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## INTERSECTIONS BETWEEN 'GENERAL PROTECTIONS' UNDER THE FAIR WORK ACT 2009 (CTH) AND ANTI-DISCRIMINATION LAW: QUESTIONS, QUIRKS AND QUANDARIES

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# INTERSECTIONS BETWEEN 'GENERAL PROTECTIONS' UNDER THE FAIR WORK ACT 2009 (CTH) AND ANTI-DISCRIMINATION LAW:

## QUESTIONS, QUIRKS AND QUANDARIES

## DISCUSSION PAPER

***Carol Andrades***[1]

## INTRODUCTION

Since their inception, established anti-discrimination laws have applied to employment-related discrimination.[2] By comparison, anti-discrimination provisions in the Workplace Relations Act 1996 (Cth) (WR Act) and its predecessors have had relatively narrower application. The Fair Work Act 2009 (Cth) (FW Act) has introduced a new system of 'general protections' which not only replicate key aspects of established anti-discrimination laws but also, in some cases, enhance the protection offered to vulnerable employees and others.

This paper examines the intersection between the FW Act and established anti-discrimination laws, with particular emphasis on some of the quirks generated by the simultaneous operation of multiple systems, as well as areas of uncertainty within the FW Act. As this paper was initially prepared for a workshop held in Victoria, the focus is primarily on Commonwealth and Victorian laws.

## PREVIOUS INTERSECTIONS BETWEEN INDUSTRIAL LAW AND ANTI-DISCRIMINATION LAW

Established anti-discrimination laws co-exist at Commonwealth, State and Territory levels. Because they overlap, users of these laws generally need to choose between a Commonwealth and a State or Territory anti-discrimination law. There are subtle differences in their application. For example, in some cases, once a particular law is selected, it is not possible to withdraw and start afresh in another jurisdiction, so the initial selection of jurisdiction is important.[3]

Apart from the 'freedom of association provisions',[4] the predecessors to the WR Act did not contain much in the nature of anti-discrimination provisions until 1988.

As enacted, the Industrial Relations Act 1988 (Cth) established the first clear link between industrial law and established anti-discrimination law. It required the Australian Industrial Relations Commission, in the performance of its functions, to take into account the principles embodied in the Racial Discrimination Act 1975 (Cth) and the Sex Discrimination Act 1984 (Cth).[5] Later, the Disability Discrimination Act 1992 (Cth) and the Age Discrimination Act 2004 (Cth) were added to the list.[6] In 1993, a similar provision was inserted in respect of the Family Responsibilities Convention.[7]

The Sex Discrimination and Other Legislation Amendment Act 1992 (Cth) amended the Industrial Relations Act 1988 (Cth) to include a process whereby the Sex Discrimination Commissioner could refer discriminatory awards to the Australian Industrial Relations Commission for review.[8] This process has progressively been expanded to encompass other industrial instruments and types of discrimination.[9]

The Industrial Relations Reform Act 1993 (Cth) substantially fortified the 1988 Industrial Relations Act's link with conventional anti-discrimination principles. Equal remuneration

provisions were inserted and thirteen characteristics became recurring reference points for matters such as unlawful termination, unacceptable content of industrial instruments, and the like. These characteristics (race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin) had a more conventional 'anti-discrimination' focus. That focus remained in the WR Act and, as discussed below, this has continued in the FW Act.

With the introduction of such provisions into the main Commonwealth industrial statute, a further layer of choice was introduced, for certain subjects of employment-related discrimination (mainly dismissed employees) who were now able to exercise rights not only under federal or State/Territory anti-discrimination laws, but also, as an alternative, under the Commonwealth industrial statute. Inevitably, principles derived from established anti-discrimination law began to infuse decisions under the industrial counterpart.[10]

## THE GENERAL PROTECTIONS REGIME

The expansion of anti-discrimination principles into the key Commonwealth industrial statute has progressed even further under the FW Act. Chapter 3-1 of the Act deals with 'General Protections'.

In brief, the General Protections:

- provide for protection from adverse action and various other inappropriate behaviour related to **workplace rights** [ss 340 – 345]
- provide for protection from adverse action and various other inappropriate behaviour related to **industrial activities** [ss 346 - 350]
- provide protection from adverse action because of **fourteen listed characteristics** [s 351] (commonly referred to as the 'discrimination' section)
- provide protection from dismissal **for temporary absence from work** for a prescribed illness or injury [s 352]
- prohibit the demanding of a **bargaining services fee** [s 353]
- provide protection from discrimination against an employer in connection with **coverage or lack of coverage of the employer's employees by the National Employment Standards or a particular workplace instrument or enterprise agreement** [s 354]
- prohibit coercion **to employ/not employ, engage/not engage** or **allocate/not allocate** particular duties to a particular person [s 355]

- provide that **objectionable terms**[11] in various industrial instruments have no effect [s 356]

- prohibit **sham arrangements** and similar conduct in relation to independent contractors [ss 357-359]

Unlike the WR Act, under which a key focus for provisions concerning discriminatory behaviour was at the point of termination of employment,[12] the adverse action provisions extend to pre-employment conduct as well as conduct during and at termination of employment. A side effect is that exceptions, such as the 'inherent requirements' and 'religion based' exceptions, also extend to all phases of the employment relationship and to pre-employment conduct.

Although s 351 is titled 'Discrimination', and has thus led to the perception that it deals solely with discrimination,[13] the operative sub-section does not use that term. Rather, as indicated above, s 351(1) prohibits the taking of '*adverse action*' because of fourteen[14] characteristics – namely, a 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', in turn, encompasses a range of offending behaviour. A chart at s 342 (reproduced at the end of this working paper) sets out in detail the circumstances in which a person may be said to take 'adverse action'. Briefly, in order to constitute 'adverse action', three elements must be established:

- **action is taken by a person specified** in the first column of the chart (for example, an employer or prospective employer)

- **against another person specified** in the first column of the chart (for example, an employee or prospective employee) and the action must be

- **of a type specified** in the appropriate part of the second column of the chart (for example, injuring in employment, dismissal, refusing to offer employment, discrimination).

Adverse action includes taking the action as well as threatening to take it or organising it.[15]

## TEN POINTS FOR DISCUSSION

The ten points set out below are only some of the issues which present themselves to those with an interest in the intersection between established anti-discrimination law and the new FW Act 'general protections'. They are not exhaustive, but are provided as a framework for discussion of this intersection. Nor do they seek to explore broader issues, such as use of the 'workplace rights' provisions, or other avenues under the FW Act, for dealing with unfair treatment connected to work.

***Point 1 – Definitions***

One type of 'adverse action' occurs when a person 'discriminates' (see for example s 342 item 1 (d)). The objects of Part 3-1 include the provision of protection from 'workplace discrimination' and the provision of effective relief for persons who have been 'discriminated against, victimised or otherwise adversely affected' as a result of contraventions of the Part.[16] To some extent, this exemplifies some of the complications presented by the text of the Part, because nowhere is there a definition of 'discrimination', (just as there is no definition of 'victimised'). This was also the case under the WR Act and its predecessors.

By contrast, established anti-discrimination laws contain detailed guidance about the meaning of 'discrimination'. In Victoria, as in other jurisdictions, the key Commonwealth and State/Territory anti-discrimination laws[17] recognise, either expressly or by implication, that discrimination may be 'direct' and 'indirect'[18]. In addition, under the Disability Discrimination Act 1992 (Cth), failure to make reasonable adjustments may constitute discrimination.[19] Similarly, under the Equal Opportunity Act 1995 (Vic), unreasonable failure to accommodate parental or carer responsibilities may constitute discrimination.[20]

The absence of a definition of 'discrimination' in the FW Act may be expected to lead to conjecture concerning the meaning of this term, especially in so far as it is used in conjunction with the fourteen grounds specified in s 351. A similar complication could be observed under the parallel streams of jurisprudence which emerged as a consequence of overlapping regulation of discriminatory employment practices, under the WR Act (and its predecessors) and anti-discrimination laws. The applicability, in an industrial context, of principles derived from established anti-discrimination laws became a matter of debate. One recurring issue was the question of whether the industrial statute intended to prohibit both 'direct' and 'indirect' discrimination.[21] Similar discussion may be expected in relation to the FW Act.

***Point 2 - Discrimination 'between employees'***

The other unusual feature, in the FW Act provision concerning discrimination against employees (as opposed to prospective employees), is that an applicant must show that the discrimination occurs '*between* the employee and *other employees* of the employer' (emphasis added).[22] This places a value upon what is essentially an arbitrary set of circumstances, namely, the composition and characteristics of a workforce at a particular point in time. Moreover, the formulation may not always capture unlawful discriminatory conduct. An employer with only one employee may still engage in such discrimination, even if there are no other employees with whom to compare the treatment. Further, the formulation makes assumptions about the composition of a workforce. For example, if an employer treats *all* its employees (all of whom happen to be women) badly because of their sex, would that constitute discrimination 'between the employee and *other*

employees' (emphasis added)? Such behaviour would constitute discrimination under established anti-discrimination laws, because it targets an employee on the basis of her sex and those laws also permit the use of a hypothetical comparator, rather than requiring reference to the employer's actual workforce.

The test under the FW Act for adverse action against *prospective* employees is broader. It requires demonstration that the employer refused to employ a person, or that an employer discriminated against a prospective employee in the terms and conditions on which the prospective employer offers to employ the prospective employee.[23] This echoes the content of s 792 (1) (e) of the WR Act. Section 792 listed conduct (including discrimination) which was unlawful if carried out for 'prohibited reasons'.[24] The line of jurisprudence relating to that provision and its antecedents may be useful in interpreting the current provisions.

Because the term 'discrimination' is used without definition, it may be worth noting, for completeness, that s 354 of the FW Act, ('coverage by particular instruments') provides that a person 'must not discriminate against an *employer* because of an employee's actual or proposed coverage or lack of coverage by the National Employment Standards or a particular workplace instrument or enterprise agreement' (emphasis added). This provision does not come within the categories of 'adverse action' protection, so the provisions of s 342 concerning discrimination, as a manifestation of adverse action (see below), will not apply.

***Point 3 - Adverse action and discrimination***

While it is helpful for legislation to define what is meant by 'discrimination', it must also be acknowledged that the definitions of discrimination, in established anti-discrimination laws, have resulted in complex, time-consuming and expensive argument. A complainant alleging direct discrimination under those laws must (in brief) generally show less favourable treatment, because of a protected characteristic, than a person without that characteristic would have received, in the same or similar circumstances.[25] There can be much debate about identification of a person with whom the complainant should be compared (sometimes referred to as the 'comparator').[26] Similarly, the test for indirect discrimination (in brief) generally requires demonstration of the imposition of an unreasonable condition, requirement or practice, with which the complainant cannot comply (because of her or his protected characteristic), but with which others, without the complainant's characteristic, can comply.[27] In some cases, it is also necessary to show that a certain proportion of those in the latter group can comply with the condition, requirement or practice.[28] The intricacy of the definition has led to convoluted argument about its components, including quibbling about precise formulation of the 'condition, requirement or practice'[29] and, where proportionality is relevant, selection of a base 'pool' of employees from which to derive the proportions.[30]

Under the 'general protections' provisions of the FW Act, it is not necessary to rely solely on the occurrence of discrimination. An allegation of 'adverse action' can capture the sense of disadvantage associated with discrimination, without the need to navigate the obstacles which accompany the definitions of 'direct' and 'indirect' discrimination. For example, an assertion that an employee has been 'injured' in his or her employment or had his or her position 'altered to the employee's prejudice', on the basis of one of the fourteen grounds in s 351, may furnish a more flexible foundation for litigation than an allegation of discrimination.[31] The example given above, of an employer who treats a particular woman, in an all-female workforce badly, because of her sex, might fit more easily into this framework (that is, it might be said that the employer has taken adverse action by injuring her in her employment, or altering her position to her prejudice, because of her sex).

***Point 4 - Exceptions drawn from other laws***

Adverse action does not include action authorised by the FW Act, other Commonwealth laws or other prescribed State or Territory laws.[32]

In addition, if action is not unlawful under certain listed anti-discrimination laws in the location where the behaviour occurred, s 351 (1) (which lists the fourteen characteristics) does not apply.[33] The practical effect is that an exception contained in a Commonwealth, State or Territory anti-discrimination law (or an exemption secured under those laws) will excuse not only discrimination, but also *any* 'adverse action' otherwise caught by s 351 (such as injuring someone in employment or altering their position to their prejudice). This is because, as mentioned above, s 351 applies to all 'adverse action', only one manifestation of which is 'discrimination'.

An illustration of the practical effect of this may be afforded by considering the 'small business' exception in s 21 of the Equal Opportunity Act 1995 (Vic). It states that an employer may discriminate in determining who should be offered employment, if the employer employs no more than the equivalent of five people on a full-time basis (including the people to whom employment is offered). This means, for example, that a small business employer in Victoria may decide, quite legally, not to offer employment to persons of a particular sexual orientation. It is unclear whether s 351(2)(a) of the FW Act intends the defence it furnishes to be available irrespective of any overriding Commonwealth law to the contrary, but in this case, there is, in any event, no listed Commonwealth anti-discrimination law which makes sexual orientation discrimination unlawful.[34] It would therefore seem that s 351(2) of the FW Act would continue to protect a Victorian employer in this circumstance.

A by-product of s 351(2)(a) is that not only Commonwealth anti-discrimination laws, but also State and Territory anti-discrimination laws, will become the subject of scrutiny and comment by the Federal Court and Federal Magistrates Court. This, in turn, may affect the jurisprudence concerning the operation of State and Territory laws, within those jurisdictions.

Note that the exception in s 351(2) applies only to conduct prohibited by s 351(1). This means, for example, that s 352, which protects an employee from dismissal for a temporary absence because of a prescribed illness or injury (itself a type of disability discrimination), is not affected by s 351(2).

***Point 5 - Operation of the 'inherent requirements' exception***

Another exception to s 351(1) of the FW Act is provided by s 351(2) (b), which states that s 351(1) does not apply to action that is taken because of the 'inherent requirements of the particular position concerned'. The 'inherent requirements' exception also figured in the unlawful termination provisions of the WR Act.[35]

Although the 'inherent requirements' exception is found in the Age Discrimination Act 2004 (Cth)[36] and Disability Discrimination Act 1992 (Cth),[37] it is not in the Sex Discrimination Act 1984 (Cth) or Racial Discrimination Act 1975 (Cth). This raises a broader issue (which also arose under the WR Act), namely, whether it is appropriate to make the 'inherent requirements' exception uniformly available, in all cases of adverse action under s 351, irrespective of the characteristic in question, and at all phases of employment and pre-employment. For example, could it ever be an inherent requirement of a job that a person not be of a particular social origin? The presence of an unqualified 'inherent requirements' exception suggests that the legislature has envisaged circumstances where this could be the case. In this sense, the FW Act invites the raising of such arguments by respondents, irrespective of the characteristic. A similar issue arises in relation to the exception concerning religion in s 351(2)(c) of the FW Act.

Further, the 'inherent requirements' exception demonstrates the inconsistency in approach between various pieces of Commonwealth legislation, all designed to address the same issue. Unlike the FW Act, the 'inherent requirements' exception in the Disability Discrimination Act 1992 (Cth) is considerably tempered by the need to consider whether the inherent requirements cannot be carried out even after the making of 'reasonable adjustments'.[38] In a similar vein, the Age Discrimination Act 2004 (Cth) provides guidance in the use of the exception, by requiring all relevant factors to be taken into account, including the person's past training, qualifications and experience relevant to the particular employment and the person's performance as an employee.[39] While such considerations may ultimately be taken into account by those who come to interpret the FW Act,[40] it is equally possible that they may not. The point is that there are no signposts, within the Act, to require that this be done. Without such guidance, the danger is that the quality of protection for vulnerable categories of employee and others may be diminished.

***Point 6 – Accommodation and adjustment – disability discrimination and parental and carer discrimination***

As noted above, under the Disability Discrimination Act 1992 (Cth), failure to make reasonable adjustments may constitute discrimination.[41] As there appears to be no

equivalent provision in the FW Act, certain cases of disability discrimination, where reasonable adjustment is needed, may fare better under the Disability Discrimination Act 1992 (Cth) than under the FW Act.

A similar issue arises in relation to discrimination on the basis of parental and carer responsibilities. The Sex Discrimination Act 1984 (Cth) offers limited protection in relation to discrimination on the basis of family responsibilities, in that it applies only to direct discrimination and to cases of termination of employment only.[42]

The general protections provisions of the FW Act protect against adverse action on the basis of family or carer's responsibilities.[43] However, the potential inflexibility of the 'inherent requirements' defence mentioned above may detract from that protection in cases where an employer insists, for example, that certain hours or shifts are an inherent requirement of the work. There is no provision under the FW Act for an applicant to ask for 'reasonable accommodation' of family or carer's responsibilities. The 'right to request' mechanism which forms part of the National Employment Standards applies only to certain parents and carers [44] and does not supply any enforceable rights.[45]

In such cases, the Equal Opportunity Act 1995 (Vic) may offer a better avenue for a complainant, because it provides that unreasonable failure to accommodate parental or carer responsibilities constitutes discrimination.[46]

***Point 7 - Reversal of onus***

Under established anti-discrimination laws, a complainant generally bears the onus of proof.[47] By contrast, under the general protections provisions of the FW Act, the onus of proof is reversed. Once an applicant has alleged a contravention by a person, the offending reason is presumed unless the person proves otherwise.[48] The reverse onus echoes that found in s 809 of the WR Act and its predecessors, though that provision operated in narrower circumstances.

As mentioned above, the choice of jurisdiction in discrimination cases can be a complex exercise. It may be anticipated that the reversal of onus under the FW Act will prove to be an attractive feature for prospective applicants.

***Point 8 - Multiple reasons***

As with Commonwealth anti-discrimination laws,[49] the general protections provisions provide that where action is taken for multiple reasons, a person takes action for 'a particular reason' if the reasons include that reason.[50] Unlike some anti-discrimination laws, there is no need to show that the reason was a substantial reason.[51]

Together with the reverse onus provision, this also militates in favour of applicants using the FW Act.

***Point 9 - Options for Conciliation***

Preliminary conciliation of a complaint is generally available under established anti-discrimination laws[52] and indications are that conciliation is useful in early resolution of complaints.[53] However, the capacity of Fair Work Australia to conciliate or mediate a 'general protections' matter varies, depending on whether a dismissal was involved or not. The policy reason for this is unclear.

If there is a dismissal in contravention of Part 3-1 (as opposed to an unfair dismissal under Part 3-2), the person dismissed or an industrial association may apply to Fair Work Australia to deal with the 'dispute' within 60 days after the dismissal took effect (or such further period as Fair Work Australia allows).[54] Fair Work Australia must:

- conduct a private conference by mediation or conciliation or make a recommendation or express an opinion, including that the application should be made under Part 3-2 (unfair dismissal);[55]
- issue a certificate where attempts to settle the 'dispute' have been or are likely to be unsuccessful;[56]
- advise the parties accordingly, where it considers that a 'general protections court application' would not have a reasonable prospect of success.[57]

If there is no dismissal involved, a person may, before taking a 'general protections' contravention to court, apply to Fair Work Australia to deal with the 'dispute'.[58] However, it is only if the parties consent that Fair Work Australia is able, and obliged, to conduct a private conference.[59]

For certain applicants alleging discrimination (for example, those who are unrepresented) the absence of an early conciliation option before Fair Work Australia, in non-dismissal cases, may make conciliation processes under established anti-discrimination laws seem a more attractive option.

***Point 10 - Costs***

It has been observed that '[i]f costs were generally awarded for successful claims, or against unsuccessful claimants, the issue of costs would become a significant barrier' to issuing proceedings in an anti-discrimination forum.[60]

In matters under Commonwealth anti-discrimination laws, costs tend to follow the event.[61] Under other anti-discrimination laws, such as the Equal Opportunity Act 1995 (Vic), costs are awarded less often, but have been awarded in certain cases.[62]

By contrast, 'general protections' matters will usually be costs-free, though costs may be awarded in certain very narrow circumstances (for example, if proceedings are instituted vexatiously or an unreasonable act or omission caused the other party to incur costs).[63]

For unrepresented applicants, especially, the issue of costs is likely to be a factor in selection of jurisdiction.

## CONCLUSION

Part 3-1 of the FW Act is a significant supplement to workplace anti-discrimination law. It promises a new role for the primary industrial statute in the field of anti-discrimination law. The introduction of the adverse action provisions are likely to exert significant influence on conceptual stereotypes and conventional analyses of unlawful discrimination. Further, given the significant expansion in the range and complexity of options available, early and accurate analysis of rights will be vital. Disparate results may follow from use of particular laws, even within the Commonwealth system. This, in turn, raises issues about access to justice, especially for those who do not have legal representation. Vulnerable workers have much to gain from the new provisions, but care will also need to be taken to ensure that appropriate support mechanisms are provided, lest the new protections be beyond the reach of those whom they were designed to benefit.

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[1] Consultant to Ryan Carlisle Thomas, Lawyers; Senior Fellow, Melbourne Law School, University of Melbourne. Thanks go to Philip Gardner and Penny Savidis of Ryan Carlisle Thomas for their helpful comments on an earlier draft. The writer is, of course, responsible for any errors. An earlier version of this paper was prepared for a Workshop of the same title convened by the Centre for Employment and Labour Relations Law, and held at the University of Melbourne on 11 November 2009.

[2] In this paper, the term 'established anti-discrimination laws' (and derivatives) will be used as a convenient description for anti-discrimination laws such as those listed at s 351 (3) of the Fair Work Act 2009 (Cth).

[3] If a complaint is lodged under State or Territory law and a person has already made a complaint or instituted a proceeding under that law, recourse to the Commonwealth anti-discrimination statutes is not permitted: s 6A(2) Racial Discrimination Act 1975 (Cth); s 10(4) Sex Discrimination Act 1984 (Cth); s 13(4) Disability Discrimination Act 1992 (Cth); s 12(4) Age Discrimination Act 2004 (Cth).

[4] These provisions, which were designed to encourage the formation of registered organisations, date from 1904.

[5] Industrial Relations Act 1988 (as enacted) s 93; this later became s 105 of the WR Act.

[6] See the Human Rights and Equal Opportunity Legislation Amendment Act 1992 (Cth); Age Discrimination (Consequential Provisions) Act 2004 (Cth).

[7] It was s 93A of the Industrial Relations Act 1988 (Cth) and eventually became s 106 of the WR Act.

[8] Section 111A and associated provisions, which preceded s 554 of the WR Act, and were inserted by Act No 179 of 1992.

[9] Enterprise agreements and, (after 1 January 2010), modern awards, can be referred to Fair Work Australia by the Australian Human Rights Commission for variation, where it appears that a discriminatory act has been done under the instrument, in breach of certain parts of the Age Discrimination Act 2004 (Cth) and Disability Discrimination Act 1992 (Cth), as well as the Sex Discrimination Act 1984 (Cth).

[10] See for example Qantas Airways Ltd v Christie [1998] HCA 18; 193 CLR 280 where concepts under the Disability Discrimination Act 1992 (Cth) were discussed in the interpretation of the Industrial Relations Act 1988 (Cth).

[11] Defined in s 12 of the FW Act.

[12] Section 659 WR Act.

[13] See, for example, Form 5D Federal Court Rules.

[14] A new characteristic – that of having carer's responsibilities, supplements the thirteen characteristics formerly specified in the WR Act.

[15] Section 342(2) of the FW Act.

[16] Section 336(c) and (d) of the FW Act.

[17] Equal Opportunity Act 1995 (Vic); Australian Human Rights Commission Act 1986 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Racial Discrimination Act 1975 (Cth); Age Discrimination Act 2004 (Cth).

[18] Sections 14 and 15 of the Age Discrimination Act 2004 (Cth); ss 5 and 6 of the Disability Discrimination Act 1992 (Cth); s 9 of the Racial Discrimination Act 1975 (Cth) is broadly expressed and does not refer specifically to direct discrimination, but direct discrimination would be covered by the terms of s 9(1); s 9(1A) refers to indirect discrimination; ss 5 – 7B of the Sex Discrimination Act 1984 (Cth). See also ss 8 and 9 of the Equal Opportunity Act 1995 (Vic).

[19] Sections 5(2), 6(2) of the Disability Discrimination Act 1992 (Cth).

[20] Sections 13A and 14A of the Equal Opportunity Act 1995 (Vic).

[21] For example, Sapevski v Katies Fashions (Australia) Pty Ltd [1997] IRCA 219; Flight Attendants' Association of Australia v Qantas Airways Limited - PR972225 [2006] AIRC 282 and the appeal at PR973846 [2006] AIRC 537; Australian Fair Pay Commission Wage Setting Decision and Reasons for Decision October 2006 at p 143.

[22] Section 342 item 1(d) FW Act.

[23] Section 342 item 2(b) FW Act.

[24] Section 792(1)(d) was located in Part 16, which dealt with Freedom of Association and other matters; most of the prohibited reasons related to activities connected with industrial associations, but they also covered matters such as entitlement to the benefit of industrial instruments or participation in industrial proceedings.

[25] See note 19 above.

[26] For example, see Purvis v New South Wales [2003] HCA 62; 217 CLR 92.

[27] See note 19 above.

[28] See for example Equal Opportunity Act 1995 (Vic) s 9.

[29] See for example NSW v Amery (2006) 226 ALR 196.

[30] Australian Iron & Steel v Banovic (1989) EOC 92-271.

[31] Such terms, as well as a reference to not discriminating against a person in the context of offering employment, have long been used in the WR Act and its predecessors in the context of freedom of association and similar provisions (s 792 WR Act). They have been the subject of judicial consideration, which should assist in interpreting the new provisions – see for example Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3) [1998] HCA 30; (1998) 195 CLR 1 at 18.

[32] Section 342(3) FW Act.

[33] Section 351(2)(a) FW Act.

[34] The Australian Human Rights Commission Act 1986 (Cth) provides a mechanism for complaint and conciliation but does not render the conduct unlawful – see s 3 definition of 'unlawful discrimination', s 31(b) of the Act.

[35] Section 659(3) WR Act.

[36] Section 18 (4) and (5) Age Discrimination Act 2004 (Cth).

[37] Section 21A Disability Discrimination Act 1992 (Cth).

[38] Section 21A Disability Discrimination Act 1992 (Cth).

[39] Section 18(5) Age Discrimination Act 2004 (Cth).

[40] See for example the arguments in Qantas Airways Ltd v Christie [1998] HCA 18; 193 CLR 280.

[41] Sections 5(2) and 6(2) Disability Discrimination Act 1992 (Cth).

[42] Sections 7A and 14(3A) Sex Discrimination Act 1984 (Cth); though note that family responsibilities discrimination may also be characterised as a species of indirect sex discrimination – see for example Hickie v Hunt & Hunt [1998] HREOCA 8 (9 March 1998).

[43] Section 351(1) FW Act.

[44] The provision applies only to parents or carers of children and there are requirements concerning the age of the child and the employee's length of service– s 65 FW Act.

[45] If an employer refuses a request for flexible arrangements, the decision cannot be tested by way of an order under the civil remedies provisions – s 44(2) FW Act.

[46] See note 19 above.

[47] See for example Qantas Airways Limited v Gama [2008] FCAFC 69; Morgan v Austin Health [2007] VCAT 229; though note provisions such as s 7C Sex Discrimination Act 1984 (Cth), s 6(4) Disability Discrimination Act 1992 (Cth) and s 15(2) Age Discrimination Act 2004 (Cth), which reverse the burden of proof in relation to whether indirect discrimination is 'reasonable'.

[48] Section 361 FW Act.

[49] Section 8 Sex Discrimination Act 1984 (Cth); s 18 Racial Discrimination Act 1975 (Cth); s 10 Disability Discrimination Act 1992 (Cth); s 16 Age Discrimination Act 2004 (Cth).
[50] Section 360 FW Act.
[51] See for example s 8(2) Equal Opportunity Act 1995 (Vic); s 10(2) Anti-Discrimination Act 1991 (Qld).
[52] For example, s 114 Equal Opportunity Act 1995 (Vic); s 46PF Australian Human Rights Commission Act 1986 (Cth).
[53] See for example, ch 4.4.1 *Annual Report 2008 – 2009 Australian Human Rights Commission*.
[54] Section 366 FW Act.
[55] Sections 368 and 592 FW Act.
[56] Section 369 FW Act.
[57] Section 370 FW Act.
[58] Section 372 FW Act.
[59] Section 374 FW Act.
[60] Tan v Xenos [2008] VCAT 1273 per Harbison J.
[61] For example, Fetherston v Peninsula Health (No 2) [2004] FCA 594.
[62] See for example, Tan v Xenos [2008] VCAT 1273.
[63] Section 570 FW Act.

## SECTION 342 FAIR WORK ACT 2009

### 342 Meaning of adverse action

(1)The following table sets out circumstances in which a person takes ***adverse action*** against another person.

**Meaning of adverse action**

| Item | Column 1<br>Adverse action is taken by ... | Column 2<br>if ... |
|---|---|---|
| 1 | an employer against an employee | the employer:<br>(a) dismisses the employee; or<br>(b) injures the employee in his or her employment; or<br>(c) alters the position of the employee to the employee's prejudice; or<br>(d) discriminates between the employee and other employees of the employer. |
| 2 | a prospective employer against a prospective employee | the prospective employer:<br>(a) refuses to employ the prospective employee; or<br>(b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee. |
| 3 | a person (the ***principal***) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor | the principal:<br>(a) terminates the contract; or<br>(b) injures the independent contractor in relation to the terms and conditions of the contract; or<br>(c) alters the position of the independent contractor to the independent contractor's prejudice; or<br>(d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or<br>(e) refuses to supply, or agree to supply, goods or services to the independent contractor. |
| 4 | a person (the ***principal***) 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 | the principal:<br>(a) refuses to engage the independent contractor; or<br>(b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or<br>(c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or<br>(d) refuses to supply, or agree to supply, goods or services to the independent contractor. |
| 5 | an employee against his or her employer | the employee:<br>(a) ceases work in the service of the employer; or<br>(b) takes industrial action against the employer. |

| | | |
|---|---|---|
| 6 | an independent contractor against a person who has entered into a contract for services with the independent contractor | the independent contractor:<br>(a) ceases work under the contract; or<br>(b) takes industrial action against the person. |
| 7 | an industrial association, or an officer or member of an industrial association, against a person | the industrial association, or the officer or member of the industrial association:<br>(a) organises or takes industrial action against the person; or<br>(b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or<br>(c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or<br>(d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member). |

(2) ***Adverse action*** includes:

(a) threatening to take action covered by the table in subsection (1); and

(b) organising such action.

(3) ***Adverse action*** does not include action that is authorised by or under:

(a) this Act or any other law of the Commonwealth; or

(b) a law of a State or Territory prescribed by the regulations.

(4) Without limiting subsection (3), ***adverse action*** does not include an employer standing down an employee who is:

(a) engaged in protected industrial action; and

(b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

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