

OUR WORK – OUR LIVES

Adverse Action – a brave new world or same old same old?

Chapter 3 of the *Fair Work Act* 2009 (Cth) contains provisions dealing with the rights and responsibilities of employees that are wide ranging and intended to provide general workplace protections.

The objects of Part 3–1 are set out in section 336 as follows:

“336. *The objects of this Part are as follows:*

- (a) *to protect workplace rights;*
- (b) *to protect freedom of association by ensuring that persons are:*
 - (i) *free to become, or not become, members of industrial associations; and*
 - (ii) *free to be represented, or not represented by industrial associations; and*
 - (iii) *free to participate, or not participate, in unlawful industrial activities;*
- (c) *to provide protection from workplace discrimination;*
- (d) *to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this part.”*

For many years at both the Federal and State level, legislation has provided a patchwork of protection in respect of workplace discrimination.¹ The question that this paper addresses is whether the inclusion of expanded protections in the *Fair Work Act* represents an improvement for workers, or replicates the existing provisions in discrimination legislation, both in substance and in practical effect.

Using the *Anti-Discrimination Act* 1977 (NSW) as a comparison, the paper will compare and contrast the procedure, outcomes and other questions such as the difficulty in establishing discriminatory behaviour, in order to analyse in what circumstances an application under the *Fair Work Act* may be preferable to an action under existing anti-discrimination legislation.

Finally, it will conclude with a review of the first reported decisions on “adverse action” under the *Fair Work Act*, although at the time of writing this paper, none have specifically raised the section that makes discrimination unlawful.

¹ See the attached table for a comparison of grounds of unlawful discrimination under Australian legislation.

Discrimination under the *Fair Work Act*

Section 351(1) of the *Fair Work Act* provides that an employer must not take adverse action against a person who is an employee, or prospective employee of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

"Adverse action" is defined in section 342 of the *Fair Work Act* in a table that contains the following examples.

<i>Adverse action is taken by ...</i>	<i>If...</i>
<i>An employer against an employee</i>	<i>The employer:</i> <ul style="list-style-type: none">(a) <i>dismisses the employee; or</i>(b) <i>injures the employee in his or her employment; or</i>(c) <i>alters the position of the employee to the employee's prejudice; or</i>(d) <i>discriminates between the employee and other employees of the employer.</i>
<i>A prospective employer against a prospective employee</i>	<i>The prospective employer:</i> <ul style="list-style-type: none">(a) <i>refuses to employ the prospective employee; or</i>(b) <i>discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.</i>

How do the new provisions compare with the previous *Workplace Relations Act*?

When the *Fair Work Bill* was introduced, the government stated in its Explanatory Memorandum² that clause 351 was intended to "broadly cover" the existing provisions of the *Workplace Relations Act* which made it unlawful to dismiss any employee for discriminatory reasons³.

While noting that the protection "has been expanded to prohibit any adverse action", it is clear that the description of "adverse action" extends far beyond simply dismissing an employee and can extend to conduct during the employment that injures the employee or alters the position of the employee to the employee's prejudice, and pre-employment activities. As an analysis of the cases later will show, adverse action can amount to any number of activities prior to termination of employment.

² Page 222, paragraph 1424.

³ Previously section s659 of the *Workplace Relations Act* 1996.

The recognition of “workplace rights” is also new and may create additional avenues to challenge action, for example, any retaliation following a bullying and harassment claim could be brought as an adverse action claim for exercising the right to a safe workplace under occupational health and safety legislation.

Who is covered?

We have been familiar with the concept of an unlawful termination in the previous *Workplace Relations Act*. Those provisions have been preserved in Part 6.4 of the *Fair Work Act* from sections 769 to 783. Those sections expressly rely on international conventions, meaning that any employee in Australia still retains those protections.

The general protections provisions do not cover all employees and to the extent that employees remain in State industrial relations systems following referral of state powers, those employees, such as State public sector workers and local government employees in NSW, may not be able to access the adverse action provisions.

In some circumstances conduct may be caught if it affects national system employers, and a close reading of sections 338 and 339 would be warranted to see if coverage was extended by those sections.

For employees in the Federal system however, whether they be employees of constitutional corporations, or employees of entities covered by a referral from the States, the adverse action provisions significantly expand the protection available when compared to the previous *Workplace Relations Act* provisions.

How does the Act compare with other anti-discrimination legislation?

Section 351 lists the grounds on which an employer must not take adverse action. In some instances these grounds are wider than provisions contained in existing discrimination legislation, and in some instances narrower. For example, under the *Anti-Discrimination Act* discrimination on the grounds of transgender status is unlawful. This ground is not contained in the list in section 351.

Before initiating an application under the *Fair Work Act* practitioners would be wise to check that the ground on which they rely is one that is covered by section 351 and not one that is only available under other anti-discrimination legislation.

Compare and contrast

Below is a table which sets out the pathways a discrimination complaint may take under both the *Fair Work Act*, the *Anti-Discrimination Act* or the federal *Sex Discrimination Act*.

FAIR WORK ACT		ADB	AHRC
<p>Complain to FWO</p> <p>FWO may investigate</p> <p>FWO may mediate</p> <p>FWO may bring proceedings</p> <p>Penalties and damages/other orders</p> <p>No costs (to individual)</p>	<p>Complaint to Fair Work Australia</p> <ul style="list-style-type: none"> • Breach of general protections • Discrimination <p>Conference (compulsory if termination) or (by agreement otherwise)</p> <p>Hearing in FC, FMC</p> <p>Penalties and damages/other relief</p> <p>No costs (except in limited cases)</p>	<p>Complaint to ADB</p> <p>Investigation</p> <p>Conciliation</p> <p>Hearing at ADT</p> <p>Damages/other relief</p> <p>Limited costs (only if fair in all the circumstances)</p>	<p>Complaint to AHRC</p> <p>Investigation</p> <p>Conciliation</p> <p>Complaint terminated</p> <p>60 days to start proceedings in FMC/FC</p> <p>Damages and other relief</p> <p>Costs follow the event usually</p>

There are a couple of comments I wish to make about significant differences between the processes –

(a) *Initiating proceedings*

All processes start with a relatively straight forward application form. In the case of a

complaint to the Anti-Discrimination Board, the complainant is asked to set out briefly the conduct that they say amounts to the discriminatory conduct. So too in an application to Fair Work Australia alleging a breach of the general protections, the applicant completes an application form setting out whether they are complaining about adverse action taken in respect of their workplace rights (section 340), their industrial activities (section 346), because of one of the discriminatory grounds (section 351), or because of temporary absence due to illness or injury pursuant to section 352. A complaint to the Fair Work Ombudsman is also made on a detailed prescribed claim form.

Under the State system the Anti-Discrimination Board then attempts to distil the complaint and provide it to the named respondents for their comment. Any response is then returned to the applicant for them to review and comment upon. This process can take some time. By contrast, Fair Work Australia must, in the context of a dismissal, convene a conference and may in other cases convene a conference if the parties can agree. This occurs despite any no response being sought from the respondent prior to the conference. This represents the possibility for early intervention by a trained Fair Work Australia member to attempt to resolve the matter by agreement. While it is possible, in cases of complaints of matters other than dismissal that the employer may not agree to a conference at least that position will be known relatively quickly.

With a complaint made to the Fair Work Ombudsman, it may investigate the complaint, and then arrange a mediation, again if the parties agree. In many respects, this mirrors more closely the ADB/AHRC approach. In the writer's experience, conferences at Fair Work Australia are convened within weeks of the application being lodged, whereas conciliation conferences before the Anti-Discrimination Board or Australian Human Rights Commissions can take place many months after the initial complaint, and it is only at that stage that the employer's complete unwillingness to negotiate any resolution may become fully known.

It remains to be seen how quickly the Fair Work Ombudsman deals with matters. This will largely depend on resourcing. The Fair Work Ombudsman has been quoted as saying "*it is an "evolving area" for the FWO, with its strongest interest in the "discrimination space". He says his organisation has received a few complaints, but "none that are heading off to court immediately by any means".*"⁴

If an applicant is in search of a quick resolution then an application to Fair Work Australia may be preferred.

(b) *Questions of onus.*

Assuming the matter is not resolved through settlement, and proceeds to a hearing, a significant advantage in an application under the *Fair Work Act* are the ancillary provisions contained particularly in sections 360 and 361. These provisions provide that a person takes an action for a particular reason if the reasons for that action

⁴ In an interview with Workplace Express on 10 June 2010,
http://www.workplaceexpress.com.au/nl06_news_selected.php?selkey=42806

include that reason. This means that it is not necessary to show that a decision was based, for example, on someone's sex and for no other reason, or that it was a substantial reason for the decision. It is sufficient if reasons for the action include that reason.

More significantly, however, section 361 reverses the onus of proof in that if it is alleged that a person took action for a particular reason, it is presumed that the action was taken for that reason unless the person proves otherwise. This then places the onus on the respondent to show why the action was taken and that it was not to do with the discriminatory reason.

This is a significant advantage in discrimination matters where an applicant may feel that action was taken for a particular reason but is unable to prove it. This provision means that it is now up to the respondent to demonstrate that the action was not taken for a reason that included the prohibited reason. An employer will of course be able to discharge this if the evidence is clear that the basis for their decision in fact rested on other believable and supportable grounds.

(c) *Technical difficulties in proving discrimination*

The *Fair Work Act* does not contain a definition of what constitutes discrimination. Although section 351 is headed "Discrimination", the section is couched in terms of adverse action against a person who is an employee because of the person's race, colour, sex, etc ...⁵ Going back to the meaning of adverse action in section 342 it simply refers to "*discriminates between the employee and other employees of the employer*".

This lack of definition of discrimination under the *Fair Work Act* will need to be addressed by the courts when they come to consider an application alleging adverse action on the basis of one of the prohibited grounds. Both in the Federal and State anti-discrimination legislation much effort has gone into defining discrimination in a manner which has led, in the writer's opinion, to an overly complicated and complex test for both direct and indirect discrimination which discourages applications and means that some otherwise meritorious applications do not pass the legal test.

In traditional legal assessments of direct discrimination, it is necessary to show that you have been treated less favourably than a person without your characteristic (say, sex) would have been in the same or similar circumstances. This need for a "comparator" has often led to quite torturous assessments of who that appropriate person would be. No area is this more obvious than in cases of pregnancy discrimination where one has to find a comparison employee who is not pregnant yet in the same or similar circumstances of a pregnant person.⁵

In cases of indirect discrimination the test becomes even more difficult for applicants to establish, requiring them to identify with some particularity the discriminatory "condition or requirement", demonstrate that they are unable to comply with the requirement or condition because of their particular attribute, that a substantially

⁵ See Allsop J's comments in *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002) at paragraphs 120-122.

higher proportion of people without their attribute can comply, and the requirement was not reasonable in all the circumstances. This requires an analysis of different sub-groups of employees and the ability to comply or not, a task which is beyond almost all self-represented litigants and, indeed, even some represented litigants.

A review of the cases alleging discrimination on the basis of carer's responsibilities under the NSW *Anti-Discrimination Act* shows that a number of these cases failed simply because they could not address the evidentiary burden imposed by the definition of indirect discrimination in the legislation.⁶

By defining adverse action very broadly to include "*injures the employee in his or her employment*" or "*alters the position of the employee to the employee's prejudice*", it has to be that this will be easier to establish than the traditional tests for direct and indirect discrimination as it requires no comparator.

There may still be a role to play for the traditional concept for comparing the employee with the attribute to other employees in the wording of "*discriminates between the employee and other employees of the employer*". Whether this will be read as discriminating between the employee who has the characteristic and other employees of the employer without the particular characteristic remains to be seen.

(d) *Role of the Fair Work Ombudsman*

Section 539 sets out who can apply for orders in relation to contraventions of civil remedy provisions. An inspector is listed as a person who has standing to apply to a court in relation to a contravention or proposed contravention of the provision, including the maximum penalty.

A complainant could make a complaint to the Fair Work Ombudsman rather than lodging an application with Fair Work Australia if they felt there had been a breach of section 351, leaving it to the Ombudsman to investigate and ultimately prosecute.

It is significant is that the Fair Work Ombudsman has an active role in investigating the complaint, not merely that of seeking a response from the respondent. This is more in the nature of an inquisitorial process, than an adversarial one, and with a Fair Work inspector able to bring civil penalty proceedings, the aggrieved complainant becomes a witness in the case, but does not have the burden of running the litigation.

For unrepresented applicants this may be a more attractive way to address complaints, particularly if their employment is vulnerable. By placing the matter in the hands of an independent "umpire" as it were, it may encourage resolution quickly and efficiently, with possibly broader implications than just the individual's complaint.

⁶ See, for example, *Stokes v Serco Sedexo Defence Services Pty Ltd* [2006] NSWADT 295 (10 October 2006) at paragraph 76, although the Administrative Decisions Tribunal has been prepared to take "judicial notice" of the fact that a substantially higher proportion of persons without responsibilities of infant children can or do comply with the requirements to work full-time. *Tleyji v The TravelSpirit Group Pty Ltd* [2005] NSWADT 294 at paragraph 89.

(e) *Remedies*

Although the orders available under various anti-discrimination acts are broad, in NSW there is a cap on the monetary damages that can be awarded. That cap is currently \$100,000. Depending on the contravention, if the damages sought are going to exceed this cap, the application may be better brought in pursuant to the *Fair Work Act* where damages are uncapped.

If the application is brought under the *Fair Work Act*, penalties can also be imposed in addition to compensation. This may have a significant educative and deterrent effect on other employers.

Case Review

At the date of writing this paper there have been 6 reported cases involving adverse action. No doubt there will be many more as the provisions are tested, and employees, employers and their respective representative bodies get a handle of the extent to which the provisions can operate, and how best they can be used.

The decisions are:

1. *James Paul Benson & Anor v Airlite Windows Pty Ltd* [SYG 2199/2009] (***Airlite***)
2. *Jones v Queensland Tertiary Admissions Centre Limited* [2009] FCA 1382 (25 November 2009) (***Jones No1***)
3. *Jones v Queensland Tertiary Admissions Centre Limited (No. 2)* [2010] FCA 399 (29 April 2010) (***Jones No2***)
4. *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284 (25 March 2010) (***Barclay***)
5. *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Limited* [2010] FCA 590 (11 June 2010) (***Phillips***)
6. *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Phillips Engineering Aus Pty Limited* (2001) FCA 611 (15 June 2010) (***Nobbs***)

Lessons learned from the cases

A common factor with the cases decided to date is that in all of them with the exception of *Jones Nos 1 and 2*, the one of the applicants has been a union. Further, the applications have related to workplace rights and industrial activities, and the facts in *Airlite* do not stray far from claims made under the freedom of association provisions contained in previous *Workplace Relations Acts*.

So far an assessment would have to be that it is “same old same old” with respect to matters that are being heard by the Courts. In general, matters being run by unions to protect their members’ rights.

There are signs of a “brave new world” however.

The matters that have run to date have shown that courts are prepared to grant interlocutory relief and interfere where satisfied there is a serious question to be tried and are taking the view that, generally speaking, the status quo is in favour of the employee either by ordering reinstatement (as in *Phillips*) or preventing termination (as in *Jones No 1*).

At the very least this buys some time while possibly a compromise can be reached by agreement.

Also as it is early days, the categorisation of what is “adverse action” is still very open, but Courts have been prepared to accept that the following types of action could constitute adverse action;

- Issuing a show cause notice
- Undertaking an investigation into allegations of bullying
- Suspension of internet access
- Suspension from work

In the discrimination context, it is easy to imagine that categories of adverse action falling short of termination could include;

- Failure to allow part-time work
- Allocation of less favourable duties on return from parental leave
- Restriction of access to training or promotion
- Selection for redundancy
- Inequitable bonus allocation or limiting participation in other incentive schemes
- Performance and pay reviews
- Disciplinary investigations.

In many of these instances, if the conduct cannot be addressed quickly, there is little point in complaining about it, and it is not worth funding a contested hearing the Federal Court over the issue. Any forum that can offer a quick, and hopefully amicable resolution is welcome in order to maintain the employment relationship and address the discriminatory conduct.

Conclusion

To date we have not had any reported decisions that deal with adverse action on the basis of a proscribed ground set out in section 351. Whether this is because those matters have been successfully resolved at conciliation or whether applicants have not wished to pursue court action, we will not know.

There are certainly matters that started with Fair Work Australia. From 1 July 2009, when Fair Work Australia commenced, to 31 March 2010, there were 2,486 dispute applications lodged. Of these, about 1,100 were dispute applications in respect of dismissal in alleged contravention of the general protections provisions of the *Fair Work Act 2009* or unlawful

dismissal, and around 150 were applications alleging a non-dismissal contravention of the general protections provisions.⁷

For women in particular who face discrimination in their work on the basis of sex, family or carer's responsibilities or indeed any of the grounds in section 351, the adverse action provisions may provide a relatively quick and effective way of addressing that discrimination.

There is the possibility that matters may be resolved quickly by agreement if applications are made to Fair Work Australia, and in circumstances short of dismissal, if the employer is prepared to attend a conference. At the very least, however, a quick resolution to the matter, even if it is unfavourable, may prevent protracted complaint handling processes that ultimately do not assist either party.

The reverse onus of proof is a significant difference to traditional anti-discrimination provisions, and when combined with potentially a simplified discrimination test and the possible abolition of a "comparator" should mean that it is easier to establish an adverse action complaint than a traditional discrimination complaint.

The ability to complain to the Fair Work Ombudsman is also a significant step forward, taking the burden off individual complainants to run matters. Whether the Fair Work Ombudsman actively pursues matters is another question, and whether it is able to do so in a timely manner is yet to be seen. If the Government is serious about the object of "*providing effective relief for people who have been discriminated against*" then there must be the ability to take the burden away from individuals to prosecute complaints, and support an active role for the Fair Work Ombudsman.

With the government announcing plans to harmonise anti-discrimination laws, it will be interesting to see whether we move towards the more streamlined model of the adverse action provisions, or retain the traditional direct and indirect discrimination tests. We need a brave new world, and not the same old same old. The adverse action provisions are a step in the right direction.

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⁷ Figures from a Presentation to Ai Group's National PIR Group Conference, The Fair Work System – Fair Work Australia's Experiences and Insights, Senior Deputy President Jennifer Acton, 19 April 2010 at http://www.fwa.gov.au/about/speeches/ActonSDP_19-April-2010.doc

GROUNDINGS OF UNLAWFUL DISCRIMINATION

Grounds	RDA	SDA	DDA	AGDA	ADA (NSW)	ADA (QLD)	EOA (SA)	RVA (SA)	ADA (Tas)	EOA (Vic)	RRTA (Vic)	EOA (WA)	CCC (WA)	DA (ACT)	ADA (NT)	FWA
Sex		5			24	7(1)(a)	29(1)(a), 29(2), 35(1)		16(e)	6(k)		8		7(1)(a), 8(1)	19(1)(b)	✓ (351)
Marital status		6			39	7(1)(b)	29(1)(c), 29(5), 35(1)		16(f)	6(e)		9		7(1)(d), 8(1)	19(1)(e)	✓
Pregnancy or potential pregnancy		7			24(1B)	7(1)(c)	29(1)(d), 29(6), 35(1)		16(g)	6(h)		10		7(1)(f), 8(1)	19(1)(f)	✓
Family responsibility		7A			49s, 49T	7(1)(o)			16(j)	6(ea)		35A		7(1)(e), 8(1)	19(1)(g)	✓
Parental status					49s, 49T	7(1)(d)			16(i)	6(ea)		35A		7(1)(e), 8(1)	19(1)(g)	
Sexual harassment		28A			22A-22J	118, 119	87		17(2), (3)	85-95		24-26		58-64	22(1), (2)	
Race	9				7	7(1)(g)	51-63		16(a)	6(i)		36		7(1)(h), 8(1)	19(1)(a)	✓
Racial hatred	18c											49A-49D	80A – 80D			
Racial vilification					20C	124A, 131A		4	19, 22(2)		7, 24		77-80	65-67		
Disability			5-9		49A, 49B	7(1)(h)	66-78, 88		16(k)	6(b)		66A		7(1)(j), 9, 8(1)	19(1)(j), 21	✓
Disability harassment			35-40													
Sexuality					49ZG	7(1)(n)	29(1)(b), 29(3), 29(4), 33(2), 35A		16(c)	6(l)		35O		7(1)(b), 8(1)	19(1)(c)	✓
Transsexuality					38B	7(1)(m)	5(1), 29(1)(a), 29(3), 29(4), 33(2), 35A		3, 16(c)	6(ac)		35AA		7(1)(c), 8(1)	4(1), 19(1)(c)	
Age				14-15	49ZYA, 49ZV	7(1)(f)	85A-85E, 85G-85L		16(b)	6(a)		66V		7(1)(lb), 8(1)	19(1)(d)	✓
Political belief or activity						7(1)(j)			16(m), (n)	6(g)		53		7(1)(j), 8(1)	19(1)(n)	✓
Religious belief or activity						7(1)(j)			16(o), (p)	6(j)		53		7(1)(j), 8(1), 11	19(1)(m)	✓
Trade union activity						7(1)(k)			16(l)	6(c)				7(1)(k), 8(1)	19(1)(k)	✓ (346)
Breastfeeding		Pending				7(1)(e)			16(h)	6(ab)				7(1)(g), 8(1)	19(1)(h)	
Associate			15-21		See definition (eg 7 for race)	7(1)(p)			16(s)	6(m)				7(1)(n), 8(1)	19(1)(r)	
Transgender vilification					38S	124A, 131A								65-67		
HIV/AIDS vilification					49ZXB									65-67		
Homosexuality vilification					49ZT	124, 131A			19, 22(2)					65-67		
Religious vilification						124A, 131A			19, 22(2)		8, 25					
Victimisation		94	42	51	50	129-131	86		18	96, 97	13, 14	67		68	23	
Incitement	17		43							98, 99	15, 16				27	
Aiding and permitting	17	105	43, 122	56	52	122-123	90		21	98, 99	15, 16	160		73	27	✓(362)
Vicarious liability	18A, 18E	106			53	114-116, 132-3	91			102, 103	17	161, 162			105	

RDA: *Racial Discrimination Act 1975 (Cth)*
 SDA: *Sex Discrimination Act 1984 (Cth)*
 DDA: *Disability Discrimination Act 1992 (Cth)*

ADA (Qld): *Anti-Discrimination Act 1991 (Qld)*
 EOA (SA): *Equal Opportunity Act 1984 (SA)*
 RVA (SA): *Racial Vilification Act 1996 (SA)*

RRTA (Vic): *Racial and Religious Tolerance Act 2001 (Vic)*
 EOA (WA): *Equal Opportunity Act 1984 (WA)*
 CCC (WA): *Criminal Code Division XI – Racist Harassment and Incitement to Racial Hatred 1990 (WA)*

AGDA: *Age Discrimination Act 2004 (Cth)*
 ADA (NSW): *Anti-Discrimination Act 1977 (NSW)*

ADA (Tas): *Anti-Discrimination Act 1998 (Tas)*
 EOA (Vic): *Equal Opportunity Act 1995 (Vic)*

DA (ACT): *Discrimination Act 1991 (ACT)*
 ADA (NT): *Anti-Discrimination Act 1992 (NT)*
 FWA: *Fair Work Act 2009 (Cth)*