Relations Act 1996* (WR Act) and are usually referred to as the freedom of association provisions. These provisions were modified by the Work Choices Act amendments (WC Act) to the WR Act in 2006 (as Part XVI of the WC Act). In 2009 the Fair Work Act (FW Act) in Chapter 3 Part 1 Division 3 further modified and extended the operation of these provisions. This Act introduced major changes (some discussed later) significantly widening the reach of the provisions to include adverse action because an employees has or exercises the ability to make a complaint or inquiry[4]. This paper discusses some aspects of "adverse action" under section 340 and deals with some recent judgments explaining its operation.

B. BACKGROUND: GENERAL PROTECTION AFFORDED BY SECTION 340

S. 340(a)(i), (ii) & (iii) of the Act prohibit a person from taking adverse action against another person because the person:

"(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right;

(iii) proposes or proposes not to, or has at any time proposed or proposed not to,

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[1] The law in this outline is current to December 2014.
[2] Barrister, Denman Chambers, Sydney.Liability limited by a scheme approved under Professional Standards Legislation.
[3] For a discussion of the historical provisions see *Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32; since the enactment of the WR Act, the general protections have been enforced through a civil penalty regime, which replaced the criminal offence regime that had been in place since 1904. For further analysis of some aspects of the history of former provisions see also *Elliott v Kodak A/Asia* (2001) 108 IR 23 at [34] – [44] & *AMIEU v Bellandra Pty Ltd* (2003) 126 IR 165 at [30] – [43] & [113 – 133].
[4] Section 341(1)(c)

exercise a workplace right; or …".

S. 340(b) of the Act prohibits a person from taking adverse action against another person *"to prevent the exercise of a workplace right by the other person."*

C. WHO ARE COVERED BY SECTION 340

Person

A person is not defined in the FW Act but it would include any body politic or corporation. In the former s.22(1)(a) of the *Acts Interpretation Act 1901* (Cth) (now s. 2(c)) provided that the word *"person"* in any Act included a body politic or corporation as well as an individual, unless the contrary intention appeared. In *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission and Others*[5] the Court held that the provisions of the former WR Act, which used the term "person", did not manifest a contrary intention, for the purposes of the application of the then s. 22(1)(a) of the *Acts Interpretation Act* in relations to orders made under s. 496(1) of the WR Act that the industrial action stop, not occur and not be organised. If this point were ever argued, the reasoning of the Court, which examined the history of the term where used in Commonwealth industrial legislation is apposite to construing s. 340 and would likely be followed[6].

In *United Motor Search Pty Ltd v Hanson Construction Materials Pty Ltd* an interim order was made for the benefit of one corporation requiring another corporation to provide casual cartage work in accordance with its usual cyclical rostering arrangements[7].The principal of the applicant claimed that the respondent has repudiated its contract with the first applicant and has refused to continue an association with the applicant for reasons because the principal had been actively engaged in industrial activity in that he has engaged in recruitment activities for the Transport Workers Union among other drivers, and further has exercised a workplace right by being involved in actions in Fair Work Australia concerning the respondent.

Employer/Employee – S.335 and s.341(c)(ii)

S. 335 provided that, in the Part, "*employee*" and "*employer*" have their ordinary meanings. This means that the Part covers a wider class of employers and

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[5] [2008] 166 FCR 108
[6] at [30] – [36] & [76]
[7] [2013] FCA 1104

employees than "*national system employer"* and "*national system employee"*[8]. Furthermore by operation of ss.30G & 30R the Part applies to action taken in a State that is a "*referring State"* despite the limitations in ss. 337, 338 & 339. A State is a "*referring State*" if the Parliament of the State has referred the certain "*subject matters"*[9]. In NSW this means basically all employees and employers except those employees and employers excluded by s.6 of the *Industrial Relations (Commonwealth Powers) Act* 2009 (NSW)[10].

Extended Coverage Corporations /Territories Powers

Elsewhere the Part also applies by operation of ss. 337 & 338 to action:

"(a) taken by a constitutionally-covered entity[11]*;*

(b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person;

(d) action taken in a Territory or a Commonwealth place;

(e) action taken by:

(i) a trade and commerce employer; or

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[8] for definition of "*national system employer"* and "*national system employee"* see ss.14 & 13 of the FW Act.

[9] For the reference in NSW see *Industrial Relations (Commonwealth Powers) Act* 2009 s.5; and for the subject matters referred see s.4 definition of "*referred subject matters"*. For *"excluded subject matters"* also see ss. 4 & 6.

[10] S. 6 basically excludes matters relating to Ministers, Members of Parliament, Judicial officers, members of Administrative tribunals, persons in the service of either House of Parliament, or of the President or Speaker, or of the President and Speaker jointly, State public sector employees, persons appointed or engaged by the Governor or a Minister under any Act, law or authority, a member of the NSW Police Force, police cadet or special constable, employees of a local council or county council under the *Local Government Act 1993*, a wholly-owned subsidiary of, or a body wholly controlled by, any such local or county council, the Local Government Association of NSW or the Shires Association of NSW or matters relating to the employer of any of the above.

[11] A "constitutionally-covered entity" is a constitutional corporation, the Commonwealth, a Commonwealth authority; a body corporate incorporated in a Territory or a registered organisation.

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect an employee of the employer;

(f) action taken by an employee of:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect the employee's employer."[12]

D. BACKGROUND: WHAT IS A WORKPLACE RIGHT

S. 341(1) defines a workplace right as:

"(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee--in relation to his or her employment."

s.341(2) defines the meaning of *process or proceedings under a workplace law or workplace instrument* as:

"(2) Each of the following is a process or proceedings under a workplace law or workplace instrument :

(a) a conference conducted or hearing held by FWA;

(b) court proceedings under a workplace law or workplace instrument;

(c) protected industrial action;

(d) a protected action ballot;

(e) making, varying or terminating an enterprise agreement;

[12] S. 338

(f) appointing, or terminating the appointment of, a bargaining representative;

(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;

(h) agreeing to cash out paid annual leave or paid personal/carer's leave;

(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);

(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;

(k) any other process or proceedings under a workplace law or workplace instrument."

Section 12 defines a workplace law as:

"(a) this Act; or

(b) the Fair Work (Registered Organisations) Act 2009 ; or

(c) the Independent Contractors Act 2006 ; or

(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)."

Section 12 defines a workplace instrument as: "*means an instrument that:*

(a) is made under, or recognised by, a workplace law; and

(b) concerns the relationships between employers and employees."

S. 341(3) provides that a prospective employee [subject to limited exceptions set out in ss.341(4) & (5)] is taken to have the workplace rights *"he or she would have if he or she were employed in the prospective employment by the prospective employer".*

Workplace Law – s. 341(1)(a) & (b)

Apart from the defined Acts, workplace laws have been held to include occupational health and safety and workers' compensation laws. In *Dowling v Fairfax Media Publications Pty Ltd*[13] the Court held that WorkCover (NSW) was "a person or body having the capacity under an industrial law to seek compliance with that law" for the

[13] (2008) 172 FCR 96

purposes of s 793(1)(j) of the WR Act[14]. See also *Jones v Queensland Tertiary Admissions Centre Ltd* (No 2) where the Court stated:

"It is not in dispute that a failure by an organisation to deal with workplace bullying may lead to breaches of workplace health and safety laws and potential prosecution of the organisation by Workplace Health and Safety authorities. Such an outcome was, for example, adverted to in Nixon…"[15]**.**

In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 2)*[16] it was not contested that the *Occupational Health and Safety Act 2004* (Vic) was a *workplace law* within the meaning of the Act[17].

However in *ALAEA v Sunstate Airlines*[18] *(Qld) Pty Ltd* the *civil aviation regulations* were found not to be a workplace law. Logan J opined that provisions which do no more than use the status of employer or employee as an incidental touchstone for the imposition of duties serving other ends do not fall within the terms of these definitions. Her Honour stated that:

"Having regard to the dictionary definitions cited by Barker J in ALAEA v International Aviation Service, each of these provisions in the CA Regs might readily be characterised as a provision which "regulates" the conduct of a person to whom it applies but the object of that regulation is not the relationship between that person as an employee and his employer ***but rather that of air safety by the imposition of particular reporting obligations****. Common to the definitions of "workplace instrument" and "workplace law" in s 12 of the Fair Work Act is the object of the relationship between employer and employee. Provisions which do no more than use the status of employer or employee as an incidental touchstone for the imposition of duties serving other ends do not fall within the terms of these definitions."*

One of the regulation in question was reg. 51 dealing with reporting of defects in Australian aircraft and stated in part that "*where a person who, in the course of his or her employment with an employer, is engaged in the maintenance of an Australian aircraft becomes aware of the existence of a defect in the aircraft, the person shall report the defect to his or her employer"*. The other regulation was reg. 215 and stated in part *"each member of the operations personnel of an operator shall comply with all instructions contained in the operations manual in so far as they relate to his or her duties or activities".*

Her Honour's decision is from a policy approach rather unfortunate as at least one

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[14] at [80]
[15] [2010] FCA 399; 186 FCR 22 at [181]
[16] (2011) 213 IR 48 at [10]; see also *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525 at [140]
[17] see also *Flavel v Railpro Services Pty Ltd* [2013] FCCA 1189 as the the SA Act
[18] [2013] 208 FCR 386 at [33] & [37];

Commission of Inquiry and any number of coronial enquiries have stressed the importance of protecting whistle blowing employees in the context of aviation safety/employment and obligations as employees under the CA Regulations[19]. It is also arguably inconsistent with Jessup J's reasoning in *Murrihy*[20] discussed immediately below. Notwithstanding in *Austin v Honeywell Ltd*[21] the FMC found that the Privacy Act was also not a work law applying the main purpose approach set out in *Sunstate.*

Workplace Instrument– s. 341(1)(a) & (b)

In *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd*[22] an ITEA employment agreement was found to be a *workplace instrument*.

The question of whether a contract of employment is a *workplace instrument* has been the subject of contradictory consideration. This is an important question as to whether adverse action will develop into a wider jurisdiction more broadly available in employment law disputes. In *Barnett v Territory Insurance Office*[23] Mansfield J took a narrow view and held that the expression workplace instrument is intended to refer to instruments which are given particular "legal effect" or "legal life" by a statutory enactment. Much of his Honour's reasoning seemed to draw sub-consciously on the recent approach of the NSW Court of Appeal to s.106 of the *Industrial Relations Act* (NSW) about the alleged industrial flavor of that legislation influencing a construction which confines words of otherwise wide import. In *ALAEA v Sunstate Airlines (Qld) Pty Ltd* [24] Logan J stated her agreement with Mansfield J's interpretative deduction that a workplace instrument was one "given legal significance" by reason of a particular workplace law. However her Honour further stated that it was not subversive of that deduction to construe "workplace law" as extending to subordinate legislation such as regulations.

However in *Murrihy v Betezy.com.au Pty Ltd*[25] Jessup J took a contrary and wide view. He stated:

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[19] see for instance Commission of Inquiry into the relations between the CAA and Seaview Air (1994–1996)
[20] [2013] FCA 908
[21] [2013] FCCA 662
[22] (2011) 193 FCR 526 at [2] – [300]
[23] (2001) 196 FCR 116 at [30], [44]
[24] [2013] 208 FCR 386 at [30]
[25] [2013] FCA 908

"… A significant innovation introduced by the FW Act was the imposition of an obligation upon a "national system employer" (such as each of the respondents was) to pay its employees amounts payable to them in relation to the performance of work in full at least monthly: s 323(1) of the FW Act. Thus the legislation picks up, amongst other things, entitlements arising under contracts of employment and gives statutory consequences to an employer's failure to make good on them. In this respect, s 323(1) is a civil remedy provision. There is - and there would have been at the time of the introduction of this provision - no reason to assume that the employees for whose benefit s 323(1) was enacted would be confined to those in unionised sectors and occupations. Perhaps more than ever before, it must realistically be accepted that individual employees, without the benefit of union representation, will often need to seek their own advice and representation in relation to rights arising under federal industrial legislation.
Against the wide terms of s 341(1)(c)(ii), I can think of no reason to assume that the legislature did not regard the protection of an unrepresented employee, who had rights under his or her contract of employment or other agreement with his or her employer, as within the range of protections provided by the provision. That such an employee should be able to have recourse to his or her solicitor, without the fear of repercussions in the nature of "adverse action" taken by the employer, would be well within the purposes of the section as they may be perceived in the legislative context to which I have referred. Further, to regard the seeking of legal advice as an "inquiry" within the meaning of para (c) is, in my view, a natural reading of the provision. I take the view, therefore, that the applicant's proposal, conveyed to Mr Kay on 20 September 2011, that she would seek legal advice was a proposal by her to make an inquiry in relation to her employment within the meaning of s 341(1)(c)(ii) of the FW Act. It follows from my reasons above that Mr Kay's threat to fire the applicant, made on 20 September 2011, amounted to a contravention, by Betezy, of s 340(1)(a)(iii) of the FW Act."[26]

Barnett does not appear to have been cited in *Murrihy* but it is surely inconceivable that Jessup J was not aware of the earlier judgment[27]. Previous FMC judgments and FWC decisions such as *Hodkinson v Commonwealth*[28], *Ratnayake v Greenwood Manor Pty Ltd*[29] and D*evonshire v Magellan Powertronics Pty Ltd & Ors*[30] are all generally consistent with the approach taken in *Murrihy.*

Able to Initiate, or Participate – s. 341(1)(b)

Workplace rights might arise pursuant to s 341(1)(b) which do not arise pursuant to s 341 (1)(a). In the context of s 341(1)(b) "to be able to participate" connotes more than the physical capability of a person to participate in the relevant process or proceedings. Rather, in the context of s 341(1)(b) it connotes the *authority or right* of

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[26] at [143] – [144]
[27] in *Australian Licenced Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd* [2012] 208 FCR 386 Logan J approves Barnett but only as to the meaning of the expression "an instrument made under or recognised by a workplace law …" in s.341(1)
[28] (2011) 207 IR 129, 248 FLR 409
[29] [2012] FMCA 350
[30] [2013] FMCA 207; 275 FLR 273 at [63] – [64]

a person to participate in the relevant process or proceedings. *Jones v Queensland Tertiary Admissions Centre Ltd* (No 2)[31].

Able to Make a Complaint – s. 341(1)(c)

Section 341(1)(c)(ii) had two relevant predecessors, namely, ss. 659(2)(e) and 793(1)(j) of the *Workplace Relations Act 1996* (Cth). These provisions were activated upon "the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation or laws or regulations or recourse to competent administrative authorities", and upon the making of a complaint or inquiry "to a person or body having the capacity under an industrial law to seek ... compliance with that law; or ... the observance of a person's rights under an industrial instrument", respectively. In relation to s 659(2)(e) when it was numbered s.170CK(2)(e), the Full Federal Court held that a complaint by an employee to his or her employer would not be caught by the provision[32].

The provisions of s. 340(1)(a)(i) & (ii), 340(1)(b) in the context of the *workplace right* defined in 341(1)(c) (ii) were new inclusions at the time of the FW Act. Although the genesis of legislative provisions prohibiting adverse action against a person because of his or her workplace right may have been for the protection of right of employees to join industrial organisations it is clear that s 340 extends protection much more broadly[33]. Furthermore the provision should be construed in the light of the explanation in the Explanatory Memorandum:

"1370. Subparagraph 341(1)(c)(ii) specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. Unlike existing paragraph 659(2)(e) of the WR Act, it is not a pre-requisite for the protection to apply that the employee has 'recourse to a competent administrative authority'. It would include situations where an employee makes an inquiry or complaint to his or her employer.

Illustrative examples

Rachel is employed in a night fill position. The ladder that she uses at work to stock the shelves is missing a rung which makes it dangerous for her to climb. Rachel raises this issue with her employer. Under subparagraph 341(1)(c)(ii) Rachel has a workplace right because she has made a complaint/inquiry to her employer in relation to her safety concerns regarding the ladder…"[34]

A Complaint or Inquiry – S.341(c)(ii)

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[31] [2010] FCA 399; 186 FCR 22 at [51]- [52].

[32] *Zhang v The Royal Australian Chemical Institute Inc* [2005] FCAFC 99; (2005) 144 FCR 347, 351 [25].

[33] *Jones v Queensland Tertiary Admissions Centre Ltd* (No 2) [2010] FCA 399; 186 FCR 22 at [62] & at [57]. This was recognised in para 1386 of the Explanatory Memorandum which stated:

'The consolidation of the existing specific WR Act provisions into generally applicable prohibitions means that the new provisions protect persons against a broader range of adverse action."

[34] at [1370]

Section 341(1)(c)(ii) had two relevant predecessors, namely, ss. 659(2)(e) and 793(1)(j) of the *Workplace Relations Act 1996* (Cth). These provisions were activated upon "the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation or laws or regulations or recourse to competent administrative authorities", and upon the making of a complaint or inquiry "to a person or body having the capacity under an industrial law to seek ... compliance with that law; or ... the observance of a person's rights under an industrial instrument", respectively. In relation to s 659(2)(e) when it was numbered s.170CK(2)(e), the Full Federal Court held that a complaint by an employee to his or her employer would not be caught by the provision[35].

However in *Murrihy v Betezy.com.au Pty Ltd*[36] Jessup J after discussing these earlier provisions held that s.341(c)(ii) operated more widely to embrace a complaint by an employee to his or her employer. He observed:

"…*On one view, that would be a wide reading of the provision, but there seems to be little doubt but that the provision was intended to mean what it says. By s 15AB(1)(a) of the Acts Interpretation Act 1901 (Cth), in the construction of a provision of an Act, recourse may be had to the relevant Explanatory Memorandum for the purpose of confirming that the meaning of the provision is the "ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act". In the case of s 341(1)(c)(ii), the ordinary meaning is the wide one to which I have referred. The relevant Explanatory Memorandum noted the wider terms of the new provision by comparison with the previous s 659(2)(e), and observed that the new provision would "include situations where an employee makes an inquiry or complaint to his or her employer". One of the illustrative examples, that of "Rachel", seems apt to cover the meaning for which the applicant contends*[37] …"

Judgments of the Federal Circuit Court have also accepted that s. 341(1)(c)(ii) covers the making of a complaint or inquiry to an employer[38].

In *Murrihy v Betezy.com.au Pty Ltd*[39] Jessup J took the view that advice that the legal advice was being sought falls within the connotation of a complaint or inquiry within the meaning of s 341(1)(c)(ii).

In *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services)*

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[35] *Zhang v The Royal Australian Chemical Institute Inc* [2005] FCAFC 99; (2005) 144 FCR 347, 351 [25].
[36] [2013] FCA 908
[37] at [142]
[38] *see Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341; *Richards v Le Cordon Bleu Australia Pty Ltd and Richards v Le Cordon Bleu* [2013] FCCA 566; *Devonshire v Magellan Powertronics Pty Ltd and Ors* [2013] FMCA 207
[39] [2013] FCA 908

Pty Ltd (No3)[40] s. 341(1)(c) was successfully relied upon in a case concerning an employee on a fixed term contract who raised a number of legitimate safety issues. At the end of the term of his contract he was not offered permanent employment. The Court found that the complaints about the various safety procedures were complaints about the employee's employment in the relevant sense. See also Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)[41].

In Relation To Employment – S.341(c)(ii)

In *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)*[42] Katzmann J took a wide view of the necessary connection between between the complaint or inquiry with the employee's employment and held that the requisite relationship may be direct or indirect. She observed:

"A relationship connotes a connection or association between two things. Phrases like "related to", "relating to" or "in relation to" are prima facie, at least, extremely wide. That much is common ground….In my view, in s 341(1)(c)(ii) the requisite relationship between the complaint or inquiry with the employee's employment may be direct or indirect. No contrary indication may be gleaned from the context of the words or the drafting history... the respondent, conceded that the words should be interpreted broadly, though he submitted they were not without limits. That qualification may be accepted but the limits are to be found in the nature and purpose of the legislation, which includes the protection of workplace rights."

E. BACKGROUND: WHAT IS ADVERSE ACTION

S. 342(1) defines adverse action. It is quite wide and includes action by an employer against an employee; a prospective employer against a prospective employee; an employee against his or her employer; a person who has entered into a contract for services or is proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor ; an independent contractor against a person who has entered into a contract for services with the independent contractor; and an industrial association, or an officer or member of an industrial association against a person. In addition by s.342(2) it is provided that adverse action includes "*threatening to take action covered by the table in subsection (1); and (b) organising such action."*

Onus

[40] [2012] FCA 697

[41] [2013] FCA 525

[42] [2012] FCA 697 at [61] –[65]

The onus is on the person making application to show that the adverse action has occurred. Ross J recently reaffirmed this in *United Firefighters Union of Australia v Easy* when he said:

"But it is important to note that s 361 does not obviate the need for the applicants to prove the existence of the objective facts which are said to provide the basis of the respondent's conduct. The onus does not shift from the applicant to the respondent until the applicant establishes the elements of each of the general protections upon which it seeks to rely. It is not enough for the applicants to merely make assertions regarding these elements, they must be determined objectively."[43]

Refusal to Engage/Employ

Usually where dismissal or termination has occurred it is not difficult to prove adverse action. However circumstances of refusal to make use of, or agree to make use of, services or refusal to employ are more difficult. The antecedent provisions have been given wide operation. In *Employment Advocate v Barclay Mowlem Construction Ltd*[44] the Court concluded that the constructor, by deciding to engage a subcontractor other than the particular subcontractor to undertake the work for which they had tendered notwithstanding its active consideration of their tender, refused to engage the particular subcontractor as an independent contractor within the meaning of s 298K(2)(d) of the then Act[45]. Similarly in *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*[46] the Court held that there can still be a refusal to employ even if there is found to be no available vacancy[47]. In *Maritime Union of Australia v Burnie Port Corp Pty Ltd* [48] the Court held that a refusal to employ the applicant who was under active consideration for two vacancies occurred when the Corporation decided to employ two other persons in preference to the applicant[49].

Injury or Alteration

To constitute an "injury" or an alteration to the position of an employee under s.342 conduct must constitute a prejudicial alteration which is real and substantial, rather

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[43] [2013] FCA 763 at [41]. But cf *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (No 3) [2012] FCA 1218 where the employer *believes* that the protected characteristic or conduct exists and takes action because of such matters. Jessup J found after detailed analysis at [79] – [80], that the employee was not a delegate or representative in the relevant sense, but because the employer *believed* that he was, it was possible to show that adverse action had been taken because of that characteristic.

[44] [2005] 139 IR 19

[45] at [48]

[46] (2003) 126 IR 165

[47] at [49]

[48] (2000) 101 IR 435

[49] at [44] and on appeal in *Burnie Port Corp Pty Ltd v Maritime Union of Australia* (2000) 104 FCR 440 by the Full Court at [14]

than merely possible or hypothetical. The concept of prejudicial alteration is apt to comprehend prejudice extending beyond legal injury. *CPSU v. Telstra Corporation*[50] and *Qantas Airways Limited v Australian Licensed Aircraft Engineers Association*[51] *referring to Patrick Stevedoring v. MUA* [52]*;* see also *Employment Advocate v National Union of Workers and Another* [53]; *Independent Education Union of Australia v. Canonincal Administrators*[54]*; CBA v FSU*[55]*; Squires v Flight Stewarts Association*[56]*.* Comparisons need to be made between the position of the employee or employees before the impugned conduct and their position thereafter *BHP Iron Ore Pty Limited v. Australian Workers Union*[57]*. In United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board*[58]*,* Goldberg J observed that *"The laying of the (disciplinary) charges exposes an employee of the board to a potential disadvantage in his or her employment if the charges are ultimately proven"*[59]*.* In *Kimpton v Minister for Education of Victoria*[60]*,* North J refused to dismiss an application in which it was contended, amongst other things, that a requirement to respond to a written question in the course of an investigation into the applicants' activities in the course of their employment constituted injury in their employment. See also Ryan J in *Police Federation of Australia v Nixon*[61]*; Jones v Queensland Tertiary Admissions Centre Ltd (No 2)*[62]*; Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd*[63]*; Automotive, Food, Metals, Engineering,*

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[50] (2001) 107 FCR 95 at 100. The Court observed at [17] *"In Patrick Stevedores the majority of the High Court held that the subsection covers "not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question". The majority also observed (at 20) that the reorganisation of companies within the Patrick Group resulted in the security of the employer companies' businesses being "extremely tenuous" with the "security of the employees' employment [being] consequentially altered to their prejudice". The reorganisation did not directly affect or alter any legal rights or obligations of the employees but it left their future employment less secure…"*

[51] [2012] FCAFC 63 at [30]

[52] (1998) 195 CLR 1 at 18.

[53] (2000 100 FCR 454 at [43] – [48]

[54] (1998) 87 FCR 49 at 68.

[55] (2007) 157 FCR 329 at [217] – [218] the Court referred with approval to the following passage from *Childs v Metropolitan Transport Trust* (1981) 29 AILR 24: *"I cannot help thinking that "injury" refers to deprivation of one of the more immediate practical incidents of his employment, such as loss of pay or reduction in rank.*

[56] (1982) 2 IR 155

[57] (2000) 102 FCR 97 at 109, 112

[58] (2003) 198 ALR 466

[59] (op cit) at [89]; see also *Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 at [17] & less enthusiastically [116]

[60] (1996) 65 IR 317 at 319

[61] [2008] FCA 467; (2008) 168 FCR 340.

[62] (2010) 186 FCR 22 at [80] & [100] as to a "show cause" letter

[63] (2011) 193 FCR 526 at [292] – [300]

Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 2)[64]. There is no additional requirement to identify an "intentional act" directed to an employee in order to find that there has been an alteration of position to an employee's prejudice. *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd*[65]*. In Australasian Meat Industry Employees' Union v Belandra Pty Ltd*[66]*,* 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. In *Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd* [67] Pagone J said *"there is… in principle nothing objectionable, or contrary to authority, in the broad proposition that to single out an employee on the basis of union membership for denial of a general wage increase which is otherwise available could amount to an injury within the meaning of paragraph (b) in item 1 to the table in s 342(1)".*

It is necessary to identify the person or ascertainable class of persons who it is alleged will suffer injury or have their position altered to their detriment by the course of conduct. *BHP Iron Ore v. AWU*[68]; *CPSU v. Telstra Corporation* [69] (see also *CBA v FSU* [70]). Mere announcement of a proposed course of conduct or decision did not constitute a threat for the purposes of s. 342(2) of the Act. The employer must communicate that the proscribed course of action will be taken *CPSU v. Telstra Corporation Limited*[71] *; NUW v. Qenos Pty Limited*[72]*; Australian and International Pilots Association v Qantas Airways Ltd*[73]*.*

To seek to obtain the consent of employees to a change in existing industrial arrangements by acting in accordance with the relevant provisions of the Act, which allow for a change in the circumstances spelt out in the Act, is not adverse action. ALHMWU v. Liquorland[74]*. Not giving gift vouchers to the striking workers (which were*

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[64] (2011) 213 IR 48; see also *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525 at [105], [115] & [119]
[65] at [303] & [311]
[66] (2003) 126 IR 165
[67] [2014] FCA 239 at [15]
[68] (op cit) at 108.
[69] (op cit) at 101.
[70] (2007) IR 262 at paras.[141] – [146], [221] – [222].
[71] (2000) 99 IR 238 at 243-244.
[72] (2001) 108 FCR 90
[73] (2006) 160 IR 1; and No 2 [2007] FCA 581
[74] (2002) 114 IR 165 at [24] – [25]

given to other workers) is also not an injury. Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd [75] .

"Discriminates between"

There seems to be no rational reason for the distinction which appears in the definitions of adverse action in Item 1 and the other discrimination definitions. In *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)*[76] Katzmann J observed:

"I think it is unlikely — despite the difference in the prepositions used in items 1(d) and 2(a) — that the Parliament had in mind anything other than conduct which discriminated against one employee when compared with other employees... I rather think that the different expressions were used for syntactical reasons. Both parties nevertheless accepted that discriminate in this context means "treat less favourably". That necessarily imports the concept of discriminating against the employee who has been treated in this way [77]"

Her Honour tentatively concluded that Item 1 *"requires that one employee is treated differently from others in the same or comparable circumstances[78]"*.

In *Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd* [79] Pagone J observed:

"Item 1(d) is directed towards different treatment in comparable circumstances and not different treatment for different circumstances. It may be that "discrimination between" does not require a finding that any difference operated adversely to the interests of a person, but item 1(d) does require that any difference be one in comparable circumstances. The respondents in this case elected to give gift vouchers to those employees who had supported the economic interests of the company during a time of industrial action. The decision to reward them in that way was to identify a criterion to qualify for the gift without discrimination of the kind to which item 1(d) is directed: it was not a criterion treating all in the same position differently."

"Discriminates against"

This provision was introduced by the FW Act and was not in the WR Act when it was considered by the High Court in *Patricks.* In *Australian Building and Construction*

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[75] [2014] FCA 239 at [16]
[76] [2012] FCA 697
[77] at [40]; I rather think that this distinction reflects the cringing "craving respectability" syndrome in some PLPALP circles that led to the out-sourcing of the drafting of the FW legislation to all different big end of town firms and hence many internal inconsistencies.
[78] At [43]
[79] [2014] FCA 239 at [18]

Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd[80] the Court stated in the context of construing s. 45 of the *Building and Construction Industry Improvement Act 2005* (Cth) that the notion of "discriminate against" is not satisfied by being treated differently but, rather, requires identification and consideration of burden or adversity and its consequences and that some adversity, disadvantage or detriment must be identified in order to establish that the prohibition in s 45 had been infringed[81]. Although the context of usage is not totally identical it is highly likely the same approach will be taken to the terminology where it is used in s. 342.

F. SECTION 361(1) ONUS OF PROOF

S. 361 provides:

"(1) If:

(a) in an application in relation to contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction."

As a consequence of s. 361(1), where an allegation of person taking adverse action is made for a particular reason or for a particular intent, the Court will presume that the adverse action was engaged in for that reason or with that intent unless the person proves to the contrary. S. 361 is in a similar form to the former s.809(1) of the WR Act 2006 (which was identical to s.298V of the WR Act 1996) and the jurisprudence on the former sections assists the construction of s.361[82].

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[80] [2012] FCAFC 93;

[81] at [26] – [27], [67] – [74] & [111] The decision of Ryan J to the same effect at first instance had been followed by Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480 at [53].The same approach was taken by Gray J in *Cozadinos v Construction, Forestry, Mining and Energy Union* [2012] FCA 46 at [93] where he observed that "There is plenty of scope for the operation of s 45(1) of the BCII Act if "discriminate against" is construed as referring to actions that inflict consequences upon the protected person. It is unnecessary and undesirable to extend the operation of the provision to words that are not capable of producing any consequence."

[82] The approach is supported by the terms of the Explanatory Memorandum which states: "*1459. Clause 361 reverses the onus of proof applicable to civil proceedings for a contravention of Part 3-1. It is intended to broadly cover section 809 of the WR Act.*
1460. Generally a civil action places the onus on the complainant to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a

The test is a subjective test not an "objective test". In *Bendigo Regional Institute of Technical and Further Education v Barclay*[83] French CJ and Crennan J stated:

"There is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression "because" in s 346, or the statutory presumption in s 361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s 361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?" This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence. However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.[84]*"*

Returning to the topic in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [85] French CJ and Kiefel J stated:

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particular intent.
1461. However, subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. This has been a long-standing feature of the freedom of association and unlawful termination protections and recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason."

[83] [2012] HCA 32; (2012) 248 CLR 500 at [45]

[84] at [44] – [45] ; elsewhere the Federal Court has explained the operation the former s.809(1) of the WR Act 2006 as enabling the allegation to stand as sufficient proof of the fact unless the employer proves otherwise. *Davids Distribution v. NUW*(1999) 91 FCR 463 at [109]; *AWU v. BHP Iron Ore* P*ty Ltd* (2000) 106 FCR 482 The same proposition applies where it is alleged that conduct was carried out for reasons that included a prohibited reason. *MUA v. CSL Australia* (op cit) at [40].The operation of the section is only exhausted where there is sufficient evidence to enable a positive finding to be made by the Court that none of the operative reasons for carrying out the conduct was a prohibited reason. *MUA v. CSL Australia* (op cit) at [60]; *Employment Advocate v Barclay Mowlam* (2005) 139 IR 19 at [55] - [57].In *Seymour v. Saint-Gobian Abrasives Pty Ltd* [2007] 161 IR 9 Buchanan J explained the practical operation of s.809(1) as follows: "*Because the respondent must exclude delegateship and membership as a reason for termination, normally sworn evidence denying any such reason is necessary and, in most cases, a explanation of the real reason for dismissal consistent with the absence of delegateship or membership as a reason is, in a practical sense, also necessary. … Where more than one person contributes to a decision to dismiss, it may be necessary to lead appropriate evidence from each such person …"* [29] – [30] The approach of Buchanan J was adopted in *CFMEU v. C. E. Marshall & Son* (2007) 160 IR 223 at [33]. See also *Commonwealth Bank v. FSU* (2007) 161 IR 262 at [118] and *CEPU V Blue Star Pacific Pty Ltd*.

[85] [2014] HCA 41

"The focus of the enquiry … is upon the reasons for Mr Brick taking the adverse action. This is evident from the word "because" … and from the terms of s 361. The enquiry involves a search for the reasoning actually employed by Mr Brick. The determination to be made by the court is one of fact, taking account of all the facts and circumstances of the case and available inferences. In Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1], French CJ and Crennan J observed that it would ordinarily be difficult for an employer who has taken adverse action to discharge the onus of proof in s 361 without calling direct evidence from the decision-maker as to his or her reasons. The court is not obliged to accept such evidence. It may be unreliable for a number of reasons. For example, other objective evidence may contradict it. However, s 346 does not involve an objective test. In Bendigo, Gummow and Hayne JJ explained that it is misleading to use the terms "objective" or "subjective" to describe the enquiry in s 346. To speak of objectively ascertained reasons risks the substitution by the court of its own view, rather than "making a finding of fact as to the true reason of the decision-maker."[86]

And later
"*Section 346 does not direct a court to enquire whether the adverse action can be characterised as connected with the industrial activities which are protected by the Act. It requires a determination of fact as to the reasons which motivated the person who took the adverse action."*[87]

This view was also supported by Gageler J. However indicating that question remains difficult, Hayne and Crennan JJ took a different view. Hayne J stated that it was important:

"to recognise that the central holding in Bendigo was that direct testimony from an employer's decision-maker, if accepted as reliable, is capable of discharging the burden on an employer under s 361(1), even where the employee is an officer or member of an industrial association and engages in industrial activity. Bendigo did not decide that accepting the decision-maker's evidence of why adverse action was taken necessarily concluded the issue in a case where the employee was engaged in industrial activity. As counsel for the Minister, intervening, rightly submitted in Bendigo, "[i]t is an error to reduce the question to a binary choice between believing or rejecting the evidence" of the relevant decision-maker.[88]"

Hayne J found that the dismissal occurred because the employee participated in an offensive manner in a lawful industrial activity and unless some distinction could be drawn between the act of representing or advancing the views or interests of the CFMEU and the *manner* in which that was done, the employee was dismissed for reasons that included his representing or advancing those views and therefore contrary to the Act.

Creennan J agreed with Hayne J's conclusion and added:

"As recognised in Barclay, the provisions present an issue of fact to be decided on the balance of probabilities in the light of all the established facts and circumstances.

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[86] at [7] – [9]
[87] at [19]
[88] at [38]

The court's task is to ask "why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason". In Barclay, the primary judge was satisfied that the decision-maker acted for the reasons she gave. His Honour also accepted her denials that she acted for any reason prohibited under the Act, particularly under s 346(a). Neither party challenged those findings of fact by the primary judge. In this Court it was acknowledged that direct testimony of a decision-maker which is accepted as reliable is capable of discharging the burden of proof cast upon an employer. This does not mean that an assertion by a credible decision-maker that adverse action was not taken because of any prohibited reason will always discharge the statutory onus on an employer to prove that the reasons for taking adverse action did not include a prohibited reason. It is open to a trier of fact to accept as honest and credible a decision-maker's explanation of his or her decision for taking adverse action, then to weigh all the evidence (including an assertion that the decision-maker did not act for any prohibited reason) but not be satisfied that an employer has discharged the statutory onus of proving that the reasons did not include any prohibited reason[89]."

Proof of Objective Facts

While the test of intention is subjective, it is obviously necessary for an applicant to prove the existence of objective facts which provide the basis for the presumption to operate. As Ross J recently stated in *United Firefighters Union of Australia v Easy*:

"But it is important to note that s 361 does not obviate the need for the applicants to prove the existence of the objective facts which are said to provide the basis of the respondent's conduct. The onus does not shift from the applicant to the respondent until the applicant establishes the elements of each of the general protections upon which it seeks to rely. It is not enough for the applicants to merely make assertions regarding these elements, they must be determined objectively."[90]

A Cautionary Word

It will be noted that French CJ and Crennan J absolutely confined their discussion to s.361(1) of the FW Act and did not consider or discuss s.360 of the FW Act. But unfortunately a certain amount of confusion has arisen out of the High Court's judgment at [56] because of the approval of Mason J's comments in *Bowling v General Motors Holdens Ltd* which referring to the then terms of s.5 of the then *C & A Act* (in 1979) and spoke of *"**a** substantial and operative factor in the dismissal".*

At *Bowling's* time s.5 created a number of offences that required, as an element, that an employer disadvantaged an employee *"by reason of the circumstances that the employee"* had engaged in conduct of the type specified in paragraphs (a) to (f) of s. 5(1). S. 5(4) then provided: *"(4) In any proceeding for an offence against this section, if all the facts constituting the offences, other than the reason for the defendant's action, are proved it shall lie upon the defendant to prove that he was not actuated by*

[89] at [55] – [56]
[90] [2013] FCA 763 at [41].

the reason alleged in the charge." It can be seen that s. 5(1) spoke of *"by reason of"* and s. 5(4) of *"the reason for"* and *"the reason alleged".* In s. 5(4) the word *"reason"* is in the singular.

In the *IR Act* 1988 the equivalent provision, s. 334(6), was altered to provide *"(6) In a prosecution for an offence against subsection (1), (2), (3), (4) or (5), it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge".* It can be seen that s. 334(6) now admitted of more than one intention motivating the dismissal.

In 1993 the *IR Act* was amended and the equivalent provisions became ss. 170DF(1) and 170EDA and were again expressed differently. The prefatory words of s.170DF(1) said that *"an employer must not terminate an employee's employment for any one or more of the following reasons,* ***or for reasons including one or more of the following reasons*** *...".* S. 170DF(1) therefore made plain that the proscribed reasons could be one of a number of reasons. Thus the proscribed reason did not need to be the only reason. S. 170EDA required the employer to establish either that if a proscribed reason is alleged, that was not the reason, or if a number of reasons are alleged including a proscribed reason, the proscribed reason was not one of the reasons.

As a consequence of these changes to the legislation, as early as 1995, Moore J cautioned that while the concept of *"substantial and operative factor"* referred to in *Bowling* provided a useful guide in applying s. 170DF and s. 170EDA, it should not distract attention from the width of the language now used in s. 170DF[91].

In 1997 the *IR Act* became the *WR Act* 1996 and the equivalent provisions became ss.298K(1) and 298V and were again expressed differently. The prefatory words of s.298K(1) continued the reference to a number of reasons and said that *"an employer must not, for a prohibited reason, or for reasons that includes a prohibited reason, do or threaten to do any of the following...".* Again the proscribed reason did not need to be the only reason.

In due course s. 298K(1) of the *WR Act* was the subject of consideration by the

[91] *Stojanovic v The Commonwealth Club* [1995] IRCA 667

Courts. In *MUA v. CSL Australia Pty Ltd* [92], relying on *MUA v. Geraldton Port Authority*[93], it was said to be sufficient to show that the conduct complained of was undertaken for a reason that includes a prohibited reason. Several previous Federal Court judgments have, consistently, held that the words *"or for reasons that include a prohibited reason"* in the former WR Act provision, permitted a reason to be the operative reason **even if it is not the substantial reason**. See *MUA v Geraldton Port Authority*[94]; *AWU V John Holland Pty Ltd*[95]; *NUW V Qenos* [96]; *McIlwaine v Ramsey Food Packaging Pty Ltd*[97].

In 2006 the *WR Act 1996* became the *WC Act* 2006 and the equivalent provisions became ss. 792(1) and 809, and were not relevantly changed. Again the proscribed reason did not need to be the only reason. But s. 792 (4) made an exception stating "*An employer does not contravene subsection (1) because of paragraph 793(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the employer doing any of the things described in paragraphs (1)(a), (b), (c), (d) and (e) of this section".* The prohibited reason provided for in s. 793(1)(i) was conduct carried out because the employee was entitled to the benefit of an industrial instrument etc. It seems to me that s. 792(4) represented an acceptance by the Parliament of the line of authority referred to above but with the defined exception.

In 2009 the *WC Act 2006* was repealed and s.360 was introduced. The Parliament's intention was made even more explicit by paragraph 1458 of the Explanatory Memorandum to the *Fair Work Bill 2008* which stated:

"Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. The formulation of this clause embodies the language in existing section 792 which appears in Part 16 of the WR Act (Freedom of Association) and includes the related jurisprudence. This phrase has been interpreted to mean that the reason must be an operative or immediate reason for the action (see Maritime Union of Australia v CSL Australia Pty Ltd). The "sole or dominant" reason test which applied to some protections in the WR Act does not apply in Part 3-1."

However in *Barclay,* Gummow and Hayne JJ appear to have reinstated the former test from *Bowling* when they stated "*In determining an application under s 346 the Federal Court was to assess whether the engagement of an employee in an*

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[92] (2002) 113 IR 326 at [41].
[93] (1999) 93 FCR 34 at [294]- [296]
[94] (op cit)
[95] (2000) 103 IR 205.
[96] (2001) 108 FCR 9 at [57] – [58]
[97] (2006) FCA 824 at [344].

industrial activity was a "substantial and operative factor" as to constitute a "reason", potentially amongst many reasons, for adverse action to be taken against that employee"[98]. The observations of Gummow and Hayne JJ were obiter but leave the situation unclear.

To further the confusion in *Barclay,* Gummow and Haynes JJ have also equated the former test from *Bowling* of *"substantial and operative factor"* as equivalent to "*the operative or immediate reasons"* test as used in *CSL*[99] which plainly it was not. Their Honours were actually referring to *MUA v. CSL Australia* which held, relying on *Greater Dandenong City Council v. Australian Municipal Clerical & Services Union*[100], that relevant reasons are the operative or immediate reasons for the conduct rather than the cause or proximate reasons for the conduct.

In my opinion the clear view is that the test remains as explained in *MUA*. Furthermore, the discussion in *Helal v McConnell Dowell Constructors (Aust) Pty Ltd (No3)* [101] makes clear that the *CSL* test remains the applicable approach. See also *McIlwaine v Ramsey Food Packaging Pty Ltd*[102].

G. APPROACH TO COMPENSATION UNDER SECTION 545 OF THE ACT

While re-instatement remains the primary remedy[103], consideration of compensation will arise if the Court determines that there has been a contravention of s.340 particularly when no order for reinstatement was made pursuant to s.545(2)(c). Recent judgments indicate that the level of compensation available under the FW Act may be analogous to that available under the former s 82 of the *Trade Practices Act 1974* (Cth). In *Australian Licenced Aircraft Engineers Association v International Aviations*

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[98] at [127]
[99] at [103]
[100] (2002) 111 IR 121 (per Merkel & Finkelstein JJ).; see also *Wood v City of Melbourne Corporation* [1979] FCA 22; (1979) 26 ALR 430 at 434
[101] (2011) 285 ALR 281 at [70] – [75]
[102] (2006) FCA 824 at [344].
[103] see for instance *Bowling v General Motors Holdens Ltd* (1980) 50 FLR 79 at 94: *Patricks v MUA* (1998) 153 ALR 626 at 638; *AMIEU v G & K O'Connor* (2000) 100 IR 382 at [43]; *Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2005) 147 IR 315 at [71]; *Seymour v. Saint-Gobian Abrasives Pty Ltd* [2007] 161 IR 9 at [138]; *Perkins v. Grace Worldwide* (1997) 72 IR 186 at 191-192*; Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [190] –[197]

Service Assistance Pty Ltd[104] Barker J observed that the Court has a wide power to make compensation orders. His Honour further stated:

"…the power of the Court under s 545(1) and (2) to make appropriate orders following contravention including an order for compensation is quite divorced from .. contractual consideration. As a matter of broad public policy, the Parliament of Australia has provided that the Court may give appropriate relief where contravention is proved. Relief in these circumstances helps to uphold the policy indicated in the FW Act that, amongst other things, contraventions of the freedom of association provisions should not occur and that appropriate orders should be made to remedy the contravention of such provisions. There is, therefore, in my view, no obvious policy consideration that militates against the making of a compensation order under s 545(1) or a compensation order under s 545(2), for the sorts of reasons that have inhibited the award of damages at common law for a breach of contract which is attended by shock, distress or humiliation[105]*."*

In *Transport Workers' Union of Australia, NSW Branch v No Fuss Liquid Waste Pty Limited*[106] Flick J followed *Australian Licenced Aircraft Engineers Association.* Furthermore in relation to s 298U(c) of the former WR Act, which empowered the Court to make a compensation order of such amount *as the Court considers necessary*, the Court took a broad view of the compensation that should be paid. In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* [107]Marshall J observed that *"Compensation" is a broad concept which should not be interpreted in a narrow way. In an appropriate case the Court is able to order compensation for non economic loss."*

In *Australian Building & Construction Commissioner v Construction, Forestry, Mining & Energy Union & Ors* the Court[108], and later the Full Court[109], was required to consider the meaning of s 49(1)(b) of the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act) which provided that *"an appropriate court, … may make one or more of the following orders in relation to a person who has contravened a civil penalty provision:… (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;…"*.. At first instance Gilmour J accepted

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[104] (2011) 193 FCR 526 at [2] – [300]
[105] at [443]
[106] [2011] FCA 982 at [23]
[107] (2006) 150 IR 179 at [4],see also *McIlwain v Ramsey Food Packaging Pty Ltd (No 4)* (2006) 158 IR 181 at [87]; and *Australian Municipal Administrative Clerical Services Union v Greater Dandenong City Council (No. 2)* [2001] FCA 1076 at [16]
[108] [2011] FCA 810
[109] *Construction, Forestry, Mining and Energy Union v Australian Building and Construction Commission* [2012] FCAFC 44

that reference to s 82 of the *Trade Practices Act 1974* (Cth), which is a similar provision to s 49(1)(b), was a useful analogue. He further stated that:

"*The statutory enquiry is as to actual damages suffered "by conduct of another person" (TPA s 82) or "as a result of the contravention" (BCII Act s 49). As to s 82 TPA common law and equitable remedies to compensate for damages suffered whether in tort, contract or otherwise, whilst they may be helpful are not determinative: Marks v GIO Australia Holdings Ltd [1998] HCA 69; (1998) 196 CLR 494. This too, in my opinion, is apt in respect to the BCII Act s 49. Accordingly, the applicant here requires to establish actual damage suffered by Diploma caused by the contraventions by the Respondents. The applicant has to prove that the damage suffered was a result of the contraventions on the balance of probabilities: Imperial Chemical Industries of Australia and New Zealand Ltd v Murphy (1973) 47 ALJR 122. Whether a party has established causation is a question of fact, ultimately to be resolved by common sense principles informed, where appropriate, by value judgments: March v E & MH Stramare Pty Ltd [1991] HCA 12; (1991) 171 CLR 506 at 515–517 per Mason CJ and 524 per Deane J. In determining the issue of causation, the "but for" test is not conclusive. However, the "but for" test applied in a common sense and not a pedantic way may still provide a useful approach to the issue of causation: McCarthy v McIntyre [1999] FCA 784. It may be enough that the contravention "materially contributed" to the damage: Chappel v Hart (1998) 195 CLR 232; Henville v Walker [2001] HCA 52; (2001) 206 CLR 459. Questions of causation involved in a statutory claim for damages are to be understood by reference to the statutory subject scope and purpose, not by making a value judgment about whether the defendant ought to be held liable: Travel Compensation Fund v Tambree [2005] HCA 69; (2005) 224 CLR 627 per Gleeson CJ at [28]-[29] and [35], per Gummow and Hayne JJ at [45] and [49]."*[110]

His Honour proceeded to award compensation for loss of early completion bonus; wages of Diploma employees; hire costs of temporary personnel; hire costs of certain equipment; and legal costs paid by Diploma. The Full Court accepted the correctness of this approach to s 49(1)(b) of the BCII Act. The wording of this section is very similar to s 545(2)(b) and it is likely this approach will be followed as to construction of s. 545(2)(b).

In *Murrihy v Betezy.com.au Pty Ltd*[111] Jessup J awarded the compensation which was what had been sought ie lost earnings up to the date of the judgment less other earnings up to the date of the judgment [112]. Ms Murrihy might have been stiff[113].

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[110] at [136] – [141]
[111] [2013] FCA 908
[112] at [159]; see also *Flavel v Railpro Services Pty Ltd (No.2)* [2013] FCCA 1449;
[113] in *Kassis v Republic of Lebanon* [2014] FCCA 155 highly respected FCC Judge Raphael dealt with an open ended claim for loss of future earnings following proven adverse action, His Honour stated: *[61] The applicant's final claim in relation to her pay, is for loss of future earnings. The applicant claims a sum of $699,309.00. She claims that this is based on Ms Nasser's rate of pay and that it takes into account a deduction for vicissitudes of life. The applicant claimed that employees in the Lebanese foreign service were usually employed until retirement and submitted that 14 years and 10 months of earnings had been lost. This would*

Finally the Full Court judgment in *Qantas Airways Ltd v Transport Workers' Union of Australia*[114] is instructive. Here the Court was considering s 494(5)(b) of the former *WC Act* which refers to the Court's power to make " any other orders, that the Court considers necessary to stop the contravention [of s.494(1) in relation to stoppage of work] or remedy its effects"[115]. The Court held that that s 494(5)(b) should be read as

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have accounted for Mrs Kassis working with the Consulate to age 65 in April of 2025 [DOB on medical report], the retirement age in Australia at the time the application was made… The principle that compensation should put the injured party in the position that they would have been in had the injury not been suffered – or in the case of a breach of contract, the breach had not occurred – is well established: Butler v Egg and Egg Pulp Marketing Board [1966] HCA 38; (1966) 114 CLR 185, at p 191, Haines v Bendall [1991] HCA 15; (1991) 172 CLR 60 at [1]. However, the court's power to award compensation for losses caused by an employer's contravention of the Fair Work Act under s.545(2)(b) is broad, and full compensation is not required: Qantas Airways Ltd v Gama [2008] FCAFC 69; (2008) 167 FCR 537.The determination of future economic loss, in particular, is necessarily fraught with uncertainty. In the instant case, Mrs Kassis should be put into the position she would have been in had the respondent not contravened the Fair Work Act: Burke v Serco Pty Ltd [2013] FMCA 196. This will require a determination of the appropriate time for which compensation should be granted.The evidence suggests that employment in the Lebanese Foreign Service is for life. … While the applicant has submitted an alternative end date of employment at age 60, I believe that the retirement age of 65, at least at the time of the dismissal, is more appropriate in the circumstances. The applicant's troubles at the Consulate were primarily with Mr Naoum. The evidence also establishes that Mr Naoum was not to remain at the Consulate for very long after Mrs Kassis dismissal. I therefore find it plausible that Mrs Naoum's employment could have continued until the retirement age of 65. This would mean that the initial sum proposed by the applicant of $699,309.00 should be applied prior to deductions. In considering loss of future earnings the court must also consider the present value of the wages which the applicant could have expected to earn had the dismissal and injury not occurred, having regard amongst other things to her health before the injury and to the vicissitudes of life: see for example General Motors-Holden Pty Ltd v Moularas (1964) 111 CLR 324 in relation to directions to juries. The court may also make a deduction for the possibility of the applicant's return to work: Goodman v Pocock (1950) 15 QB 576… The applicant also submits that any work would have to be part time, that there is no evidence as to what that work may be or of the remuneration and finally that the applicant is unlikely to obtain work due to her age… In these circumstances the court can only do the 'best it can' with the evidence available. The manner of calculation of wage loss cannot be a simple multiplication of the current wage less vicissitudes. It is the present value discounted according to the principles set out in Todorovic v Waller [1981] HCA 72; (1981) 150 CLR 402. It is the court's view upon the evidence that Mrs Kassis would recommence her employment (part time) within 2 years. She is entitled to 2 years loss of wages at her rate upon termination… If she returns to part time work from then until the age of 65, the court assesses her loss at 50% of her previous net earnings for 10 years capitalised and discounted subject to the deferred tables less vicissitudes which, because of her age the court would put at 15% as not all vicissitudes are negative. The total award is calculated as follows. For the period post termination on 25 February 2011 up to judgment on 14 February 2014, a multiplication of the number of weeks passed, 155, and Mrs Kassis contractual weekly wage of $846.90 has been used (see [47] of these reasons). This amounts to $131,269.50.For the period of 2 years following judgment, Mrs Kassis is entitled to a present lump sum calculated using her net weekly wage discounted at 3%, with a multiplier for the two years of 101.3 applied. This amounts to: $85,790.97.For the next period of 10 years at 50% of Mrs Kassis ' net weekly wage, or $423.45, she is entitled to a lump sum calculated using that wage discounted at 3%, with a multiplier for ten years of 451.8, deferred for three years using a multiplier of .915. This amounts to: $175,052.96.When combined and reduced by the vicissitudes, the total award is $333,296.42."

[114] [2012] FCAFC 10; 199 FCR 190

[115] s.298U of the WR Act and s.807 of the WC Act were in the same form

empowering the Court to make an order for monetary compensation as one of the range of orders it can make to remedy a contravention of s 494(1) or (3)[116].

As to the calculation of the monetary order- Qantas filed a cross-appeal in relation to the dismissal of its claims in the same proceedings for inducing breach of contract and interference with trade or business by unlawful means at first instance. The Court accepted that the cross-appeal had no utility if the appeal concerning s.494(5) was dismissed, because the damages awarded for either or both of the torts alleged would not differ from the compensation ordered by Moore J on the statutory cause of action[117].

[116] at [14] & [52]
[117] at [3] & [22]