

**Adverse Action, Discrimination and the Reverse Onus of Proof:  
Exploring the Developing Jurisprudence**

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The *Fair Work Act 2009* (Cth) (*FW Act*) introduced novel adverse action provisions with the Part 3-1 General Protections. On their face these adverse action protections are broader than the predecessor freedom of association and unlawful termination provisions that they largely replaced. In particular, the adverse action rights include protections against workplace discrimination that apply throughout the employment relationship, and have potential to draw a significant case load away from anti-discrimination law.

Much complexity and uncertainty attends the interpretation of the Part 3-1 adverse action protections generally, including in relation to the use of discrimination concepts and approaches. For example, key concepts and terms used in the *FW Act*, such as ‘discriminates between’, ‘disability’, and ‘family or carer’s responsibilities’, are of uncertain scope. Also uncertain in interpretation is the exemption for conduct that is ‘not unlawful under’ anti-discrimination law, as are exemptions that relate to ‘inherent requirements’ and religious institutions. In addition, the reverse onus of proof in the adverse action protections is of great significance. A reverse onus has been a long-standing feature of the previous freedom of association and unlawful termination protections, which covered only termination of employment, but is new in relation to the broader discrimination-type protections of adverse action, and now also covers conduct preceding and during employment.

The *FW Act* provides little guidance on the correct interpretation of the various key terms of the adverse action provisions that intersect with the field of anti-discrimination law.<sup>1</sup> This prompts

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the questions: What use is being made of anti-discrimination law and jurisprudence in judicial interpretations of the new *FW Act* provisions? Are emerging interpretations under the *FW Act* adverse action provisions consistent with understandings and concepts of anti-discrimination law?

To date the exemptions of ‘not unlawful under’ anti-discrimination law, ‘inherent requirements’, and religious institutions, have not received substantive judicial scrutiny. However, three other key issues have been examined: adverse action in the form of ‘discriminates between’; the meaning of the discriminatory grounds (and notably ‘disability’); and the reverse onus of proof. This conference paper examines the emerging case interpretations of these three key aspects of the adverse action protections.<sup>2</sup> Although the Part 3-1 protections have been operational since 1 July 2009, it remains early days in their interpretation, particularly in relation to the first two issues.

Prior to examining this developing field of interpretation of the *FW Act*, the paper sets out the legislative framework of the adverse action protections contained in Part 3-1 of the *FW Act*.

## 1. Legislative Framework of Adverse Action in Part 3-1 General Protections

The *FW Act* prohibits a person from taking ‘adverse action’ against another person ‘because’ of various prescribed grounds, subject to several exceptions.

*What is ‘adverse action’?*

The meaning of the term ‘adverse action’ depends on the relationship between the people involved. In respect of action taken by an employer against an employee, ‘adverse action’ means dismissing them, injuring them in their employment, altering their position to their prejudice, or discriminating ‘between’ them and other employees (s 342(1), item 1). It also includes threatening or organizing to engage in such behavior (s 342(2)). Adverse action can be taken in situations outside an employment relationship, including by prospective employers against prospective employees, principals against independent contractors, and industrial associations against others (s 342(1), items 2, 3 & 7). For simplicity, this paper uses the language of adverse action taken by an employer against an employee, but the issues discussed in the paper have broader application to the other contexts of adverse action.

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<sup>1</sup> Rules of statutory construction indicate that words used in legislation are usually to be given their ordinary meaning conveyed by the text of the provision, taking into account their context and the object underlying the Act: *Acts Interpretation Act 1901* (Cth) s 15AB. A guiding principle is that words should be interpreted in a way that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act): *Acts Interpretation Act 1901* (Cth) s 15AA.

<sup>2</sup> Notably, a number of discrimination-type claims have been pursued within the framework of adverse action because of a ‘workplace right’ (eg, to reasonable accommodation of family responsibilities under the *Equal Opportunity Act 1995* (Vic), to seek a review of a the claimant’s fitness for work, or a right to access unpaid parental leave under the NES): *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011); *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011). See also *Fair Work Ombudsman v W.K.O Pty Ltd* [2012] FCA 1129 (17 October 2012) (penalty determination on the basis of an agreed statement of facts).

*What are the prescribed grounds?*

The FW Act prohibits adverse action on a wide range of grounds or attributes. The grounds are grouped into three main categories: ‘industrial activities’, ‘workplace rights’, and a list of discrimination-type attributes such as race and sex. In relation to ‘industrial activities’, an employer must not take adverse action against an employee because the employee is or is not an officer or member of a union, or engages (or does not engage) in certain ‘industrial activities’ (including participating in lawful union activities and representing the views of a union) (ss 346-7).

In relation to ‘workplace rights’, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes to exercise or not to exercise a workplace right (s 340(1)(a)), or to prevent an employee from exercising a workplace right (s 340(1)(b)). The term ‘workplace right’ is broadly defined and includes being entitled to the benefit of, or having a role or responsibility under, a workplace law or instrument (s 341).

Finally, an employer must not take adverse action against an employee because of a list of discriminatory grounds: the employee’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’ (s 351).

*What is the causal link?*

Adverse action is only prohibited if it is taken ‘because’ of a prescribed ground. This word ‘because’ defines the causal link between the ground and the adverse action that is necessary to create a breach. (One exception is s 340(1)(b), which does not use the word ‘because’ – it prohibits an employer taking adverse action against an employee ‘to prevent the exercise of a workplace right’.)

The *FW Act* further provides that ‘a person takes action for a particular reason if the reasons for the action include that reason’ (s 360). It also includes a reverse onus in relation to the reasons for taking an action (s 361). This means that although the employee must still establish by evidence that they possess a prescribed ground, and have suffered adverse action within the meaning of the legislation, once the employee alleges their employer took action for a particular reason, it is presumed that the employer’s action *was* taken for that reason unless the employer proves otherwise. In short, the employee is relieved of the burden of proving the employer’s reason for taking an action.

*Are there exceptions?*

Part 3-1 of the *FW Act* provides a number of exceptions. The first applies in relation to all three categories of ‘industrial activities’, ‘workplace rights’ and the list of discriminatory grounds

‘race, sex etc, and to all forms of adverse action on those grounds. It is that the conduct of the employer will not amount to unlawful adverse action where that conduct was ‘authorised by or under’ the *FW Act* or other law of the Commonwealth, or a prescribed State or Territory law (s 342(3) (and see sub-sect (4)). Three other exceptions apply solely in relation to the list of grounds ‘race, colour, sex, sexual preference, age’ and so on in s 351(1). They apply in relation to all forms of adverse action on this list of discriminatory grounds. The three exceptions are where the adverse action:

- was ‘taken because of the inherent requirements of the particular position’ (s 351(2)(b));
- was taken on good faith religious grounds against a staff member in a religious institution (s 351(2)(c)); and
- was ‘not unlawful under any anti-discrimination law in force in the place where the action is taken’ (s 351(2)(a)).<sup>3</sup>

## 2. Adverse Action as ‘Discriminates Between’: s 342(1) item 1(d)

One form of adverse action is where an employer ‘discriminates between the employee and other employees of the employer.’<sup>4</sup> This phrase is unknown in anti-discrimination law, which uses only the formulation ‘discriminates against.’

*What does discrimination mean?*

The concept of discrimination (and its derivatives) is not defined in the *FW Act*, and the Explanatory Memorandum (EM) provides no assistance on interpretation.<sup>5</sup> Nor has the concept of discrimination been defined in federal industrial legislation since it first appeared some thirty years ago in relation to non-discriminatory content of awards and agreements. It has however been interpreted from these early days by drawing on meanings of anti-discrimination law, specifically to include the concepts of both direct and indirect discrimination, articulated in ways that broadly captured the meanings in anti-discrimination law at the time.<sup>6</sup>

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<sup>3</sup> The meaning of anti-discrimination law in this rule is defined in an unsurprising manner: see s 351(3).

<sup>4</sup> *FW Act* s 342(1) item 1. See also items 2 and 4 which refer to ‘discriminates against’ a prospective employee or independent contractor.

<sup>5</sup> Notably though the EM does refer to a broad idea of non-discrimination, as an objective of Part 3-1 is ‘preventing discrimination’ ([1333]), and protecting workers from ‘workplace discrimination’ ([1424]). In addition the EM states that ‘[m]any similar protections against discriminatory conduct exist in other Commonwealth, State and Territory anti-discrimination legislation’ [1431].

<sup>6</sup> See eg, *Flight Attendants’ Association of Australia v Qantas Airways Limited* (2006) AIRC 282 (10 May 2006) [36]-[52] (on potentially discriminatory content of a certified agreement); not contested on appeal: *Flight Attendants’ Association of Australia v Qantas Airways Limited* (2006) AIRC 537 (1 September 2006) [11]-[15]; *Sapevski v Katies Fashions (Australia) Pty Ltd* (1997) IRCA 219 (8 July 1997) (on discrimination in unlawful termination). Direct and indirect discrimination have also been used in interpreting the equal remuneration principles in federal industrial law: Meg Smith, ‘Gender Pay Equity Reform in Australia: What is the Way Forward?’ (2009) 35 *Australian Bulletin of Labour* 652 at 659-660.

Fair Work Australia (FWA) has continued to adopt anti-discrimination law meanings of discrimination in a number of proceedings under the *FW Act*.<sup>7</sup> In contrast, in one decision FWA used a dictionary to ascertain the ordinary meaning of ‘discriminate’ in the definition of adverse action.<sup>8</sup> Importantly though, none of these decisions of FWA were directly on the adverse action provisions in Part 3-1 themselves.

Interestingly, the Fair Work Ombudsman has indicated that it will interpret s 351 as prohibiting both direct and indirect discrimination (in a manner that broadly reflects anti-discrimination law understandings of those concepts).<sup>9</sup>

In contrast to this use by the federal tribunal and the Fair Work Ombudsman of anti-discrimination law meanings in interpreting the industrial statute, early decisions of the Federal Magistrates Court directly on the adverse action protections of Part 3-1 indicate a greater ambivalence towards using anti-discrimination law concepts. To date two Federal Magistrates Court decisions have directly examined ‘discriminates between’ in s 342(1) of the *FW Act*: *Hodkinson and Ramos*.<sup>10</sup> In both decisions the Macquarie and Oxford dictionaries were given prominence in interpreting the ordinary meaning of ‘discriminate’, to conclude that the ‘element of intent is central’ to these dictionary definitions, and requires a ‘conscious decision’ to make a distinction between people.<sup>11</sup>

The dictionary definitions cited in the judgments were the *Macquarie Dictionary* (5th ed), which relevantly defines ‘discriminate’ in the following terms:

‘1. to make a distinction, as in favour of or against a person or thing,’

and the *Shorter Oxford English Dictionary* (6th ed) which relevantly defines ‘discriminate’ as:

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<sup>7</sup> See eg, *Deng v Inghams Enterprises Pty Ltd* [2010] FWA 8797 (23 November 2010) [55]-[56] where in the context of an unfair dismissal hearing, FWA interpreted the concept of discrimination in the Part 3-1 General Protections as involving direct and indirect discrimination; *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 (10 June 2011) [11]-[14] where ‘discriminatory term’ under the *FW Act* s 195 was interpreted to mean both direct and indirect discrimination; *Shop, Distributive and Allied Employees Association* [2011] FWA 6251 (14 September 2011) [30] where the prohibition in the *FW Act* s 153 on modern awards containing terms ‘that discriminate’ was assumed (without a firm view being expressed) to include indirect discrimination. The *FW Act* provides FWA with a broad direction to take into account the objectives of the Act and specifically ‘the need to respect and value diversity of the work force by helping to prevent and eliminate discrimination’: s 578.

<sup>8</sup> *D H Gibson Pty Limited* [2011] FWA 911 (10 February 2011) [27] where in the context of an application for approval of an enterprise agreement, FWA relied on the Macquarie Dictionary definition of discriminate to interpret the meaning of s 342 adverse action.

<sup>9</sup> Fair Work Ombudsman, *Guidance Note 6: Discrimination Policy*, 2<sup>nd</sup> edn, 1 December 2011, [5.4]. Note this guidance note was last updated before the High Court’s decision in *Barclay* was handed down.

<sup>10</sup> *Hodkinson v Commonwealth* [2011] FMCA 171 (31 March 2011) (*Hodkinson*); *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341 (24 August 2011) (*Ramos*).

<sup>11</sup> *Hodkinson* [176]; *Ramos* [59]-[61].

‘4. Make a distinction in the treatment of different categories of people or things, esp. unjustly or prejudicially against people on grounds or race, colour, sex, social status, age, etc.’<sup>12</sup>

In *Hodkinson* Cameron FM additionally drew on the objects of Part 3-1 and expressed the view that the meaning of (direct) discrimination in the *Disability Discrimination Act 1992* (Cth) (DDA) s 5 ‘appears to encapsulate an important part of the meaning of discrimination to be derived from the dictionary definitions and the object expressed in ... [Part 3-1], in the sense that a person is being treated unjustly, prejudicially, discriminated against, victimised or adversely affected.’<sup>13</sup>

In the Federal Court Katzmann J (in *Pilbara Iron Company*) has also expressed the view that the concept of discriminates in s 342(1) ‘is not defined so it must have its ordinary meaning which, relevantly, is simply to make a distinction (the first meaning in both the Oxford and the Macquarie Dictionaries).’<sup>14</sup>

These two early decisions of the Federal Magistrates Court, and the decision of the Federal Court, indicate a preference for a dictionary meaning of discriminate, although clearly in the minds of the Federal Magistrates such an ordinary meaning is not completely divorced from anti-discrimination law understandings. Nevertheless, it seems that anti-discrimination law concepts were used to flesh out and operationalise the dictionary meaning of discriminate by the Federal Magistrates. Notably, the concept of less favourable treatment, articulated by both Federal Magistrates, reflects the standard approach to the meaning of direct discrimination in anti-discrimination law.<sup>15</sup>

#### *Must the discrimination be deliberate?*

A second significant early departure from the anti-discrimination law approach is in the holdings in these cases that ‘discriminates’ must be deliberate. In *Hodkinson*, Cameron FM concluded that ‘discriminates between’ in s 342(1) ‘involves an employer deliberately treating an employee, or a group of employees, less favourably than others of its employees’.<sup>16</sup> In *Ramos* Driver FM expressed the view that as the complaint was one of direct discrimination, ‘it is necessary for ...

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<sup>12</sup> Ibid.

<sup>13</sup> *Hodkinson* [177].

<sup>14</sup> *CFMEU v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 (29 June 2012) (*Pilbara Iron Company*) [40]. His Honour explained his view that Parliament intended to cover ‘conduct which discriminated against one employee when compared with other employees’: [40]. Katzmann J was of the view that this meaning applied in relation both to ‘discriminates between’ and ‘discriminates against’ in s 342(1) items 1 and 2 respectively: [40]. His Honour saw the different prepositions of ‘between’ and ‘against’ as merely reflecting a difference in syntax: [40]. The judgment records that both parties accepted that discriminates in s 342(1) means to ‘treat less favourably’, and for Katzmann J this ‘necessarily imports the concept of discriminating against’: [41].

<sup>15</sup> See eg, *Sex Discrimination Act 1984* (Cth) s 5, s 6; *Disability Discrimination Act 1992* (Cth) s 5; *Anti-Discrimination Act 1977* (NSW) s 7(1)(a); Neil Rees, Katherine Lindsay & Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials*, Federation Press, 2008, [4.2]. Note also that federal anti-discrimination law is currently under review.

<sup>16</sup> *Hodkinson* [176]-[178]. See also [191].

[the applicant] to prove that ... [the employer] deliberately treated him less favourably than its other employees.’<sup>17</sup>

In contrast, as the High Court clarified very early,<sup>18</sup> anti-discrimination law has never required that intention, motive or consciousness be established as part of a direct discrimination claim, and some statutes explicitly provide that the following are irrelevant: the motive of the respondent, and whether or not the respondent is aware of the discrimination or considers the treatment to be unfavourable.<sup>19</sup> The dimension of deliberateness articulated by the Federal Magistrates appears to owe more to the dictionary meaning than anti-discrimination law approaches.

### *Is a comparator approach appropriate?*

Anti-discrimination law uses a comparator methodology to establish direct discrimination, in the sense that the applicant has been treated less favourably than a (real or hypothetical) comparator would or has been treated in the same or similar circumstances. A key statement and application of this comparator approach is the High Court decision under the *DDA* in *Purvis v NSW*.<sup>20</sup>

Decisions to date under the adverse action provisions in Part 3-1 have grappled with the question of whether a similar comparator approach is appropriate in interpreting ‘discriminates between’ in s 342. In the 2011 Full Federal Court decision of *Barclay*, the court (by majority) indicated that a comparator test of the kind applied in the case of *Purvis v NSW* was not relevant to forms of adverse action other than ‘discriminates between’.<sup>21</sup> This suggests by inference a view of the majority that the approach of *Purvis v NSW* is appropriate for application in the test of ‘discriminates between’ in s 342.

In *Ramos* Driver FM directly examined whether the test of ‘discriminates between’ in s 342 contains a comparator approach.<sup>22</sup> After referring to *Purvis v NSW* and the Full Federal Court majority in *Barclay*, and despite claiming to rely on the ordinary meaning of ‘discriminate,’ Driver FM applied a comparator approach by concluding that ‘it is appropriate to undertake a comparative test between the Applicant and another employee who had not filed a complaint but

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<sup>17</sup> *Ramos* [62]. With respect this appears to misunderstand the role of the reverse onus of proof in s 361 (discussed below).

<sup>18</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349.

<sup>19</sup> See eg, *Equal Opportunity Act 2010* (Vic) s 8(2)(a), s 9(4), s 10; Rees, Lindsay & Rice, above n 15, [4.2.5], [4.2.18].

<sup>20</sup> *Purvis v New South Wales* (2003) 217 CLR 92; Rees, Lindsay & Rice, above n 15, [4.2.11]-[4.2.16].

<sup>21</sup> *Barclay v BRIT* [2011] FCAFC 14 (9 February 2011) [35]-[36] (Gray and Bromberg JJ). That approach has been followed in *Ramos* [64]-[66], it has also been applied in *Stephens v Australian Postal Corporation* [2011] FMCA 448 (8 July 2011) [84] (*Stephens*); *Farah v Ahn* [2012] FMCA 44 (3 February 2012) [75]. The High Court in *BRIT v Barclay* did not comment on this point regarding a comparator” *BRIT v Barclay* [2012] HCA 32 (7 September 2012).

<sup>22</sup> *Ramos* [66].

who had behaved in a similar manner' to the applicant.<sup>23</sup> This articulation parallels the *Purvis v NSW* anti-discrimination law comparator approach.

The issue of a comparator was raised in *Pilbara Iron Company* in the Federal Court. Justice Katzmann noted the 'real difficulty' in determining how the comparison should be drawn in the adverse action protections.<sup>24</sup> His Honour noted that this question was not as 'acute' in anti-discrimination law where the approach to drawing the comparator is more fully articulated (for example, and as noted in the decision, through the *DDA* s 5 and *Purvis v NSW*).<sup>25</sup> After reciting the support of the Full Federal Court majority in *Barclay* for applying the comparator approach of anti-discrimination law to the adverse action jurisdiction, Katzmann J concluded that '[w]ith respect, to import the reasoning in *Purvis*, which was concerned with the interpretation of different words in a different statute in a different context, is to invite error.'<sup>26</sup> Although rejecting the appropriateness of applying *Purvis v NSW*, his Honour expressed a concluded view that 'discriminates between' 'requires that one employee is treated differently from others in the same or comparable circumstances.'<sup>27</sup> Ultimately on the facts of the case, Katzmann J was not satisfied that the applicant had made out his claim of 'discriminates between' (on the ground of 'workplace rights') as the applicant had merely asserted that he was not offered continuing employment at the end of his traineeship when other trainees were.<sup>28</sup> In short, the applicant employee did not offer in his submissions or evidence any comparisons, and that approach was insufficient to establish the necessary elements of 'discriminates between'.<sup>29</sup> This judgment evidences a more thorough attempt to maintain a clearer separation between the emerging jurisdiction under s 342(1) and anti-discrimination jurisprudence.

*Does anti-discrimination law play a special role in industrial law interpretations?*

Outside the *FW Act* adverse action provisions, but still within the context of current industrial legislation, the Full Federal Court has indicated that anti-discrimination law meanings of 'discriminates' play no special or central role in the interpretation of discrimination in the industrial context. In *McConnell Dowell* the Full Federal Court examined in some depth the meaning of 'discriminate against' in s 45 of the *Building and Construction Industry Improvement Act 2005* (Cth) (*BCII Act*).<sup>30</sup> Notably that phrase, like the words 'discriminate between' in the

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<sup>23</sup> *Ramos* [66].

<sup>24</sup> *Pilbara Iron Company* [42].

<sup>25</sup> *Purvis v NSW* (2003) 217 CLR 92.

<sup>26</sup> *Pilbara Iron Company* [43].

<sup>27</sup> *Ibid.*

<sup>28</sup> Evidence indicated that the applicant was one of 6 trainee car examiners (out of 15) who were not offered a continuing position upon the expiration of their 12 month fixed term contracts: *Pilbara Iron Company* [39].

<sup>29</sup> It was not however necessary for his Honour to express a concluded view on this aspect of the applicant's claim, due to the view he reached on other aspects of the claim: [44].

<sup>30</sup> *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* [2012] FCAFC 93 (29 June 2012) (*McConnell Dowell*). Section 45(1) of the *BCII Act* is headed '[d]iscrimination against employer in relation to industrial instruments' and provides (in part) that a 'person ... must not discriminate against

adverse action provisions in the *FW Act*, is not further defined or articulated in the *BCII Act*. In their separate judgments Buchanan J and Flick J explore the wide range of statutes and areas of law, including the *Australian Constitution*, that use a concept of ‘discriminate against’, ‘discriminate between’ and more broadly the concept of discrimination.<sup>31</sup> It is clear that Buchanan J and Flick J share the view that there is no credible reason to give anti-discrimination law meanings of discrimination any particular significance in interpreting s 45 of the *BCII Act*. Flick J expressed the view that ‘[c]aution must necessarily be exercised, ... in seeking to transpose the considerable learning that has been accumulated in discrimination law as it applies to human rights legislation into the realm of industrial law.’<sup>32</sup> The third judge to make up the Bench - Katzmann J - was similarly of the view that there is no sound reason to import an anti-discrimination law understanding of discrimination into the interpretation of s 45.<sup>33</sup> Buchanan J and Flick J expressed a clear view that the meaning of the term discriminates must be discerned from the statute in which the phrase appears.<sup>34</sup> This was also the basis on which Katzmann J approached the issue. All three judges found no fault with the adoption by the primary judge of the view that the words (in s 45 of the *BCII Act*) ought to be given their ordinary meaning, and that required (drawing on the Oxford dictionary) not only differential treatment based on a prohibited ground, but that some adverse treatment or impact was evident.<sup>35</sup>

### Conclusion

Although it remains early days in the interpretation of s 342(1) ‘discriminates between’, these initial cases on the meaning of discrimination in the *FW Act* (and the *BCII Act*) suggest a trend in interpretation away from anti-discrimination law and concepts, in favour of a dictionary-based approach and an emerging industrial jurisprudence of discrimination.<sup>36</sup>

### 3. Grounds of ‘race, colour, sex ...’: s 351

In addition to the grounds of ‘industrial activities’ and ‘workplace rights’, Part 3-1 prohibits adverse action on a list of discriminatory grounds. The list is: ‘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’.

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another person ... on the ground that’, for example, the employment of the second person is covered, or is not covered, by a particular kind of industrial instrument.

<sup>31</sup> *McConnell Dowell* [10]-[26] per Buchanan J; [41]-[49] per Flick J.

<sup>32</sup> *McConnell Dowell* [49] per Flick J.

<sup>33</sup> *McConnell Dowell* [109] per Katzman J.

<sup>34</sup> *McConnell Dowell* [5] per Buchanan J; [50] per Flick J.

<sup>35</sup> *McConnell Dowell* [27] per Buchanan J; [56]-[85] per Flick J; [111] per Katzmann J.

<sup>36</sup> Notably, the approach of the High Court in *BRIT v Barclay* (discussed below) may shape whether the anti-discrimination law concept of indirect discrimination can be included within the adverse action concept of ‘discriminates between’ in s 342(1), item 1.

Like the concept of ‘discriminates between’ in s 342(1), these terms are not defined in the *FW Act*, and nor have they ever been defined in industrial legislation. In addition, the EM is of no assistance on the appropriate approach to interpretation.<sup>37</sup>

*What does ‘physical or mental disability’ mean?*

Of the prescribed grounds, ‘physical or mental disability’ has received the most judicial attention to date. A number of decisions of the Federal Magistrates Court have given the word ‘disability’ in s 351 its ordinary meaning rather than the extended definition found in anti-discrimination law. In these cases Federal Magistrates have considered and rejected the technical definition of disability contained in the *DDA*, in favour of the use of the Macquarie and Oxford dictionaries to discern the ordinary meaning of ‘disability’.<sup>38</sup> Using this methodology, Cameron FM in *Hodkinson* defined ‘disability’ in s 351 to refer to ‘a particular physical or mental weakness or incapacity and to include a condition which limits a person’s movements, activities or senses.’<sup>39</sup>

Federal Magistrates have differed over whether the ground of ‘physical or mental disability’ encompasses the practical or functional consequences of the underlying medical condition. In *Hodkinson* Federal Magistrate Cameron explicitly confined the ground of disability to the physical or mental limitations, and not the ‘practical consequences’ of the disability (such as more frequent absence from work).<sup>40</sup> In contrast, in *Stephens*, Smith FM, drawing on dictionary meanings of disability and the objects of the legislation, was of the view that it would be inappropriate to limit the words ‘physical or mental disability’ to the underlying diagnosed medical condition itself. Rather, for Smith FM the ground also encompasses the ‘inherent and perceived functional impairments or consequences in relation to presentation or work in a workplace, which are the manifestation of the underlying condition.’<sup>41</sup> Potentially much depends on how narrowly or broadly the ‘physical or mental disability’ is drawn in terms of the establishment of the causal link between the ground and the adverse action.

This issue of whether a manifestation of a disability is part of the disability in the *DDA* was addressed in *Purvis v NSW*. The majority of the High Court held that the practical or functional manifestations of the claimant’s medical condition (his anti-social and violent behaviour caused

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<sup>37</sup> The EM does however note that the words ‘or carer’s’ have been inserted into the previous phrase of ‘family responsibilities’ to ‘expand’ the protection offered compared to the previous protections of the Workplace Relations Act 1996 (Cth): Explanatory Memorandum to the Fair Work Bill 2008 [1426].

<sup>38</sup> *Hodkinson* [145]-[146]; *Stephens* [86]-[87]; *Cugura v Frankston City Council* [2012] FMCA 340 (24 April 2012) (*Cugura*) [163]. For decisions on ‘physical disability’ where the interpretation of that term is not discussed in a substantive manner, see *Silver v Rogers & Rogers* [2012] FMCA 674 (8 August 2012); *Eriksson v Commonwealth of Australia* [2011] FMCA 964 (12 December 2011); *Fair Work Ombudsman v Drivecam Pty Ltd* [2011] FMCA 600 (9 August 2011).

<sup>39</sup> *Hodkinson* [146].

<sup>40</sup> *Hodkinson* [146]. To this end Cameron FM commented that the alleged disability (and adverse action causally connected to that disability) ought to be particularised clearly in the pleadings, as is the requirement in anti-discrimination law: [147].

<sup>41</sup> *Stephens* [86]-[90].

by his brain injury) were not part of his disability under the *DDA*.<sup>42</sup> Notably though, at that time the *DDA* did not contain characteristic extension provisions, as many anti-discrimination statutes do, nor a defence of unjustifiable hardship in relation to the management or exclusion of a student. Since the High Court decision the *DDA* has been amended to provide that defence and to provide that disability ‘includes behaviour that is a symptom or manifestation of the disability’.<sup>43</sup>

In contrast to the approach of using a dictionary to ascertain the ordinary meaning of ‘disability’, in *Leighton Contractors*, a July 2012 decision, the Federal Magistrate used the *FW Act* s 12 definition of ‘employee with a disability’ to determine the meaning of disability in s 351.<sup>44</sup> This s 12 definition is very narrow as it is confined to employees who qualify for a disability support pension under the *Social Security Act 1991* (Cth). That meaning is much more restricted than the ordinary meaning of disability, and the meaning of disability under anti-discrimination law. It surely cannot reflect the intent of Parliament.

#### *Other grounds?*

To date there has been no substantive exploration in relation to other discriminatory grounds. Although the grounds of ‘family or carer’s responsibilities’<sup>45</sup> have been used in litigation, as has ‘pregnancy’,<sup>46</sup> and age,<sup>47</sup> there has been no exploration of the methodology of interpretation or the outer reaches of each ground.

#### *Conclusion*

Like the meaning of ‘discriminates between’ in s 342(1), these early case decisions on the meaning of the terms used in s 351 indicate an early trend of using the ordinary meaning of words, rather than the meanings of anti-discrimination law. This reinforces a preliminary view that these early cases are carving out the discrimination-type protections in Part 3-1 of the *FW Act* as a jurisdiction separate too, and distinctive from, anti-discrimination law and jurisprudence.

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<sup>42</sup> (2003) 217 CLR 92 at [210]-[212] per Gummow, Hayne and Heydon JJ.

<sup>43</sup> *DDA* s 4(1) definition of ‘disability’ as amended by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).

<sup>44</sup> *CFMEU v Leighton Contractors Pty Ltd* [2012] FMCA 487 (25 July 2012) (*Leighton Contractors*) [159]-[162]. The s 12 definition of ‘employee with a disability’ appears to apply most obviously to the setting of different (lower) wage rates for ‘employees with a disability’ in modern awards (s 139), enterprise agreements (s 195(3)) and the national minimum wage order (s 294).

<sup>45</sup> *Ucchino v Acorp Pty Ltd* [2012] FMCA 9 (27 January 2012) (*Ucchino*); *Cugura* [165]-[167]; *Bayford v MAXXIA Pty Ltd* [2011] FMCA 202 (12 April 2011).

<sup>46</sup> *Ucchino*; *Fair Work Ombudsman v W.K.O. Pty Ltd* [2012] FCA 1129 (17 October 2012) (agreed statement of facts and contravention); *Fair Work Ombudsman v Wongtas Pty Ltd (No 2)* [2012] FCA 30 (2 February 2012) (pregnancy and gender; agreed statement of facts).

<sup>47</sup> *Silver v Rogers & Rogers* [2012] FMCA 674 (8 August 2012); *Vink v LED Technologies Pty Ltd* [2012] FMCA 917 (9 October 2012).

#### 4. Causal Link and Reverse Onus of Proof

The adverse action provisions draw together and expand on various parts of previous legislation including freedom of association provisions. Such provisions, and their associated causal link and reverse onus, have existed in federal industrial law for over 100 years.<sup>48</sup> The reverse onus reflects the fact that it can be very difficult for an applicant to prove the reason for the respondent's action. This was particularly so under early forms of the legislation when breach of the union victimisation provisions was a criminal offence,<sup>49</sup> and accordingly, without the reverse onus provision, the employee would have been required to prove the reason for the employer's action 'beyond reasonable doubt'. In one case, it was noted that '[t]he circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly with the knowledge of the employer.'<sup>50</sup>

An early case on the causal link was the 1917 High Court decision in *Pearce*.<sup>51</sup> A union issued a log of claims, and the employer asked an employee (the sole union member at the business) to sign a document stating that he was satisfied with his wages and conditions. If he had signed the document there would have been no dispute between the employer and the union and the employer could not have been made a party to the relevant award. When the employee refused, he was dismissed. The employer gave evidence that the employee's union status did not influence his decision to dismiss the employee – rather, he dismissed the employee because the employee was dissatisfied with his wages and conditions and 'I would not keep a man in my employ who was dissatisfied'.<sup>52</sup> The Magistrate had no reason to doubt this evidence, and found the employer had not breached the union victimisation provisions. On appeal, a majority of the High Court found there was no ground to overturn the Magistrate's finding. Acting Chief Justice Barton noted the Magistrate had the benefit of hearing the witnesses and observing the cross-examination, although his Honour issued a note of caution that 'mere declarations as to the mental state that prompted the employer's actions are entitled to little or no regard'.<sup>53</sup> This case illustrates a straightforward approach to issues of causation and the reverse onus. The Magistrate accepted the employer's evidence, including the denial of a prescribed reason, and this was a complete answer to the claim.

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<sup>48</sup> The wording of the provisions has changed over time. In particular, in relation to the causal link, in 1904 employers were prohibited from dismissing an employee 'by reason merely of the fact that' the employee was a union member or officer: *Conciliation and Arbitration Act 1904* (Cth) s 9(1). In 1914 the causal link became 'by reason of the circumstance': *Conciliation and Arbitration Act 1904* (Cth) s 9(1), later renumbered to s 5(1). With the introduction of the *Industrial Relations Act 1988* (Cth), the causal link became 'because', and this word continued to be used in the *Workplace Relations Act 1996* (Cth) and the present provisions of the *FW Act*.

<sup>49</sup> *Conciliation and Arbitration Act 1904* (Cth); *Industrial Relations Act 1988* (Cth).

<sup>50</sup> *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 267, quoted with approval in *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326, 336. This phrase was also used in Explanatory Memorandum, Industrial Relations Reform Bill 1993 (Cth), 64.

<sup>51</sup> *Pearce v W D Peacock & Co Ltd (Pearce)* (1917) 23 CLR 199.

<sup>52</sup> *Ibid* 202.

<sup>53</sup> *Ibid* 203.

Justice Isaacs dissented. His Honour considered the employee's dissatisfaction was 'bound up' with his union membership, and if the employer could not say 'one is independent of the other', the employer could not rely on the excuse that the dismissal was because the employee was dissatisfied. Justice Isaacs said '[s]uch an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached'.<sup>54</sup> His Honour referred to other evidence which suggested the union membership was a factor – that 'there was a "horse" attached to the "halter", and that he knew it'.<sup>55</sup> On one view, Isaacs J's decision is consistent with the straightforward approach described above – his Honour simply disagreed with the Magistrate's finding about the employer's evidence, because other parts of the employer's own evidence contradicted it. However, the 'horse and the halter' analogy also hints at a more nuanced and complex approach to the issue of the causal link. It highlights that an entire claim can fall on the way an employer defines and subdivides their reasons for acting – perhaps even where their stated reason for acting (the halter) is clearly closely related to a prescribed ground (the horse).

### *Barclay*

Against this background, we turn to consider the 2012 High Court decision *Barclay*. Mr Barclay was employed by the Bendigo Regional Institute of Technical and Further Education (BRIT), and was the President of the BRIT sub-branch of the Australian Education Union (AEU). Four AEU members raised concerns with Barclay (in his union capacity) regarding inaccurate information in documents for an upcoming audit. Each wished to remain anonymous. Barclay sent an email from his BRIT email address to all AEU members at BRIT, stating that 'several members ... have witnessed or been asked to be part of producing false and fraudulent documents for the audit' and warning members not to become involved in these activities. He closed the email with 'Greg Barclay President BRIT AEU Sub-Branch'. BRIT's Chief Executive Officer, Dr Harvey, formed the view that Barclay's email and his failure to tell his managers about the allegations or reveal the identity of the AEU members may have constituted misconduct and a breach of the relevant code of conduct. At trial, she gave evidence that she considered the email was distressing to staff, damaging to BRIT's reputation and undermined confidence in the audit.<sup>56</sup> Harvey suspended Barclay on full pay.

Barclay argued BRIT had taken adverse action against him because he was an officer of the AEU and had engaged in industrial activity. BRIT conceded it had taken conduct constituting adverse action by suspending Barclay. Accordingly, the main issue at all stages of the litigation was whether BRIT's adverse action was taken for a prescribed reason – that is, whether the causal link was made out.

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<sup>54</sup> Ibid 207.

<sup>55</sup> Ibid 208.

<sup>56</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 264.

The case was initially heard in 2010 by Tracey J of the Federal Court.<sup>57</sup> Justice Tracey determined that BRIT had not contravened the legislation. His Honour accepted Harvey's evidence of her reasons for suspending Barclay, and her express denial that his union status and activities were factors. His Honour found Harvey's evidence credible, and held that this evidence was a complete answer to the claim.

Barclay argued that the use of the word 'because' in the causal link (rather than 'by reason of', which had been used in predecessor legislation) meant the decision-maker's subjective reasons for taking the action were irrelevant and the test was purely objective.<sup>58</sup> Such an approach would have allowed the court to take a broader view of the reasons for the suspension – including the fact that all of the matters that concerned Harvey (the terms of the email and Barclay's insistence on maintaining the confidences of his union members) were part of Barclay's exercising of his union functions and engagement in industrial activities. Justice Tracey rejected this argument.<sup>59</sup> His Honour found that an employer's evidence is relevant, and '[i]f it supports the view that the reason was innocent and that evidence is accepted the employer will have a good defence'.<sup>60</sup>

Barclay appealed to the Full Court of the Federal Court, which in 2011 found in his favour.<sup>61</sup> While Gray and Bromberg JJ agreed with Tracey J that the introduction of the word 'because' did not make the decision-maker's state of mind irrelevant,<sup>62</sup> their Honours considered the decision-maker's state of mind is not *conclusive*. What is required is a determination of the 'real reason' for the conduct.

The real 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>63</sup>

In other words, it is not open to the decision-maker to choose to ignore the fact that the halter was attached to a horse. Even though Harvey had 'chosen to characterise' Barclay's conduct as that of an employee (rather than a union officer), and therefore 'did not regard herself' as taking

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid 258.

<sup>59</sup> Ibid 258.

<sup>60</sup> Ibid 260-1.

<sup>61</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

<sup>62</sup> Ibid 220.

<sup>63</sup> Ibid 221 (emphasis added).

action because of Barclay's union status or activities, it 'does not alter the fact that her real reasons included these factors.'<sup>64</sup>

Justice Lander dissented, finding that '[t]he subjective intention of the alleged contravenor if accepted by the Court to be the actual intention will be determinative'.<sup>65</sup> His Honour found that a breach will not be made out 'by simply establishing that adverse action was taken whilst the union official was engaged in industrial activity' – there will only be a breach 'if in fact that is the reason for the taking of the adverse action'.<sup>66</sup>

BRIT appealed to the High Court, which overturned the Full Federal Court's decision. Like Tracey J and the Full Federal Court majority, French CJ and Crennan J rejected Barclay's argument that the use of the word 'because' made the decision-maker's state of mind irrelevant. On the contrary, the existence of the reverse onus 'naturally and ordinarily mean[s] that direct evidence of a decision-maker as to state of mind, intent or purpose' will be relevant, although the 'central question remains "why was the adverse action taken?"'.<sup>67</sup> Their Honours noted that evidence from the decision-maker may not always be accepted (for example, if it is contradicted by proven objective facts or by other parts of the decision-maker's own evidence). 'However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer'.<sup>68</sup> Their Honours also noted that the employer's onus is not 'made heavier (or rendered impossible to discharge) because an employee affected by adverse action happens to be an officer' or to have engaged in industrial activity.<sup>69</sup> Such an approach would 'destroy the balance between employers and employees central to the operation of s 361'.<sup>70</sup>

Justices Gummow and Hayne were in 'general agreement' with the reasons of French CJ and Crennan J.<sup>71</sup> Their Honours cautioned against looking for 'objective' or 'subjective' reasons, saying this approach adopts 'an illusory frame of reference'. The issue is a question of fact, and the Full Federal Court majority made an error of law when it displaced Tracey J's factual findings and reassessed the evidence.<sup>72</sup> The 'reliability and weight' of the employer's evidence

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<sup>64</sup> Ibid 234.

<sup>65</sup> Ibid 254.

<sup>66</sup> Ibid 258.

<sup>67</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 657.

<sup>68</sup> Ibid 657.

<sup>69</sup> Ibid 662.

<sup>70</sup> Ibid 662.

<sup>71</sup> Ibid 663.

<sup>72</sup> Ibid 675, 677. It is also interesting to note that Gummow and Hayne JJ held that an employer breaches s 346 'if it can be said that engagement by the employee in an industrial activity comprised "a substantial and operative" reason, or reasons including the reason, for the employer's action' (at 671). The phrase 'substantial and operative reason' derives from the High Court decision in *General Motors-Holden Pty Ltd v Bowling* (1976) 12 ALR 605, quoted in *Barclay* at 667 (see also French CJ and Crennan J at 661). That case was decided under the *Conciliation and Arbitration Act 1904* (Cth) (*CA Act*). Under the *CA Act*, there was no provision similar to the current s 360 (which deals with multiple reasons for an action, and provides that 'a person takes action for a particular reason if the reasons for the action include that reason'.) Later versions of the legislation did deal with the possibility of multiple reasons. For example, the *Workplace Relations Act 1996* (Cth) (*WR Act*) prohibited an employer from taking certain action 'for a prohibited reason, or for reasons that include a prohibited reason' (s 298K(1) of the pre-

‘was to be balanced against’ the employee’s evidence and the overall facts of the case, ‘but it was the reasons of the decision-maker ... which was the focus of the inquiry.’<sup>73</sup>

Justice Heydon was of the view that ‘[t]he word “because” requires an investigation of Dr Harvey’s reason for the conduct’.<sup>74</sup> It was not open to the Full Federal Court majority to depart from the trial judge’s conclusions. His Honour was critical of the Full Federal Court majority’s distinction between ‘what actuated the conduct’ and ‘what the person thinks he or she was actuated by’, describing the position as ‘indefensible’.<sup>75</sup>

Ultimately, the High Court took a seductively straightforward approach to the issue of causation. If the decision-maker gives evidence that they did not take adverse action for a prescribed reason, and that evidence is accepted, there will not be a breach of the Act.<sup>76</sup> Clearly, this approach to the causal link relies almost entirely on the trial judge’s assessment of the decision-maker’s evidence and credibility.<sup>77</sup> In this case, it is perhaps worth noting that Tracey J’s assessment of Harvey’s evidence took only one paragraph of his Honour’s judgment, and included some reservations (that she was a ‘tentative and nervous witness’ and at times ‘unnecessarily guarded and defensive’). Leaving aside this particular case, such an approach of assessing the evidence of the decision-maker has the potential to allow (and perhaps even encourage) employers (whether deliberately or not) to characterise their reasons for acting in a way that suits their cause. In the *Barclay* case, as the majority Full Federal Court judges noted, ‘[a]ll of the relevant conduct in issue ... involved Mr Barclay in his union capacity’.<sup>78</sup> However,

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WorkChoices *WR Act*, and s 792(1) of the post-WorkChoices *WR Act*). Some cases decided under these statutes held that it was no longer necessary that a prescribed reason be a *substantial* reason - see, eg, *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326 (*CSL*). In that case, Branson J referred to the phrase ‘for reasons that include a prohibited reason’ and said ‘[t]he employer’s reasons will include a prohibited reason within the meaning of this subsection if the prohibited reason is one of the operative reasons for the conduct *whether or not it was the substantial reason for the conduct*’ (at 337, emphasis added). Later in the judgment, her Honour held that the reason must be an ‘operative or immediate reason’ for the conduct (at 342). This phrase from *CSL* was quoted in the FW Bill’s Explanatory Memorandum which, in turn, was quoted by Gummow and Hayne JJ at 671. In light of Branson J’s finding that the reason need not be a ‘substantial’ reason for the conduct, it is interesting that Gummow and Hayne JJ held ‘[t]he phrase “operative or immediate” used in *CSL* is relevantly indistinguishable from the phrase “a substantial and operative factor” used by Mason J in *Bowling*’ (at 671). Some cases decided after *Barclay* adopt the language ‘substantial and operative’: see, eg, *Vink v LED Technologies Pty Ltd* [2012] FMCA 917 (9 October 2012) at [48].

<sup>73</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 676.

<sup>74</sup> *Ibid* 678.

<sup>75</sup> *Ibid* 679.

<sup>76</sup> The earlier Fair Work Act Review Panel report took a similar approach. The panel recommended that, if the High Court upheld the approach taken by the Full Federal Court majority, the provisions should be amended ‘so that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action’. Ron McCallum, Michael Moore and John Edwards, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation* (Report to Minister for Employment and Workplace Relations, 15 June 2012) 237.

<sup>77</sup> It also gives primacy to the decision-maker’s characterisation of the scope of their reasons. The decision-maker’s initial evidence defines the scope of their reasons (for example, that the reason was limited to the halter, and did not extend to the horse). In the absence of a finding that such evidence is not credible, it appears the Court will not revisit or reassess the decision-maker’s characterisation of the scope of their reasons.

<sup>78</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 233.

because Harvey's evidence asserted that her only reason for acting was Barclay's conduct in his capacity as an employee, this link was treated as not relevant.

The central importance of a trial judge's assessment of the decision-maker's evidence may be illustrated by contrasting *Barclay* with a 2002 Federal Court union victimisation case which dealt with a similar factual scenario but reached the opposite conclusion because of the judge's opinion of the decision-maker's evidence.<sup>79</sup> In that case, a bank manager (who was also the National President of the Finance Sector Union) took part in protected industrial action and spoke to the media about job security for women in the banking industry. She was counselled and given a written warning. The employee made a number of claims, including that this action was taken because of her union status and participation in industrial action.<sup>80</sup>

The manager gave evidence that the employee's participation in the industrial action 'played no part in his decisions to conduct a counselling meeting and to issue a warning letter'.<sup>81</sup> Justice Wilcox said:<sup>82</sup>

The question is whether I should accept [the manager's] assertion. I need to ask myself whether it is probable that, if [the employee] had not participated in the stoppage, [the manager] would, nonetheless, have decided to require her to attend a counselling meeting and/or to give her a written warning...

Justice Wilcox was unable to answer this question affirmatively, and the main reason for this was his Honour's assessment of the manager. His Honour considered the manager's 'knowledge of industrial matters [was] sparse and his attitude to them simplistic and naïve'.<sup>83</sup> The manager strongly believed that it was the employee's responsibility (as branch manager) to promote the bank's line, and to keep the branch open when the industrial action was proposed. His Honour found the manager 'must have thought it a betrayal for her, not only to fail to urge the staff to work, but to give a lead in the opposite direction by stopping work herself'.<sup>84</sup> Further, Justice Wilcox considered that in giving a media interview and participating in industrial action, the employee was wearing her union 'hat', and

the activities for which she was disciplined were associated with her position in the [union]. Therefore ... it is necessary to ask whether the particular activities that gave rise to the disciplinary action may have constituted misconduct of a sufficient degree of

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<sup>79</sup> *Finance Sector Union v Australia and New Zealand Banking Group Ltd* (2002) 120 FCR 107.

<sup>80</sup> The employee claimed the employer had breached provisions under two separate parts of the *Workplace Relations Act* 1996 (Cth): Pt VIB (dealing with certified agreements) and Pt XA (dealing with freedom of association).

<sup>81</sup> (2002) 120 FCR 107, 134.

<sup>82</sup> *Ibid* 134-5.

<sup>83</sup> *Ibid* 135.

<sup>84</sup> *Ibid* 135-6.

seriousness as to exclude the possibility that she was being counselled and warned because of her position in the [union].<sup>85</sup>

His Honour found that speaking to the media was not a ‘serious transgression’ of her employment duties,<sup>86</sup> and that the manager’s views of the employee were ‘shaped’ by her union position and activities. Accordingly ‘it would be naïve to accept his assurance that they had nothing to do with his decision’ to counsel and warn her.<sup>87</sup>

#### *Contrasting the reverse onus and causal link with anti-discrimination law*

Although *Barclay* concerned the specific prescribed ground of engaging in industrial activities, the High Court’s interpretation of the causal link will be relevant to all claims of adverse action, including those relating to the more conventional discriminatory grounds of sex, race, disability and so on. This is because s 351 uses the same causal link (‘because’), and the same reverse onus, as the industrial activities provision considered in *Barclay*.<sup>88</sup>

The approach to causation and the reverse onus under the adverse action provisions (as illustrated in *Barclay*) may be contrasted with the approach taken under anti-discrimination law. A reverse onus is not a feature of anti-discrimination statutes in Australia.<sup>89</sup> In anti-discrimination law the applicant bears the onus of proving that the various elements of the claim are established, a feature of the schemes that is recognized as imposing substantial difficulty for many applicants.<sup>90</sup> The reverse onus in the adverse action provisions may accordingly be a factor encouraging applicants to bring claims under Part 3-1 rather than anti-discrimination laws.

As noted above, it is possible to prove a breach of anti-discrimination laws even where the decision-maker did not have any deliberate (or conscious) intent, much less admit to having that intent in evidence. Anti-discrimination law has never required that intention, motive or consciousness be established as part of a direct discrimination claim, and some statutes explicitly provide that such matters are irrelevant.<sup>91</sup> For example, the *Equal Opportunity Act 2010* (Vic) states ‘[i]n determining whether or not a person discriminates, the person’s motive is

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<sup>85</sup> Ibid 141.

<sup>86</sup> Ibid 143.

<sup>87</sup> Ibid 144.

<sup>88</sup> See, for example, *Vink v LED Technologies Pty Ltd* [2012] FMCA 917 (9 October 2012) which dealt with an adverse action claim on the basis of age under s 351. Federal Magistrate Riley quoted extensively from the High Court’s decision in *Barclay*.

<sup>89</sup> Although some legislation contains a reverse onus in relation to the specific aspect of reasonableness in definitions of indirect discrimination: eg, *Sex Discrimination Act 1984* (Cth) s 7C; *Age Discrimination Act 2004* (Cth) s 15(2); *Equal Opportunity Act 2010* (Vic) s 9(2). On onus of proof, see Rees, Lindsay & Rice, above n 15, [4.3.28]-[4.3.36].

<sup>90</sup> See eg, Jonathon Hunyor, ‘Skin-deep: Proof and Inferences of Racial Discrimination in Employment’ (2003) 25 *Sydney Law Review* 535-554; Margaret Thornton (ed), *Sex Discrimination in Uncertain Times*, ANU E Book, 2010.

<sup>91</sup> See eg, *Equal Opportunity Act 2010* (Vic) s 8(2)(a), s 9(4), s 10; Rees, Lindsay & Rice, above n 15, [4.2.5], [4.2.18].

irrelevant.’<sup>92</sup> In cases of indirect discrimination, it is even clearer that there is no requirement of motive or intent.

A noticeable feature of the *Barclay* High Court judgments (in contrast to the Full Federal Court majority judgment) was a lack of engagement with the possibility of unconscious bias infecting a decision, and the approach of anti-discrimination law to this issue. The High Court has previously (in the context of anti-discrimination law) rejected the idea that a person is always aware of their own motives.<sup>93</sup> Literature on the role of unconscious motivations in anti-discrimination law suggests that people may act for reasons that they are unaware of or refuse to admit to themselves, such as unconscious prejudice.<sup>94</sup> In some cases it is possible to remedy such situations through an anti-discrimination claim.

By way of example, in *Australian Iron & Steel Pty Ltd v Banovic* a 1989 High Court decision on sex discrimination under the *Anti-Discrimination Act 1977* (NSW), Deane and Gaudron JJ considered whether it was necessary to establish an ‘intent’ to discriminate.<sup>95</sup> Their Honours gave an example of an employer ‘denying women certain opportunities by reference to the inadequacy of toilet facilities’, and noted that the decision-maker’s “consciousness” may extend only to the inadequacy of toilet facilities without a full appreciation that that consideration is but an aspect of a characteristic that appertains generally or is generally imputed to women.’ In this example, the decision-maker’s reason was the lack of toilet facilities, not gender, and the decision-maker genuinely failed to appreciate the connection between their reason and the prescribed reason.

Another example is the more recent case of *Virgin Blue Airlines* where Virgin Airlines was found to have discriminated against job applicants on the basis of age. The application process for positions with the airline involved an assessment of ‘flair’ and the ability to have fun. The assessors were under the age of 35 and it was determined that they tended to identify with people of their own age. There was no conscious decision or motive by the assessors to choose younger people, but the process had that effect, and was found to breach the *Anti-Discrimination Act*

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<sup>92</sup> Section 10. See also s 8(2) (in relation to direct discrimination) which provides ‘In determining whether a person directly discriminates it is irrelevant – (a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable ...’ (in relation to direct discrimination); and s 9(4) (in relation to indirect discrimination) which provides ‘In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination’.

<sup>93</sup> *Purvis v Department of Education and Training (NSW)* (2003) 217 CLR 92, quoted by Gray and Bromberg in *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 221.

<sup>94</sup> Charles Lawrence, ‘The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism’ (1987) 39 *Stanford Law Review* 317; Linda Krieger, ‘The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity Employment’ (1995) 47 *Stanford Law Review* 1161; Charles Lawrence, ‘Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”’ (2008) 40 *Connecticut Law Review* 931.

<sup>95</sup> *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

1991 (Qld).<sup>96</sup> Given the High Court's decision in *Barclay*, it seems clear that an attempt to remedy a situation of this type through an adverse action claim would not succeed.

## 5. Conclusion

The *FW Act* introduced novel provisions that allow individuals to pursue a complaint of discrimination at work under industrial law processes, in much broader circumstances than previous industrial law permitted. The concepts used in these new provisions, from 'discriminates between' in s 342, to the meaning of 'disability' and the exemption of 'inherent requirements', reverberate with terminology familiar in anti-discrimination law.

To date judgments under Part 3-1 have examined three key aspects of the new provisions: 'discriminates between', the meaning of the grounds listed in s 351 (and notably the term 'disability'), and the reverse onus of proof. This conference paper has examined the emerging judgments under these three aspects. Leaving aside the High Court decision in *Barclay* on the meaning of the reverse onus, it remains early days in the Part 3-1 jurisdiction. Nonetheless, it appears that the *FW Act* jurisdiction in these respects is developing along a distinctive path, and a separation between Part 3-1 and anti-discrimination law is emerging. The High Court decision in *Barclay* confirms this early trend. Indeed, the silence regarding anti-discrimination law in the High Court judgments is noticeable.

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<sup>96</sup> *Virgin Blue Airlines Pty Ltd v Stewart* (2007) EOC 93-457.