

**Centre for Employment and Labour Relations Law**

**The University of Melbourne**

**Student Working Paper No. 11**

**ADVERSE ACTION IN THE *FAIR WORK ACT 2009* (CTH):  
A CASE OF UNINTENDED CONSEQUENCES?**

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MELBOURNE LAW SCHOOL

ISSN 1837-1418

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# ADVERSE ACTION IN THE *FAIR WORK ACT 2009* (Cth): A CASE OF UNINTENDED CONSEQUENCES?

JENNIFER WINCKWORTH

## I INTRODUCTION

The current adverse action provisions, contained in Part 3-1 of the *Fair Work Act 2009* (Cth) (*FW Act*), have received significant attention from the legal profession in recent times due to concerns regarding their potential scope and effect.<sup>1</sup> These provisions have a long history, as industrial laws have protected workers from victimisation on the basis of their union status or their use of the arbitration system since well before the introduction of the first anti-discrimination statutes.<sup>2</sup> Since the 1990s, the purpose of these anti-victimisation provisions has primarily been to protect freedom of association.<sup>3</sup> Throughout this essay, however, it will be demonstrated that the current adverse action provisions have substantially broadened the operation of these freedom of association protections beyond their intended scope and effect. This is particularly so in light of their most recent judicial interpretation, which has resulted in a significant shift in the balance between employee protections and employer rights. The potential implications of this for employers in the context of employees who are union members or delegates are of particular importance.

This essay will first introduce the concept of ‘balance’, which provides the policy context in which the current provisions were enacted. The key differences between the provisions in the *FW Act* and the predecessor freedom of association and unlawful termination provisions in the *Workplace Relations Act 1996* (Cth) post-Work Choices (*WR Act*)<sup>4</sup> will then be analysed, highlighting the effect of such differences on the scope of the current protections. Third, the first significant judicial decision to have substantively considered the application of the adverse action provisions, the Full Federal Court case of *Barclay v Board of Bendigo Regional Institute of Technical and Further Education*<sup>5</sup> (*Barclay*), will be examined. It will be demonstrated that the majority decision in *Barclay* considerably broadens the scope and application of the adverse action provisions. It is argued that a significant consequence of this is that the adverse action provisions, particularly post-*Barclay*, strike a balance between employee protections and employer rights which was unintended by parliament, as it is skewed too heavily in favour of the former, resulting in significant implications for the latter.

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<sup>1</sup> See, eg, Emma Goodwin and Bianca Friedman, ‘General Protections under Part 3-1 of the Fair Work Act: key features and protection of workplace rights’ (2011) 17(3-4) *Employment Law Bulletin* 48; Gareth Jolly, ‘The first 100 days of Fair Work: The rise and rise of employee claims’ (2009) 15(9) *Employment Law Bulletin* 91; Giri Sivaraman, ‘Adverse Action: Broader protections withstand the test’ (2001) 49(3) *Law Society Journal* 62; Neil Napper, ‘Adverse Action: Protecting union officers and activities’ (2011) 2(1) *Workplace Review* 8.

<sup>2</sup> Andrew Stewart, *Stewart’s Guide to Employment Law* (The Federation Press, 3<sup>rd</sup> ed, 2011) 262.

<sup>3</sup> Note that more recently, this purpose has also extended to protect the freedom not to associate; Breen Creighton and Andrew Stewart, *Labour Law* (The Federation Press, 5<sup>th</sup> ed, 2010) 566; Stewart, ‘Guide to Employment Law’, above n 2, 262.

<sup>4</sup> *Workplace Relations Act 1996* (Cth) as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). Note that the *Workplace Relations Act 1996* (Cth) has now been renamed as the *Fair Work (Registered Organisations) Act 2009* (Cth).

<sup>5</sup> (2011) 191 FCR 212.

## II FORWARD WITH FAIRNESS AND THE NOTION OF BALANCE

The adverse action provisions were introduced as part of the Australian Labor Party's ('ALP') broader reforms to the existing workplace relations regime, which was based around a policy termed 'Forward with Fairness'.<sup>6</sup> This policy formed a significant part of the ALP's 2007 election campaign and was designed to bring about important changes to the previous *WR Act*. The desire to restore *balance* to the regulatory system post-Work Choices dominated the Labor Government's Forward with Fairness policy,<sup>7</sup> as it sought to '[get] the balance right'<sup>8</sup> between employee protections (for example, against victimisation and unfair dismissal) and employer rights (such as the right to manage employees).<sup>9</sup>

The ALP's policy objective of balance is 'front and centre'<sup>10</sup> in the *FW Act* as evidenced by s 3, which states that the object of the legislation is 'to provide a *balanced* framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.'<sup>11</sup> Whilst the adverse action provisions are clearly intended to provide protection for employees, it has been argued that these provisions confer upon employees a range of protections which 'go beyond those previously available under the former *WR Act*'.<sup>12</sup> Given that many commentators and practitioners have highlighted the substantial possibilities that the provisions offer employees and the related difficulties this creates for employers,<sup>13</sup> it is important to consider the extent to which the Labor Government's notion of 'balance' between employee protections and employer rights is being achieved by the adverse action provisions today.

## III LEGISLATION: THE EXPANDING PROTECTIONS

In order to assess the implications of the current adverse action provisions on the balance between employee protections and employer rights, it is first necessary to consider the extent to which the legislative provisions themselves expand or narrow the scope of protection afforded to employees when compared to that which previously existed under the *WR Act*.<sup>14</sup> In turn, this involves a consideration of whether the *FW Act*

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<sup>6</sup> Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, Australian Labor Party, Canberra 2007.

<sup>7</sup> Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 45.

<sup>8</sup> Kevin Rudd and Julia Gillard, *Forward with Fairness: Policy Implementation Plan*, Australian Labor Party, Canberra 2007, 2; Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3, 46.

<sup>9</sup> Stewart, 'A Question of Balance', above n 7, 45-46.

<sup>10</sup> *Ibid* 46.

<sup>11</sup> *FW Act* s 3 (emphasis added); Stewart, 'A Question of Balance', above n 7, 46 (emphasis in original). Note also that it is clear from the various goals outlined in s 3 that a balance between productivity and protection is a central aim of the *FW Act* – see, eg, *FW Act* ss (3)(f) and (g) in relation to productivity and ss (3)(b), (c), (d) and (e) in relation to protection.

<sup>12</sup> Goodwin and Friedman, 'Key Features and Protection of Workplace Rights', above n 1, 48.

<sup>13</sup> Goodwin and Friedman, 'Key Features and Protection of Workplace Rights', above n 1, 48; see also, eg, Bryan Mueller and Sual Harben, *Adverse action under the Fair Work Act clarified by the Barclay decision* (16 March 2011) Clayton Utz <<http://www.claytonutz.com>>.

<sup>14</sup> The key predecessor provisions in the *WR Act* were those which related to freedom of association and unlawful termination and were contained in Part 16 and Part 12, Division 4, respectively; Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11193 (Julia Gillard).

imposes greater or lesser obligations on employers. While historically, the scope of the predecessor protections in the various federal statutes has expanded gradually over time,<sup>15</sup> it has been argued that the introduction of the adverse action provisions constitutes one of the most profound changes to the existing *WR Act*.<sup>16</sup> Indeed, commentators have argued that the provisions in the *FW Act* relating to 'workplace rights' and 'industrial associations/activities' are significantly greater in scope than the corresponding freedom of association and unlawful termination provisions in the *WR Act*.<sup>17</sup> While the Explanatory Memorandum ('*EM*')<sup>18</sup> outlines that the *FW Act* was intended to consolidate and 'rationalise, but not diminish, existing protections'<sup>19</sup> it is expressly acknowledged that in some cases, the consequence of providing these general protections has expanded their scope.<sup>20</sup> This essay will outline the key adverse action provisions in the *FW Act* and analyse the nature and extent to which they differ in scope from the predecessor provisions in the *WR Act*.<sup>21</sup>

### **A The Definition of 'Adverse Action'**

The *FW Act* prohibits an employer from taking, or threatening to take, adverse action against an employee where such action is taken for a proscribed reason.<sup>22</sup> 'Adverse action', which is a new concept introduced by the *FW Act*,<sup>23</sup> is therefore a key definition that 'intersects with a number of substantive protections'<sup>24</sup> in Part 3-1. It is broadly defined in s 342 of the *FW Act* as being where the employer 'dismisses the employee,'<sup>25</sup> 'injures the employee in his or her employment,'<sup>26</sup> 'alters the position of the employee to his or her prejudice'<sup>27</sup> or 'discriminates between the employee and other employees.'<sup>28</sup> While in substance, the forms of conduct are largely the same as those proscribed by s 792 of the *WR Act*,<sup>29</sup> the insertion of the broad ground of discrimination is a new type of proscribed action which provides current employees with an additional form of protection that was previously unavailable under the *WR Act*.<sup>30</sup> There is significant debate and uncertainty regarding the meaning of 'discrimination' in this

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<sup>15</sup> Simon Rice and Cameron Roles, 'It's a Discrimination Law Julia, But Not As We Know It': Part 3-1 of the Fair Work Act' (2010) 21(1) *The Economic and Labour Relations Review* 13, 16.

<sup>16</sup> Goodwin and Friedman, 'Key Features and Protection of Workplace Rights', above n 1, 48

<sup>17</sup> Creighton and Stewart, above n 3, 561; Goodwin and Friedman, 'Key Features and Protection of Workplace Rights', above n 1, 48; Alex Manos and Nick Ruskin, 'Widening the scope of legal actions against employers – Fair Work Act 2009' (2009) 12(8) *In House Counsel* 97; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> Ed, 2011) 547.

<sup>18</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth).

<sup>19</sup> *Ibid* 1336.

<sup>20</sup> *Ibid*.

<sup>21</sup> For the purposes of this essay, only those provisions which provide protection to employees will be considered.

<sup>22</sup> See generally, Stewart, 'Guide to Employment Law', above n 2; Creighton and Stewart, above n 3.

<sup>23</sup> Joe Catanzariti, 'Adverse action no longer an abstraction' (2010) 48(4) *Law Society Journal* 44.

<sup>24</sup> *EM* 1383.

<sup>25</sup> *FW Act* s 342(1)(a).

<sup>26</sup> *Ibid* s 342(1)(b).

<sup>27</sup> *Ibid* s 342(1)(c).

<sup>28</sup> *Ibid* s 342(1)(d).

<sup>29</sup> See, eg, *WR Act* ss 792(1) and (5) and s 659.

<sup>30</sup> *FW Act* s 342(1)(d); cf *WR Act* ss 792(1)(e) and (5)(e), which provide that discrimination is only relevant in so far as it applies to 'the terms or conditions on which the employer offers to employ' a person as an employee (emphasis added).

context,<sup>31</sup> as it is a new provision in federal industrial law in Australia<sup>32</sup> and is not defined in the *FW Act*.<sup>33</sup> However, despite this uncertainty, when combined with the consolidation of the pre-existing specific grounds of protection under the *WR Act* (discussed below), it becomes clear that the new provisions protect employees against a broader range of victimisation than was the case under the *WR Act*.<sup>34</sup>

## **B The Consolidated Grounds of Protection**

The *FW Act* consolidates and streamlines the various grounds of protection for which an employer is prohibited from taking adverse action. The protections have been divided into three categories, namely, protections relating to ‘workplace rights’,<sup>35</sup> ‘industrial activities’<sup>36</sup> and other protections.<sup>37</sup> While the form and language of the *FW Act* provisions are significantly different to those under the *WR Act*, they still ‘firmly enshrine the freedom both to associate and not to associate’,<sup>38</sup> although, as will be discussed, they appear to go further in certain respects.

Division 4 of Part 3-1 sets out the provisions which protect employees against adverse action because of their membership or non-membership of an industrial association, or because of their engaging or not engaging in certain industrial activities.<sup>39</sup> The various forms of ‘industrial activity’ defined in the *FW Act* encompass those set out in the *WR Act*,<sup>40</sup> although they appear to be cast slightly more broadly in scope.<sup>41</sup> More significantly, however, the new definition of ‘industrial association’ represents a more fundamental change when compared with the *WR Act*,<sup>42</sup> as it now includes registered and unregistered bodies,<sup>43</sup> as well as formally and informally formed associations of employees.<sup>44</sup> The implication of this in the context of the adverse action protections is that an employee exercising representative functions in the workplace, such as advancing the views of an industrial association,<sup>45</sup> would be protected even if they are not a union member, officer or workplace delegate.<sup>46</sup> Through extending legal

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<sup>31</sup> See, eg, Carol Andrades, ‘Intersections between ‘General Protections’ Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries’ (Working Paper No 4, Centre for Employment and Labour Relations Law, December 2009); Fair Work Ombudsman, *FWO Discrimination Policy: Guidance Note 6* (17 December 2009), 5.4 <<http://www.fairwork.gov.au/guidancenotes/GN-6-FWO-Discrimination-Policy.pdf>>; Beth Gaze and Anna Chapman, (2009) ‘An introduction to the general protections in the *Fair Work Act* and anti-discrimination law’, Paper to Workshop, *Intersections between General Protections Fair Work Act and Anti-Discrimination Law: Questions, Quirks and Quandaries*, Centre for Employment and Labour Relations Law, Melbourne Law School; Rice and Roles, above n 15, 24; Carolyn Sappideen et al, *Macken’s Law of Employment* (Thomson Reuters, 7<sup>th</sup> ed, 2011) 606; Belinda Smith, ‘Legislative Developments: Fair and Equal in the World of Work: Two Significant Federal Developments in Australian Discrimination Law’ (2010) 23 *Australian Journal of Labour Law* 199.

<sup>32</sup> Rice and Roles, above n 15, 21.

<sup>33</sup> Sappideen, above n 31, 606.

<sup>34</sup> *EM* 1386.

<sup>35</sup> *Ibid* 1338.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid*.

<sup>38</sup> Stewart, ‘Guide to Employment Law’, above n 2, 262.

<sup>39</sup> *FW Act* s 346; see also Stewart, ‘Guide to Employment Law’, above n 2, 265; Owens, Riley and Murray, above n 17, 546.

<sup>40</sup> *FW Act* s 347; cf *WR Act* s 793(1)(a)-(h) and (m)-(p).

<sup>41</sup> Sivaraman, above n 1, 63.

<sup>42</sup> Owens, Riley and Murray, above n 17, 547.

<sup>43</sup> *FW Act* s 12.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid* s 347(b)(v).

<sup>46</sup> *EM* 1417.

protection to unregistered, less formal collectives of workers,<sup>47</sup> the *FW Act* clearly provides broader protections to employees than the previous *WR Act* did.

Further, Division 3 of Part 3-1 of the *FW Act* prohibits adverse action being taken against an employee because that employee has a 'workplace right', or because of the exercise or non-exercise of that right by the employee or a third party (such as a union member or official).<sup>48</sup> The term 'workplace right' did not exist under the predecessor provisions in the *WR Act*,<sup>49</sup> which was significantly narrower in scope.<sup>50</sup> 'Workplace right' is broadly defined in s 341 and includes, most relevantly, where an employee is able to make a 'complaint or inquiry...in relation to their employment.'<sup>51</sup> The addition of this workplace right is an 'entirely new provision'<sup>52</sup> which, unlike s 659(2)(e) of the *WR Act*, does not require that the employee has 'recourse to a competent administrative authority' as a prerequisite for the protection to apply.<sup>53</sup> Therefore, it is possible that:

*'an employee who makes any complaint or enquiry to any body or person about any matter relating to their employment, even if the 'matter' does not pertain to a workplace law or workplace instrument, would still be entitled to the protection of Division 3.'*<sup>54</sup>

Whether the scope of the provision is as broad as this, however, depends on the interpretation given to, first, the reference to an employee being 'able' to make a complaint or enquiry and secondly, to the breadth of the phrase 'in relation to [their] employment'.<sup>55</sup> The *EM* provides no clarification of these issues and as such, judicial guidance is necessary.<sup>56</sup>

Finally, although it is not fully examined in this paper, it is also worth noting that the introduction of a general anti-discrimination provision has significantly expanded the scope of protection afforded to employees when compared with the *WR Act* regime.<sup>57</sup> Whilst previously employees were only protected from workplace discrimination if they were *dismissed*,<sup>58</sup> under s 351 of the *FW Act*, employees now have a general discrimination cause of action,<sup>59</sup> which protects employees from discrimination in circumstances extending beyond mere termination.<sup>60</sup> Although a comprehensive consideration of these changes is beyond the scope of this essay, it is evident that s 351 further expands the protections available to employees under the *FW Act*.<sup>61</sup>

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<sup>47</sup> Owens, Riley and Murray, above n 17, 547; *EM* 1417.

<sup>48</sup> *EM* 1382; Stewart, 'Guide to Employment Law', above n 2, 264.

<sup>49</sup> *WR Act* ss 793 and 659(2)(e).

<sup>50</sup> Creighton and Stewart, above n 3, 561.

<sup>51</sup> *FW Act* s 341(1)(c)(ii); Owens, Riley and Murray, above n 17, 544.

<sup>52</sup> Goodwin and Friedman, 'Key Features and Protection of Workplace Rights', above n 1, 49; Owens, Riley and Murray, above n 17, 560.

<sup>53</sup> *EM* 1370; See also the similar restriction in s 793(1)(j) of the *WR Act*.

<sup>54</sup> Creighton and Stewart, above n 3, 560.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> See, eg, Rice and Roles, above n 15, 18; Smith, above n 31.

<sup>58</sup> *WR Act* s 659(2)(f), see also *EM* 1424; Stewart, 'Guide to Employment Law', above n 2, 266.

<sup>59</sup> Terri Butler, 'Protection from dismissal and 'adverse action' for discriminatory reasons (2009) (94) *Precedent* 10.

<sup>60</sup> Rice and Roles, above n 15, 17.

<sup>61</sup> See, eg, Andrades, above n 31; Butler, above n 59; Rice and Roles, above n 15; Smith, above n 31.

### **C Reverse Onus and Multiple Reasons for Action**

A long-standing feature of the freedom of association protections has been the reverse onus of proof.<sup>62</sup> Once the claimant has proven that they have a protected entitlement (for example, a workplace right) and that adverse action has been taken against them, the respondent-employer is then required to prove, on the balance of probabilities, that they did not take adverse action for a proscribed reason.<sup>63</sup> This reverse onus of proof is adopted in s 361 of the *FW Act* and therefore does not alter the balance between employee protections and employer rights.

Importantly, in order to establish a contravention, the *FW Act* provides that the prohibited reason need only be one of the reasons which motivated the respondent to take adverse action.<sup>64</sup> This differs from the position under the *WR Act* where, if a claimant alleged adverse action on the basis that they had ‘the benefit of an industrial instrument’,<sup>65</sup> a contravention would only occur if the prohibited reason was the ‘sole or dominant reason’<sup>66</sup> for the respondent’s conduct.<sup>67</sup> This requirement under the *WR Act* therefore operated as ‘an effective defence for many employers’<sup>68</sup> who could argue that their action was not taken solely or dominantly for a prohibited reason but was instead taken for a range of reasons.<sup>69</sup> As such, at least in relation to the protections regarding ‘workplace rights’, the *FW Act* returns the law to its pre-Work Choices position,<sup>70</sup> and in doing so, significantly increases the difficulty of defending an adverse action claim, thereby shifting the balance between employee protections and employer rights in favour of employees.

### **D The Legislative Framework: Where has the balance been struck?**

While nothing in the Act or the *EM* indicated that the *FW Act* was intended to bring about a substantive change in the law relating to the freedom of association provisions,<sup>71</sup> it is clear from the above analysis that the *FW Act* protections are significantly broader in scope than their predecessors under the *WR Act*. Indeed, commentators have suggested that the *FW Act* provisions appear to ‘require a form of fair treatment at work,’<sup>72</sup> which clearly indicates that the legislation has extended beyond the original goals of protecting freedom of association and preventing victimisation based on union membership or activity.<sup>73</sup> An obvious consequence of this is to shift the balance between employee protections and employer rights in favour of

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<sup>62</sup> Ian Colgrave, ‘Employee Protections in the Fair Work Act: Adverse Action Against Employees Exercising Workplace Rights’ (2010) 32(9) *Bulletin (Law Society of South Australia)* 12; John Colvin, Graeme Watson and Nicholas Ogilvie, *An introduction to Industrial Relations Reforms* (Lexis Nexis, 2006) at 114; Rice and Roles, above n 15, 20.

<sup>63</sup> Creighton and Stewart, above n 3, 571; Stewart, ‘Guide to Employment Law’, above n 2, 268.

<sup>64</sup> *FW Act* s 360; Stewart, ‘Guide to Employment Law’, above n 2, 268.

<sup>65</sup> *WR Act* ss 793(1)(i) and 792(4).

<sup>66</sup> *Ibid.*

<sup>67</sup> Owens, Riley and Murray, above n 17, 548; Goodwin and Friedman, ‘Key Features and Protection of Workplace Rights’, above n 1, 48.

<sup>68</sup> Andrew Gray, ‘Employment Law: Protections against adverse action – the new protections available to employees under the Fair Work Act’ (2011) 63(4) *Keeping Good Companies* 233, 234.

<sup>69</sup> *Ibid.*

<sup>70</sup> Owens, Riley and Murray, above n 17, 548.

<sup>71</sup> *EM* 1336.

<sup>72</sup> Creighton and Stewart, above n 3, 561.

<sup>73</sup> *Ibid.*

employees when compared to the position under the *WR Act*. In turn, the *FW Act* provisions therefore provide broader and more uncertain requirements for employers. In any event, the extent of this shift (and its practical implications) will largely depend upon the interpretation given to these provisions by the judiciary, which will be discussed below.

#### IV JUDICIAL INTERPRETATION: THE *BARCLAY* DECISION

A key aspect of the protection for employees, which was also a requirement under the *WR Act*, is that, for the employer's action to constitute a contravention of the *FW Act*, it must be taken 'because'<sup>74</sup> the aggrieved person had/exercised a protected entitlement.<sup>75</sup> It is this requirement for some form of 'causal nexus' that has been the subject of recent judicial interpretation and which has the capacity to substantially affect the balance between employee protections and employer rights. The interpretation of this requirement is particularly significant given the existence of the reverse onus of proof and the requirement that the prohibited reason not form part of the reasons why adverse action was taken. The major case to have considered this issue under the current legislation is the Full Federal Court decision in *Barclay*, which will be critically examined below.

##### ***A Barclay: First Instance Decision***

This case concerned an adverse action claim by Greg Barclay ('*GB*') against his employer, Bendigo Regional Institute of TAFE ('*BRIT*'). *GB* was a senior teacher at *BRIT*, as well as the sub-branch president of the Australian Education Union ('*AEU*'). He sent an email to *AEU* members alleging that there had been reports of individuals producing fraudulent documents in preparation for a pending audit of *BRIT* and urged members not to participate in such activities.<sup>76</sup> At no point did *GB* notify any manager of the alleged fraudulent activity.<sup>77</sup> Dr Louise Harvey, the Chief Executive Officer of *BRIT*, obtained a copy of the email and, after *GB* declined to provide the names of his informants, subsequently suspended *GB* and initiated disciplinary proceedings against him.

The reasons stated by Dr Harvey for *BRIT* taking action against *GB* related to the manner in which he raised the allegations, the fact that he had failed to report the alleged improper conduct and his refusal to provide particulars when requested to do so by his manager, all of which she believed constituted a breach of the Code of Conduct for Victorian Public Sector Employees.<sup>78</sup> The *AEU* and *GB*, however, claimed that *BRIT* took action against him because he was an officer of the *AEU* and because he had

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<sup>74</sup> Note that although the *WR Act* used the language 'for the reason that' instead of 'because', this difference has unanimously been held to be 'stylistic, not substantive': *Barclay* (2011) 191 FCR 212, 24 (Bromberg and Gray JJ), 191-193 (Lander J); *Barclay v Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 72.

<sup>75</sup> *Barclay v Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 20-21.

<sup>76</sup> *Barclay v Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

<sup>77</sup> *Barclay v Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251; Catanzariti, above n 23, 44.

<sup>78</sup> *Barclay v Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 8.

engaged in industrial activity (for example, he was representing and advancing the views of the *AEU*).<sup>79</sup>

At first instance, Justice Tracey outlined that ‘the central issue in this case is...whether a causal nexus exists between an employee’s union membership and activities and any prejudicial action about which complaint is made’.<sup>80</sup> On the basis of Dr Harvey’s evidence of her innocent subjective reasons for suspending *GB*, Tracey J held that the adverse action was not taken ‘because’ of *GB*’s union status or involvement in industrial activities.<sup>81</sup>

## ***B Appeal to the Full Federal Court***

On appeal, *GB* was successful by a 2:1 majority. In dissent, Justice Lander largely adopted the approach taken by Justice Tracey at first instance, whereas the majority (Bromberg and Gray JJ) held that Dr Harvey’s grounds for taking action included a proscribed reason, and therefore constituted a contravention of the *FW Act*. The key difference in reasoning between the various judgements appears to have been in relation to ‘the relevance of a finding as to subjective intention’.<sup>82</sup> As will be demonstrated, the majority seems to have adopted an objective approach, which evidences a critical departure from the existing jurisprudence.<sup>83</sup> In addition, in adopting such an approach, the majority decision appears to be inconsistent with the parliamentary intent in relation to the application of the adverse action provisions. Crucially, it will be argued that this approach has the unintended consequence of significantly broadening the scope of protection afforded to employees by these provisions. Whilst special leave to appeal to the High Court has been granted on this point,<sup>84</sup> the Full Court decision is currently the most authoritative statement on the application of the adverse action provisions.

### *1 Borrowing from Anti-Discrimination Jurisprudence: the Majority’s Objective Approach*

In reaching their decision, the majority heavily relied on the High Court’s reasoning in the anti-discrimination decision of *Purvis v Department of Education and Training (NSW) (‘Purvis’)*,<sup>85</sup> and in doing so, appear to have applied an objective approach. Their Honours held that the causal requirement of ‘because’ necessitates a determination of the ‘real reason’<sup>86</sup> for the conduct, which must be ‘dissociated’ from the protected

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<sup>79</sup> This claim was based on ss 346(b) and 347(b)(v) of the *FW Act*. Note that *GB* also alleged certain other breaches of the adverse action provisions, however these are not the focus of this essay.

<sup>80</sup> *Barclay v Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 19.

<sup>81</sup> *Ibid*, 54.

<sup>82</sup> *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526, 310.

<sup>83</sup> See, eg, *Bowling v General Motors Holdens Pty Ltd* (1975) 8 ALR 197, affirmed by *General Motors Holdens Pty Ltd v Bowling* (1976) 12 ALR 605; *Harrison v P & T Tube Mills Pty Ltd* (2009) 181 IR 162, affirmed by *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270; *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326; *Pearce v W. D. Peacock & Company Limited* (1917) 23 CLR 199; The Board of Bendigo Regional Institute of Technical and Further Education, ‘Appellant’s Submissions’, Submission in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*, M 128/2011, 30 September 2011, 44.

<sup>84</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2011] HCATrans 243 (2 September 2011).

<sup>85</sup> (2003) 217 CLR 92.

<sup>86</sup> *Barclay* (2011) 191 FCR 212, 28.

attribute/activity.<sup>87</sup> When characterising the reason for the action taken, Bromberg and Gray JJ stated that ‘the state of mind or subjective intention of the decision-maker will be centrally relevant,’<sup>88</sup> although they noted that it is by no means decisive.<sup>89</sup> Indeed, from the following passage, it appears that the majority placed very little weight, if any, on the subjective reasons provided by the decision-maker:

*‘[t]he reason for a person’s conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.’<sup>90</sup>*

It has been argued that the effect of the majority approach is that the reason for the adverse action is the ‘objectively assessed, causative reason, not the subjective motivation of the decision-maker’.<sup>91</sup> The fact that the ‘real reason’ behind the taking of adverse action may be some unconscious reason that the decision-maker had not even subjectively turned their mind to provides strong support for this conclusion. In applying this approach to the circumstances of the case, the majority rejected the evidence of Dr Harvey’s subjective grounds for taking action and held that as a matter of objective fact, the email was sent by GB in his capacity as a union officer and it was part of the activities he engaged in in that capacity.<sup>92</sup>

The majority felt comfortable adopting this largely objective approach on the basis that it is ‘consistent with the approach to construction taken in relation to provisions in the anti-discrimination legislation where, in a similar context, the word “because” is utilised.’<sup>93</sup> Indeed, there are a number of legitimate reasons that would appear to justify adopting such an approach. For example, there are numerous references in the *EM* to discrimination, including in relation to the industrial activities protections.<sup>94</sup> In addition, other references to discrimination include in the objects of Part 3-1,<sup>95</sup> in the definition of adverse action,<sup>96</sup> and also in s 351,<sup>97</sup> which is said to have the ‘superficial

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<sup>87</sup> Ibid, 32.

<sup>88</sup> Ibid, 28.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Workplace Express, *Adverse action lessons learnt* (23 September 2011) <<http://www.workplaceexpress.com.au>> citing Professor Joellen Riley, ‘The Fair Work Act – Running the Rule through Adverse Action’ (Speech delivered at the 10<sup>th</sup> Annual Workforce Conference, Sydney, 5 September 2011); Emma Goodwin and Bianca Friedman, ‘General Protections in Pt 3-1 of the Fair Work Act on trial: controversy and contradiction in the courts’ (2011) 17(5) *Employment Law Bulletin* 73, 81-82; see also, *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2011] HCATrans 243 (2 September 2011), 55; The Board of Bendigo Regional Institute of Technical and Further Education, ‘Appellant’s Submissions, above n 83, 45.

<sup>92</sup> Frank Parry S.C., ‘Adverse Action’ (Unpublished Paper, 24 March 2011).

<sup>93</sup> *Barclay* (2011) 191 FCR 212, 29.

<sup>94</sup> *EM* 1333, 1345 and 1407.

<sup>95</sup> See, eg, *FW Act* s 336(c), which states that one of the objects of Part 3-1 is ‘to provide protection from workplace discrimination’.

<sup>96</sup> *FW Act* s 342(1)(d).

<sup>97</sup> See above Part III(B).

appearance of what anti-discrimination law knows as ‘direct discrimination’, even to the extent that it uses the same language the High Court [in *Purvis*] has said is the correct test for causation in anti-discrimination law.<sup>98</sup>

However, despite these references to ‘discrimination’, it has been argued that even the explicit ‘discrimination’ ground of protection in s 351 ‘is not a discrimination provision as we know it.’<sup>99</sup> There are many differences between the two bodies of law,<sup>100</sup> however ‘a major difference’<sup>101</sup> is that, unlike the *FW Act* provisions, most anti-discrimination laws do not contain a reverse onus of proof.<sup>102</sup> In the absence of a reverse onus, it is understandable why the courts (such as the High Court in *Purvis*)<sup>103</sup> would favour an approach which allows more weight to be placed upon the objective circumstances of the case.<sup>104</sup> Indeed, the *EM* recognises that, without the reverse onus of proof in the *FW Act*, ‘it would be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason,’<sup>105</sup> as such reasons are ‘peculiarly within the knowledge of the [employer].’<sup>106</sup> Further, in relation to s 342, it has been argued that it is inappropriate to look to anti-discrimination jurisprudence to understand the definition of ‘discrimination’ in the *FW Act*, as parliament has not included any such direction to do so.<sup>107</sup> This argument would also appear to apply to Part 3-1 more broadly. Ultimately, the existence of the reverse onus in the *FW Act* seems to strongly mitigate the need to follow anti-discrimination law by adopting an objective approach, whilst also indicating that it is the subjective reasons for the action taken which the *FW Act* is concerned with.

The outcome of adopting an approach consistent with anti-discrimination law is, in effect, to impose an objective standard which, when combined with the reverse onus of proof and the requirement for the proscribed ground to only be one of the reasons for taking action, makes it substantially more difficult for employers to defend adverse action claims than was previously the case under the *WR Act*.<sup>108</sup> As will be demonstrated, this is due to the fact that the majority’s approach departs from existing jurisprudence and in doing so, significantly affects the balance between employee protections and employer rights under the *FW Act*.

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<sup>98</sup> Rice and Roles, above n 15, 18.

<sup>99</sup> *Ibid.*

<sup>100</sup> See, eg, Andrades, above n 31; Rice and Roles, above n 15.

<sup>101</sup> Elizabeth Raper, ‘Discrimination: Pick me: Choosing the right discrimination law forum’ (2010) 1 *Workplace Review* 30, 31; Sappideen, above n 31, 607; Smith, above n 31.

<sup>102</sup> Dominic Allen, ‘Reducing the burden of proving discrimination in Australia’ (2009) 31(4) *Sydney Law Review* 579, 583; Rice and Roles, above n 15, 20.

<sup>103</sup> Kate Rattigan, ‘The *Purvis* Decision: A Case for Amending the Disability Discrimination Act 1992’ (2004) 28(2) *Melbourne University Law Review* 532, 554.

<sup>104</sup> Andrew Frazer, ‘Anti-Discrimination Law at Mid Life Crisis’ (2011) 24 *Australian Journal of Labour Law* 75, 86; Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (The Federation Press, 2008) 92; Rice and Roles, above n 15, 19-20. See also Allen, above n 102.

<sup>105</sup> *EM* 1461.

<sup>106</sup> *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605, 617; *Maritime Union of Australia v Geraldton Port Authority* (1999) FCR 34, 68; see also The Board of Bendigo Regional Institute of Technical and Further Education, ‘Appellant’s Submissions, above n 83, 45.

<sup>107</sup> Gaze and Chapman, above n 31, 4; cf Rice and Roles, above n 15, 21.

<sup>108</sup> Stewart, ‘Guide to Employment Law’, above n 2, 269.

## 2 Departure from Existing Jurisprudence and Parliamentary Intent: the Subjective Approach

In adopting the anti-discrimination based approach, the majority in *Barclay* expressly rejected the distinction made in existing jurisprudence between the ‘reason’ and the ‘cause’ for taking action<sup>109</sup> on the basis that such a distinction is ‘not helpful’<sup>110</sup> and that, in fact, the two terms are ‘interchangeable’.<sup>111</sup> This approach, however, goes against the parliament’s express intention, as stated in the *EM*, to retain the application of existing jurisprudence,<sup>112</sup> which bears out this distinction and enables more weight to be placed on the subjective reasons of the decision-maker.

The *EM* provides that, in determining whether the action was taken because of a proscribed reason, the decision-maker's reason must be the ‘operative or immediate reason for that action’.<sup>113</sup> On this point, the *EM* cites specific paragraphs of the Federal Court decision in *Maritime Union of Australia v CSL Australia Pty Limited* (‘*CSL*’),<sup>114</sup> in which the reasoning of Finkelstein and Merkel JJ in the Full Federal Court decision of *Greater Dandenong City Council v ASU*<sup>115</sup> (‘*Greater Dandenong*’) was adopted. In *Greater Dandenong*, Finkelstein and Merkel JJ outlined that a distinction must be made between ‘the operative (or immediate) reason for the [employer’s] conduct and the cause (or proximate reason) for the [employer’s] conduct’.<sup>116</sup> The distinction was based on the fact that ‘there can be a significant difference between the employer’s subjective reason for engaging in prejudicial conduct and the objective circumstances that led to the employer engaging in the conduct’.<sup>117</sup> In other words, the ‘operative or immediate reason’ for a decision will be the employer’s subjective reason for so acting.<sup>118</sup> The Court in *CSL* noted that ‘this distinction may in many cases be easier to articulate than to draw,’<sup>119</sup> but nevertheless applied the same approach.

The specific paragraphs of the *CSL* decision referred to in the *EM* clearly demonstrate how this distinction is to be applied. That is, while the Court in *CSL* found that the fact that the employees (who were crew members of a vessel) were entitled to the protection of an industrial instrument was a *cause* of the employer’s decision to threaten to terminate their employment, it was not the *operative reason* for the decision. Instead, the operative reason was found to be the employer’s need to utilise the vessel in a cost effective way. In reaching this decision, very little weight was given to the objective fact that ‘the freedom to crew the [vessel] with a crew which did not enjoy the protection of the industrial instruments would contribute significantly to the cost-

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<sup>109</sup> The meaning of these terms is critical to the application, and thus the scope and effect, of the adverse action provisions and will be explored in detail below.

<sup>110</sup> *Barclay* (2011) 191 FCR 212, 30.

<sup>111</sup> *Ibid*, 31.

<sup>112</sup> *EM* 1458.

<sup>113</sup> *Ibid*.

<sup>114</sup> (2002) 113 IR 326.

<sup>115</sup> *Greater Dandenong* (2001) 112 FCR 232.

<sup>116</sup> *CSL* (2002) 113 IR 326, 54, citing Merkel and Finkelstein JJ in *Greater Dandenong* (2001) 112 FCR 232.

<sup>117</sup> *Greater Dandenong* (2001) 112 FCR 232, 164; Parry, above n 92, 3.

<sup>118</sup> David Quinn, ‘To Be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act’ (2004) 17 *Australian Journal of Labour Law* 1, 20, citing *Greater Dandenong* (2001) 112 FCR 232 and *CSL* (2002) 113 IR 326.

<sup>119</sup> *CSL* (2002) 113 IR 326, 54.

effective utilisation of the vessel.<sup>120</sup> Thus as a result of this distinction, the Court placed substantially more weight on the decision-maker's subjective evidence than on the objective connection between the decision and the employee's protected entitlement. Such approach is said to be consistent with an 'unbroken line of state and federal authority.'<sup>121</sup>

The 'cause/reason' distinction has been queried by lower courts<sup>122</sup> and academically criticised for 'severely limiting the scope for successful actions',<sup>123</sup> as it allows too much weight to be attributed to the decision-maker's subjective reasons for taking action.<sup>124</sup> David Quinn has argued that, in the context of the protections for union members such as those in *Barclay*, the cause/reason distinction allows an employer to defend a claim by asserting that, while the objective cause for their conduct was the employee's union membership, their subjective reason was their 'assessment of the negative effects of employing unionists'<sup>125</sup> (ie, 'unionists don't respect management's authority').<sup>126</sup> Quinn suggests that this approach is 'virtually impossible for an applicant...to overcome'<sup>127</sup> and as such, it evidences a failure to sufficiently take into account the underlying purpose of the provisions,<sup>128</sup> which is to protect employees and their right to freedom of association.

Whilst there is some merit to Quinn's argument, it is clear from the case law that this concern is overstated, as courts do not consider the decision-maker's subjective evidence 'in a vacuum.'<sup>129</sup> For example, in *Rojas v Esselte Australia Pty Ltd (No 2)*,<sup>130</sup> the Court rejected the subjective reasons provided by the employer for dismissing the unionist (ie, misconduct) due to a lack of credibility and thus found that the employer had contravened the freedom of association provisions.<sup>131</sup> In addition, it is clear from the *EM*, and the strength of the application of the cause/reason distinction in the cases cited therein, that parliament intended for this approach to be retained in relation to the current adverse action provisions. Thus, in circumstances where there is credible evidence of the decision-maker's subjective reasons for taking action, and where such reasons do not include a prohibited reason, it appears that parliament intends no contravention to be established, despite the presence of an objective connection.<sup>132</sup> This reasoning is also consistent with the approach adopted by previous cases

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<sup>120</sup> *CSL* (2002) 113 IR 326, 55.

<sup>121</sup> *Greater Dandenong* (2001) 112 FCR 232, 287 (Finkelstein J); see also, eg, *Eaton v McKenzie* (1916) 12 Tas LR 94; *Klanjscek v Silver* (1961) 4 FLR 182.

<sup>122</sup> *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165, which was a decision of a single judge (North J); *Twentieth Superpace Nominees v Transport Workers Union* (2006) 156 IR 323, which was a decision of the New South Wales Industrial Relations Commission.

<sup>123</sup> David Quinn, 'To Be or Not to Be a Member - Is That the Only Question? Freedom of Association under the Workplace Relations Act' (2004) 17 *Australian Journal of Labour Law* 1, 23.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, 20.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, 22.

<sup>128</sup> *Ibid.*, 20.

<sup>129</sup> *Barclay* (2011) 191 FCR 212, 254 (Lander J), affirmed by *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526, 310.

<sup>130</sup> (2008) 177 IR 306.

<sup>131</sup> See also *Seymour v Saint-Gobain Abrasives Pty Ltd* (2006) 1 IR 9.

<sup>132</sup> *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 294-295.

concerning union delegates such as *Pearce v W.D. Peacock & Company Limited*<sup>133</sup> and *Harrison v P & T Tube Mills*,<sup>134</sup> in which sufficient credible evidence of the subjective intentions of the decision-maker mitigated findings of breach. Indeed, this view is further supported by the submissions of Counsel for BRIT, in their successful application for special leave to the High Court, where Counsel stated that:

*'the prohibited reason is the subjective intent of the decision-maker..., and that has been the consistent approach...for these provisions for over 100 years...We cannot find any industrial case which has dealt with these "freedom of association" provisions where...there has been a finding of an innocent subjective intent, but the employer has lost. The majority [in Barclay] broke new ground in doing this.'*<sup>135</sup>

### 3 Conclusions on the Majority Decision: Where does the Balance Lie?

As can be seen from the above, there are competing views regarding which approach '[gets] the balance right'<sup>136</sup> between employee protections and employer rights. However, it is evident that the reasoning adopted by the majority in *Barclay* represents a significant departure from the existing jurisprudence in this area, which previously allowed more weight to be placed on the subjective evidence of the decision-maker by drawing a distinction 'between the immediate reason for the employer's conduct, and what lies behind that reason.'<sup>137</sup> By rejecting this reasoning in favour of a largely objective standard based on anti-discrimination jurisprudence, the majority adopted an approach that is inconsistent with the parliament's clear and express intent as outlined in the *EM*. Indeed, Andrew Stewart has queried whether other judges will follow Bromberg and Gray JJ's approach in future.<sup>138</sup> Nevertheless, in adopting this approach, the majority significantly broadened the application of the adverse action provisions, such that it is now substantially more difficult for employers to defend an adverse action claim.<sup>139</sup> This difficulty is exacerbated by the reverse onus imposed on employers and the fact that the prohibited reason need only be a reason for taking action. As such, the majority approach clearly provides greater protection for employees and thereby brings about unintended consequences for the balance struck by the adverse action provisions between employee protections and employer rights.

## V IMPLICATIONS: UNINTENDED CONSEQUENCES?

A significant implication for employers of the broader legislative protections and their judicial interpretation is highlighted by the outcome of the *Barclay* decision, which demonstrates the practical difficulty experienced by employers where there is misconduct by employees who are also active unionists.<sup>140</sup> This issue has been

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<sup>133</sup> (1917) 23 CLR 199.

<sup>134</sup> (2009) 181 IR 162, affirmed by *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270.

<sup>135</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2011] HCATrans 243 (2 September 2011), 90-100.

<sup>136</sup> Rudd and Gillard, 'Policy Implementation Plan', above n 8, 2; Stewart, 'A Question of Balance', above n 7, 46.

<sup>137</sup> Creighton and Stewart, above n 3, 562.

<sup>138</sup> Stewart, 'Guide to Employment Law', above n 2, 269.

<sup>139</sup> Goodwin and Friedman, 'Controversy and Contradiction', above n 91, 81-82.

<sup>140</sup> Parry, above n 92; Mueller and Harben, above n 13.

recognised by courts in the past, who have noted the difficulties that arise where such employees' industrial conduct is contrary to the 'best interests'<sup>141</sup> of the employer.<sup>142</sup> Critically, due to the approach to causation adopted in *Barclay*, Bromberg and Gray JJ held that:

*'[i]f adverse action is taken by an employer in response to conduct of a union, it is impossible for that employer to dissociate or divorce from that conduct its reasons for the taking of the adverse action simply by characterising the activity of the union as the activity of its employee.'*<sup>143</sup>

This statement creates the possibility that where the employee's conduct is objectively performed in their capacity as a unionist, any response by the employer will 'be regarded as having been because the employee was a [unionist]...apparently even if the activities were in breach of the employer's rules or were not authorised by the union.'<sup>144</sup>

It is unclear exactly how far this reasoning could extend, however the potential scope of protection that seems to be afforded to employees by this approach does not appear to achieve a desirable balance between employee protections and employer rights. Although it is clear that '[o]n the one hand, victimisation of union[ists] is not to be tolerated...[o]n the other hand, a union[ist] is given no immunity from normal constraints of behaviour, nor any licence to act in a manner which would not be tolerated in another employee.'<sup>145</sup> The majority reasoning in *Barclay*, however, would seem to protect a unionist who, for example, neglects their substantive employment duties during work-hours or breaches their employment obligations when acting in their capacity as a unionist.<sup>146</sup> This has consequently caused great concern amongst employers both in relation to their rights to manage their employees (particularly those who are unionists) and their ability to legitimately defend adverse action claims.<sup>147</sup> At this stage, however, it is not entirely clear whether or not these employer concerns are well founded, as it is too early to decipher a clear trend in how *Barclay* will be

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<sup>141</sup> Parry, above n 92, 4, citing *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Australian Health & Nutrition Association Ltd* (2003) 147 IR 380, 3.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Barclay* (2011) 191 FCR 212, 74 (Bromberg and Gray JJ).

<sup>144</sup> Parry, above n 92, 11.

<sup>145</sup> Parry, above n 92, 4, citing *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Australian Health & Nutrition Association Ltd* (2003) 147 IR 380, 3.

<sup>146</sup> Stewart, 'Guide to Employment Law', above n 2, 269; see also Smart Workplace, *First decision on general protection provisions from the full court of the Federal Court is alarming for employers* (February 2011) <<http://www.smartworkplace.com.au>>

<sup>147</sup> See, eg, Business Council of Australia, Submission to Minister for Tertiary Education, Skills, Jobs and Workplace Relations, *Monitoring the Operation of the Fair Work Act 2009*, 19 May 2011, 3-4 <<http://www.bca.com.au/Content/101865.aspx>>; Steve Knott (Chief Executive of Australian Mines and Metals Association), 'The new IR laws – a challenge or opportunity for resource industry employers' (Paper presented at Australia's National Gas Conference: FutureGAS 2011, 24 March 2011), 24-27 <[http://www.amma.org.au/home/home/media\\_publications/2011/20110324\\_SteveKnottFutureGasSummit2011Speech.pdf](http://www.amma.org.au/home/home/media_publications/2011/20110324_SteveKnottFutureGasSummit2011Speech.pdf)>. Note also a recent study performed by RMIT University which not only highlighted these employer concerns but also discussed the potential for employers to be subject to unmeritorious adverse action claims by active unionists who are 'leveraging off recent legal decisions': Dr Steven Kates, 'The AMMA Workplace Relations Research Project - A Survey Based Analysis: Third Report' (Research Report, School of Economics, Finance and Marketing, RMIT University, June 2011), 33-39.

interpreted as claims continue to be brought before the courts.<sup>148</sup> Until further guidance is given as to where the balance should be struck, the potential unintended consequences of the Full Federal Court decision in *Barclay* regarding employers' ability to manage unionist workforces remain salient.

## VI CONCLUSION

As has been demonstrated, the adverse action provisions in the *FW Act* provide significantly broader protections for employees than was the case under the *WR Act*. This shift in the balance between employee protections and employer rights arises from the combined effect of the legislative consolidation process and the judicial interpretation of the current provisions adopted by the majority of the Full Federal Court in *Barclay*. The largely objective approach to the issue of causation adopted by the majority evidences a departure from previous jurisprudence and is inconsistent with the parliamentary intent for the construction of these provisions. While it is by no means clear exactly where the balance should be struck, it is evident that the current interpretation of the provisions brings about unintended consequences, particularly in the context of employees who are active unionists. Ultimately, there is a great deal of uncertainty surrounding the application of the adverse action provisions. Although the pending High Court hearing may provide some much needed guidance and clarification in relation to the causation requirement, it is evident that the legislative consolidation process has left many areas of uncertainty that will likely continue to affect the balance between employee protections and employer rights into the future.

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<sup>148</sup> See, eg, *Bayford v Maxxia Pty Ltd* (2011) FMCA 202, where despite the applicant's heavy reliance on the objective approach of the Majority in *Barclay*, the Federal Magistrates Court of Appeal rejected the alleged 'inextricable link' between the applicant's lateness for work and family commitments; cf *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526.

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