**ADVERSE ACTION---A RISING REMEDY UNDER THE FAIR WORK ACT**

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1) When new statutes are made or amendments are added to existing statutes which attempt to control and regulate society's affairs the use and the jurisprudence attached to such new legislation can take years if not decades to develop and be added to the armoury of legal remedies. Adverse Action cases having their broad origins in both the **Industrial Relations Act** 1988 the **Workplace Relations Act**1996 which dealt with 'prohibited conduct' and 'prohibited reasons', are coming to maturity and common usage under Chapter 3 of the **Fair Work Act**. That chapter is entitled- RIGHTS AND RESPONSIBILITIES OF EMPLOYEES ,EMPLOYERS AND ORGANISATIONS ETC.

2) Part 3-1 of Chapter 3 of the Act sets out the General Protections accorded to WORKPLACE RIGHTS as found in Division 3, INDUSTRIAL ACTIVITIES as found in Division 4 and OTHER PROTECTIONS as found in Division 5.
3) The Objects of the Part are set out in section 336 of the Act as follows;

"**336 Objects of this Part**

**(1)**
**[Objects]** The objects of this Part are as follows:
**(a)**

to protect workplace rights;

**(b)**

to protect freedom of association by ensuring that persons are:

**(i)**

free to become, or not become, members of industrial associations; and

**(ii)**

free to be represented, or not represented, by industrial associations; and

**(iii)**

free to participate, or not participate, in lawful industrial activities;

**(c)**

to provide protection from workplace discrimination;

**(d)**

to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

[Subs (1) am Act 174 of 2012, s 3 and Sch 5 item 2, with effect from 1 Jan 2013]

**(2)**

**[Protections are provided to a person]** The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

4) The Protections are set out in section 340;

"340 Protection

(1)

[When a person must not take adverse action] A person must not take adverse action against another person:

(a)

because the other person:

(i)

has a workplace right; or

(ii)

has, or has not, exercised a workplace right; or

(iii)

proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b)

to prevent the exercise of a workplace right by the other person.

Note:

This subsection is a civil remedy provision (see Part 4-1).

(2)

[Adverse action because of third party] A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note:

This subsection is a civil remedy provision (see Part 4-1).

5) The meaning of Workplace Right is set out in section 341 as follows;

**"341 Meaning of *workplace right***

*Meaning of workplace right*

**(1)**

A person has a ***workplace right*** if the person:

**(a)**

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

**(b)**

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

**(c)**

is able to make a complaint or inquiry:

**(i)**

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

**(ii)**

if the person is an employee—in relation to his or her employment.

*Meaning of process or proceedings under a workplace law or workplace instrument*

**(2)**

Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:

**(a)**

a conference conducted or hearing held by the FWC;

**(b)**

court proceedings under a workplace law or workplace instrument;

**(c)**

protected industrial action;

**(d)**

a protected action ballot;

**(e)**

making, varying or terminating an enterprise agreement;

**(f)**

appointing, or terminating the appointment of, a bargaining representative;

**(g)**

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

**(h)**

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

**(i)**

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

**(j)**

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

**(k)**

any other process or proceedings under a workplace law or workplace instrument.

[Subs (2) am Act 174 of 2012, s 3 and Sch 9 item 366, with effect from 1 Jan 2013]

*Prospective employees taken to have workplace rights*

**(3)**

A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

**Note:**

Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

*Exceptions relating to prospective employees*

**(4)**

Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.

**(5)**

**[Exception for employee who benefits from transfer of business]** Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business).

[Subs (5) am Act 175 of 2012, s 3 and Sch 1 item 54A, with effect from 5 Dec 2012]

[S 341 am Act 175 of 2012; Act 174 of 2012]

6) The meaning of Adverse Action is set out in section 342 as follows,

**"342 Meaning of *adverse action***

**(1)**

**[When a person takes adverse action]** The following table sets out circumstances in which a person takes ***adverse action*** against another person.

| **Meaning of *adverse action*** |
| --- |

| Item | Column 1 | Column 2 | |
|---|---|---|---|
| | ***Adverse action* is taken by ...** | **if ...** | |
| 1 | an employer against an employee | the employer: | |
| | | (a) | dismisses the employee; or |
| | | (b) | injures the employee in his or her employment; or |
| | | (c) | alters the position of the employee to the employee's prejudice; or |
| | | (d) | discriminates between the employee and other employees of the employer. |
| 2 | a prospective employer against a prospective employee | the prospective employer: | |
| | | (a) | refuses to employ the prospective employee; or |
| | | (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: | |
| | | (a) | terminates the contract; or |
| | | (b) | injures the independent contractor in relation to the terms and conditions of the contract; or |
| | | (c) | alters the position of the independent contractor to the independent contractor's prejudice; or |
| | | (d) | refuses to make use of, or agree to make use of, services offered by the independent contractor; or |
| | | (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 | the principal: | |
| | | (a) | refuses to engage the independent contractor; or |

| | | | |
|---|---|---|---|
| | contractor, or a person employed or engaged by the independent contractor | (b) | discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or |
| | | (c) | refuses to make use of, or agree to make use of, services offered by the independent contractor; or |
| | | (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: | |
| | | (a) | ceases work in the service of the employer; or |
| | | (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: | |
| | | (a) | ceases work under the contract; or |
| | | (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: |
| | | (a) | organises or takes industrial action against the person; or |
| | | (b) | takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or |
| | | (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 |
| | | (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)**

**[Meaning of adverse action]** ***Adverse action*** includes:

**(a)**

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

**(b)**

organising such action.

**(3)**

**[Exception for authorised actions]** ***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)**

**[Exception for certain employees]** 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.

7) The reach of Adverse Action cases brought in either the Federal Court or Federal Circuit Court has been wide ;The following schedule is taken from the Thomson Reuters' **National Workplace Relations Service** (available both on-line or in hard copy),

## Examples of Prejudicial Alteration of Employee's Position Beyond Legally Compensable Injury

*Last Review: 24/11/2014*

Injury beyond legally compensable injury which would thus fall under the description of prejudicial alteration of an employee's position has been held to include:

- issuing warnings under a disciplinary code: Construction, Forestry, Mining and Energy Union v Coal and Allied Operations Pty Ltd (No 2) (1999) 94 IR 231; [1999] FCA 1714 (Branson J);

- reneging on an assurance: Childs v Metropolitan Transport Trust (1981) 29 AILR 24 (Smithers J); Kimpton v Minister for Education (Vic) (1996) 65 IR 317; 40 AILR 3-381 (North J);
- corporate restructuring reducing the solvency of the employer: *Patrick Stevedores*;
- discriminatory allocation of less congenial shifts or rosters: Independent Education Union of Australia v Canonical Administrators (1998) 87 FCR 49; 84 IR 123; [1998] FCA 1127 at 68 (FCR) (Ryan J);
- attaching conditions or limitations, which did not previously exist, to access to promotions or other employment benefits may amount to an injury and/or prejudicial alteration: BHP Iron Ore Pty Ltd v Australian Workers' Union (2000) 102 FCR 97; 97 IR 266; [2000] FCA 430 at [44] (Full Court); United Firefighters' Union of Australia v Country Fire Authority (unreported, Industrial Relations Court of Australia, North J, 24 December 1996). It is immaterial whether a particular employee would ever have sought a promotion or other benefit: Commonwealth Bank of Australia v Finance Sector Union of Australia (2007) 157 FCR 329; 161 IR 262; [2007] FCAFC 18 at [145] (Branson J);
- a decrease in the prospects of future employment or future job opportunities for casual employees with previous regularity of work may amount to a prejudicial alteration: Linehan v Northwest Exports Pty Ltd (1981) 1 IR 125 (Ellicott J); Employment Advocate v NUW (2000) 100 FCR 454; 98 IR 302; [2000] FCA 710 at [73]–[77] (Einfeld J);
- • in the Full Court decision of Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association (2012) 202 FCR 244; 216 IR 451; [2012] FCAFC 63, Qantas contravened s 340(1)(a)(ii) by altering the position of an employee pilot to his prejudice because he had exercised a “workplace right”. The “workplace right” was a claim made by the employee in relation to certain entitlements arising from a temporary posting in Japan. Qantas suspended overseas postings for an indeterminate period following the claim made by the employee. The Full Court said that the suspension denied the employee the opportunity to obtain an overseas posting which he would have expected prior to the claim he made to his manager. “The effect of this suspension in this period was therefore real and substantial and not hypothetical or insubstantial. There was an adverse affection of and deterioration in the advantage enjoyed by Mr Murray before the suspension

was imposed. Mr Murray was one of the employees to whom the suspension was directed" (at [39]).

- • in Jones v Queensland Tertiary Admissions Centre Ltd (2009) 190 IR 218; [2009] FCA 1382, the commencement of an investigation into allegations against the Chief Executive Officer and the subsequent commissioning of a report on the complaints made about her conduct of enterprise bargaining negotiations with a union arguably constituted "adverse action" taken by an employer against an employee under this provision. The terms and conditions in an employment contract which permit termination by an employer of an employee's employment at any time with 3 months' notice, for any reason whatsoever or none at all, are difficult to reconcile with a contention that the employee is entitled to natural justice in respect of a decision to terminate his or her employment. Where a contract of employment provides for different grounds of termination and associated periods of notice, and a specific provision excluding review procedures in respect of an employee's employment, it is difficult to see how the implication of a term importing the rules of natural justice into such terms and conditions of employment can be justified. Further, the commencement of an investigation into bullying allegations could be "adverse action" within the meaning of s 342. However, where, as here, the employer had reasonable or adequate cause to commence the investigation, the commencement did not constitute adverse action. An alleged failure by an employer to accord natural justice and/or fair process to an employee is not "adverse action" within the meaning of s 342.
- in Australasian Meat Industry Employees' Union v Belandra Pty Ltd (2003) 126 IR 165; [2003] FCA 910, North J "held that the disappointment of an expectation of re-employment, even where there was no legal right to re-employment, was an alteration of an employee's position to his prejudice": Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3) [2012] FCA 697 at [51]; and
- in Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3) [2013] FCA 525 Murphy J decided that Visy took adverse action against an occupational health and safety representative when it investigated his actions in response to a potential health and safety risk. His Honour was satisfied that the investigation exposed the employee to a reduction in the security of his future

employment and therefore this deteriorated the advantages enjoyed by him prior to the investigation.

- in Rowland v Alfred Health [2014] FCA 2, Marshall ACJ stated that inaction in the sense of a failure to appoint someone could constitute adverse action. At [48] His Honour stated that: "[f]or example, an employee may be denied a promotion notwithstanding that he or she satisfied established criteria while others (who do not) are promoted. The non-selection of Mr Rowland was adverse action".
- in Rowland v Alfred Health [2014] FCA 2, Marshall ACJ stated that a "spill and fill" following a restructure could be adverse action. This is because it prejudicially alters the employee's position as it makes the employment less secure. See further below discussion relating to the case of National Union of Workers v Qenos Pty Ltd (2001) 108 FCR 90; 106 IR 373; [2001] FCA 178. These decisions appear to contradict each other on this point.
- in Sumontha v Action Workforce Australia Pty Ltd [2014] FCCA 725, Jones J accepted that a labour hire employee who was refused work unless she agreed not to take legal action against the company could be the subject of unlawful adverse action. In effect if an employee is forced to forgo their legal rights on pain of being refused further work this would fall within the definition of s 342(1).
- in Director of The Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd [2014] FCCA 721, Judge Manousaridis reasoned that an employee who has been switched from a contract to an enterprise agreement even if the employee was better off on the enterprise agreement could be adverse action. At [217] his Honour stated:

  > An employer may dismiss an employee within the meaning of s 342(1) of the Act even though the employee does not suffer any recoverable loss. An employer who wrongfully terminates a contract of employment inflicts an injury on the employee in his employment, whether or not the employee can establish recoverable loss. The injury is the loss of the contract, the foundation of the employment relationship; and that is injury enough because a breach of a contract is a civil injury, whether or not the innocent party can prove any recoverable loss. And an employee who loses his employment contract as a result of his employer's conduct has had his position altered to his prejudice. Here,

the alteration of position and prejudice are one and the same, namely, the loss of the contract.

These cases indicate adverse action has a wide reach.

## [FWA 342.100] Cases falling outside scope of prejudicial alteration limb

*Last Review: 24/11/2014*

There are, however, limitations to the application of the phrases. Action that was held not to be a prejudicial alteration of the employee's position includes:

- a decision not to readvertise a position internally so that an employee could apply for the position during a redeployment period did not amount to a prejudicial alteration of the employee's position. The decision to advertise externally was made on the basis that there were no suitable candidates internally. Further, the employee did not experience a deterioration of the advantages associated with his position, as he would not have been able to apply for the position in the first place: Wolfe v Australian and New Zealand Banking Group Ltd [2013] FMCA 65 at [84];
- a letter sent to a manager of a store outlining examples of the manager's poor performance; failure to follow established policies and procedures in relation to overtime and leave; and, a statement relating to possible future disciplinary action, was not a prejudicial alteration of the employee's position: Ramos v Good Samaritan Industries (No 2) [2011] FMCA 341 at [57], [71]; upheld on appeal: Ramos v Good Samaritan Industries [2013] FCA 30;
- subjection to a disciplinary investigation brought in good faith on a proper evidentiary basis is unlikely to be a prejudicial alteration, as no substantive change is involved: Police Federation of Australia v Nixon (2008) 168 FCR 340; 173 IR 132; [2008] FCA 467 at [46] (Ryan J). But see United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board (2003) 123 IR 86; [2003] FCA 480 at [89] (Goldberg J);
- a subjective decrease in an employee's job satisfaction is not likely to amount to injury or prejudicial alteration. The test is objective: Hammond v Department of Health (1983) 6 IR 371 at 375 (IR Commission of NSW in Court Session, Full Bench);
- a failure to make persons redundant, thereby depriving them of redundancy entitlements, has been held not to amount to an injury or prejudicial alteration, as the "status quo" remains: Unsworth v Tristar Steering and

Suspension Australia Ltd (2008) 175 IR 320; [2008] FCA 1224 at [22]–[23] (Gyles J);

- an offer of voluntary redundancy is not, of itself, a threat to injure an employee in his or her employment. It is an offer that the employee can accept or reject: Maritime Union of Australia v Geraldton Port Authority (1999) 93 FCR 34; 94 IR 244; [1999] FCA 899 at [244] (R D Nicholson J); and
- mere announcements of intended action are not comprehended as adverse action, nor are they threats of adverse action, because the possibility always remains that a statement of intended action may never be acted on: Australian and International Pilots Association v Qantas Airways Ltd (2006) 160 IR 1; [2006] FCA 1441 at [27] (Tracey J). As a result, the announcement of a plant closure and "spill and fill" process for new positions has been held not to constitute a threat to injure or prejudicially alter: National Union of Workers v Qenos Pty Ltd (2001) 108 FCR 90; 106 IR 373; [2001] FCA 178 (Weinberg J). However in Rowland v Alfred Health [2014] FCA 2, Marshall ACJ rejected a submission that a "spill and fill" could not constitute adverse action under s 342(1), but made no reference to the earlier decisions on this point. At [47] his Honour said the following:

    > Adverse action includes, in s 342(1) of the Act, an alteration of an employee's position to his or her prejudice. In accordance with Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia [1998] HCA 30; (1998) 195 CLR 1 at [4], subjecting an employee to a situation where he or she is compelled to re-apply for his or her position, with the threat of redundancy looming is an "… adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question". The decision to restructure the Unit constituted adverse action against all employees employed in the Unit whose continued employment was put at risk by the "spill and fill" process. The position of all existing employees in the Unit was made less secure by having to re-apply for their jobs.

A potentially contentious issue is whether the phrase "dismisses the employee" incorporates the concept of termination on the employer's initiative: see s 386. This is not clear from the legislative provision and the question may arise if the conduct does not fall under the other three phrases ("injury", "prejudicial alteration", "discrimination") in "adverse action". It is suggested that the reference in the s 12

definition of "dismiss" to "see section 386" means that the s 386 definition applies to the whole Act, so that "dismisses the employee" in s 342 includes any termination on the employer's initiative, which may include a constructive dismissal: see [FWA 386.20] ff.

## [FWA 342.120] Refusal to Employ

*Last Review: 24/11/2014*

A refusal to employ may require a vacancy. It appears there is some disagreement as to whether a vacancy first must be proven to exist by the Applicant before the onus shifts to the Respondent to rebut the statutory presumption in s 361. Recent authority suggests that a refusal requires a vacancy: see Stephens v Australian Postal Corporation [2014] FCA 732. This requirement appears not to accord with North J's judgment in Australasian Meat Industry Employees' Union v Belandra Pty Ltd (2003) 126 IR 165; [2003] FCA 910 at [51]. In Stephens v Australian Postal Corporation [2014] FCA 732, Flick J at [17]-[31] examined the relevant authorities including North J's judgment. There appears some acknowledged contention arising from North J's comments in Australasian Meat Industry Employees' Union v Belandra Pty Ltd (2003) 126 IR 165; [2003] FCA 910 mentioned above and Moore J's comments in Fraser v Fletcher Construction Australia Ltd (1996) 70 IR 117 at 119 and Wilcox J's comments in Construction, Forestry, Mining and Energy Union v BHP Steel (AIS) Pty Ltd [2000] FCA 1008 at [50]. The latter two judgments note that a vacancy is required for there to be "a refusal to employ". However, Flick J interpreted North J's reasoning as still requiring a vacancy at [20].

See also George Kweifio-Okai v Australian College of Natural Medicine Pty Ltd t/as Endeavour College of Natural Health (No 2) [2014] FCA 1124 where Tracey J held that an employer's decision to not renew a contract was a refusal to employ a prospective employee and could amount to adverse action in accordance with Item 2 of the table in section 342(1), as had been conceded by the respondent employer. However the employer had not contravened the "workplace rights" protections in this case as his Honour accepted the employer's reason for not renewing the contract. The stated reason for the non-renewal was an adverse finding in an investigation report regarding certain emails the academic sent which led to the academic's suspension. The employee claimed that the contract was not renewed because of an employment related complaint. That is, that he was subjected to adverse action because he exercised a workplace right in accordance with section 341(1)(c)(ii). His Honour rejected these claims.

## [FWA 342.140] Application to Contractors

*Last Review: 24/11/2014*

In Construction, Forestry, Mining and Energy Union v Victoria (2013) 302 ALR 1; [2013] FCA 445 Bromberg J examined in some detail the independent contractor provisions in the adverse action table s 342(1), see [109]–[165]. His Honour rejected an argument that contractor in the context of s 342(1) was "limited to an entity that is the functional equivalent of an employee": [116]. His Honour accepted an interpretation that would give the provision a wider application. Contractor in s 342(1) "extends to persons carrying on the business of a contractor that provides services, irrespective of scale": [116]. See [159]–[161] where his Honour accepts the contentions of the Construction, Forestry, Mining and Energy Union in this regard. See also [171]–[172] where his Honour rejects a narrow reading of the phrase "proposing to enter into a contract" in item 4 of the table in s 342(1). See related decision which raised similar claims: Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2) [2013] FCA 446. It appears that this part of Bromberg J's reasoning relating to the specific interpretation of the provisions relevant to ss 342(1) was not disturbed when these decisions were overturned on appeal. See Victoria v Construction, Forestry, Mining and Energy Union (2013) 218 FCR 172; [2013] FCAFC 160.

### [FWA 342.160] Threats

*Last Review: 24/11/2014*

Adverse action also encompasses threats to take such action (s 342(2)(a)): see Construction, Forestry, Mining and Energy Union v Victoria (2013) 302 ALR 1; [2013] FCA 445 at [219]–[239]. Protections applying to threats to dismiss, injure or prejudicially alter an employee's position have been part of the federal industrial laws since at least 1920, see Conciliation and Arbitration Act 1920 (Cth) No 31 of 1920.

### [FWA 342.180] Organising

*Last Review: 24/11/2014*

The FW Act has added to this and introduced "organising" such action into the definition of adverse action (s 342(2)(b)).

8) The section of the Act dealing with the kind of workplace discrimination amenable to the Adverse Action jurisprudence is found at section 351, it provides;

## "351 Discrimination

**(1)**
**[Employer must not discriminate]** An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
**Note:**
This subsection is a civil remedy provision (see Part 4-1).
[Subs (1) am Act 98 of 2013, s 3 and Sch 1 item 63E, with effect from 1 Aug 2013]
**(2)**
**[When employer does not discriminate]** However, subsection (1) does not apply to action that is:
**(a)**
not unlawful under any anti-discrimination law in force in the place where the action is taken; or
**(b)**
taken because of the inherent requirements of the particular position concerned; or
**(c)**
if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
**(i)**
in good faith; and
**(ii)**
to avoid injury to the religious susceptibilities of adherents of that religion or creed.
**(3)**
**[Meaning of anti-discrimination law]** Each of the following is an ***anti-discrimination law***:
**(aa)**
the Age Discrimination Act 2004;
**(ab)**

the Disability Discrimination Act 1992;

**(ac)**

the Racial Discrimination Act 1975;

**(ad)**

the Sex Discrimination Act 1984;

**(a)**

the Anti-Discrimination Act 1977 of New South Wales;

**(b)**

the Equal Opportunity Act 2010 of Victoria;

**(c)**

the Anti-Discrimination Act 1991 of Queensland;

**(d)**

the Equal Opportunity Act 1984 of Western Australia;

**(e)**

the Equal Opportunity Act 1984 of South Australia;

**(f)**

the Anti-Discrimination Act 1998 of Tasmania;

**(g)**

the Discrimination Act 1991 of the Australian Capital Territory;

**(h)**

the Anti-Discrimination Act of the Northern Territory.

[Subs (3) am Act 136 of 2012, s 3 and Sch 1 item 123, with effect from 1 Aug 2012]

[S 351 am Act 98 of 2013; Act 136 of 2012]

9) Three recently decided cases also cast some further light on this evolving piece of legislation ;

(i) Ermel v Duluxgroup (Australia) Pty Ltd (No 2) [2015] FCA 17 (28 January 2015),( (*Ermel)*

(ii) Ryan v Primesafe [2015] FCA 8 (21 January 2015) ( *Ryan*) and

(iii) Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 27 (30 January 2015) ( *Sayed)*

10) In *Ermel* the applicant claimed that adverse action had been taken against him because he took sick leave and had made a complaint about a workplace right. Justice Bromberg dismissed the claim.The dispute arose after it become apparent that the respondent wished to re-structurte its

business and decided to transfer the applicant to a new position,which transfer the applicant resisted.

11) In considering 'general protections' claims his Honour stated at [48] as follows;

> 48. "In a general protections claim brought pursuant to s 340 of the FW Act, success depends upon the Court being satisfied that the applicant has been subjected to adverse action for one or more of the specific reasons identified by the FW Act as an impermissible basis upon which action adverse to the applicant may be taken. A general protections proceeding is not a broad inquiry as to whether the applicant has been subjected to a procedurally or substantively unfair outcome. As Gray, Cowdroy and Reeves JJ said in *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109 at [31]:

A general protections application is not intended to provide an opportunity for the appellant to raise whatever issues she wishes to about the validity of the steps taken before her dismissal. The crucial issue in such an application is the causal relationship between adverse action and one or more of the factors mentioned in the various provisions of Pt 3-1. The issue is whether the person who has taken the adverse action has done so because the person against whom the adverse action has been taken has one or more of the relevant characteristics or has done one or more of the relevant acts.

12) The applicant in *Ermel* failed in that he was unable to prove a link between the action taken by the respondent and the four reasons said to have motivated an officer of the respondent to take the action he did.

13) In coming to that conclusion Justice Bromberg said,

> 60. "As earlier stated, it was Griffith that made the decision to terminate Ermel's employment. He was assisted by Simpson in making that decision and Simpson's evidence is relevant to the extent that it throws light on Griffith's reason or reasons for the termination. However, it is Griffith's state of mind that needs to be assessed. It is not in contest that by reason of s 361(1) of the FW Act, Dulux must establish that Ermel was not dismissed for a prohibited reason: *Board of Bendigo Regional Institute of Technical and Further Education v Barclay [No 1]*[2012] HCA 32; (2012) 248 CLR 500at [1] (French CJ and Crennan J). Nor is it contested that only an operative reason is of any

significance: *Barclay* at [65] (French CJ and Crennan J); [103]-[104] (Gummow and Hayne JJ) and at [140] (Heydon J).

61. Griffith's denial that he was motivated by any prohibited reason is not determinative. In assessing what actuated Griffith's decision, it is both permissible and necessary to examine the circumstances surrounding the decision and in particular those matters likely to have been germane to the decision-making process in which Griffith engaged.

14) After considering the legislative history of the provision going back to the Industrial Relations Act 1988 and s 170 DF (1) dealing with temporary absence from work the judge stated ,

"90.For Ermel to succeed therefore, I need to be satisfied that Griffith dismissed Ermel including for the reason that he was absent because he was ill. Dulux had the onus of rebutting the presumption made by the operation of s 361 of the FW Act. Whilst for the reasons earlier given, I am not satisfied that Ermel's absence on 31 May 2013 was not an operative reason, Dulux has satisfied me that Ermel's absence because he was ill was not an operative reason for his dismissal.

91. There was no evidence that Dulux or Griffith had any history of concern about or opposition to the taking of sick leave by employees at Dulux. Nor was there any evidence which suggested that Ermel's history in relation to the taking of sick leave had or was in any way likely to have been a concern in the mind of Griffith. There was therefore nothing in the evidence which raised any likelihood that Griffith was motivated to take any action against Ermel (let alone the drastic action of dismissing him) because Ermel took sick leave either generally or specifically on 31 May 2013."

15) In *Ryan* the Federal Court ordered a lawyer to personally pay another party's legal costs in a general protections claim, finding that he unreasonably advised his client to add his employer's solicitor to the application. The manager settled his claim with Primesafe and the chief executive on July 10 last year, but continued it against Humphery-Smith,a partner from Landers and Rogers who had advised the respondent.. At a directions hearing on July 16, the court ordered the manager to give Humphery-Smith further particulars of the accessorial claim against him by

July 30, but he instead unilaterally filed a notice of discontinuance on that date.

16) Justice Debra Mortimer recounted the proceedings history,

"11.It appears that more money and resources may have been spent on debates about costs in this proceeding than any other aspect of it. This proceeding was commenced on 28 May 2014 and was discontinued by the applicant against all respondents on 30 July 2014. In fact, the Court had been advised at the only hearing held in this matter, a directions hearing on 16 July 2014, that the applicant's claims in respect of the first respondent (**Primesafe**) and second respondent had settled. The second respondent was the Chief Executive Officer of Primesafe and was alleged by the applicant to have been involved in the contraventions of the Fair Work Act alleged against Primesafe. Aside from the initiating process and attendance at the directions hearing, the other principal step in the proceeding appears to have been a request for further and better particulars in respect of the applicant's claim against the third respondent. An order to provide those particulars was made at the 16 July 2014 directions hearing. The applicant never provided those particulars, and instead discontinued his claim against the third respondent.

12. The applicant's claim concerned an employment agreement he had entered into with Primesafe in July 2012. Primesafe is a Victorian government agency, and the applicant was employed as its Operations Manager. In January 2014 he was informed that his position would become redundant as a result of a restructure of the agency. The applicant was dismissed from his position with payment in lieu of five weeks' notice on 18 March 2014.

13. His claim against Primesafe involved allegations that Primesafe had failed adequately to consult him in relation to the restructure and redundancy process and that this failure, and Primesafe's failure to redeploy him to another suitable alternative position and its ultimate decision to dismiss him,

constituted adverse action for the purposes of s 342(1) of the Fair Work Act.

14. The applicant then contended the adverse action was taken for prohibited reasons, including, in contravention of s 340, because the applicant had exercised his workplace rights to take personal leave and to initiate proceedings and participate in a conference before the Fair Work Commission. The applicant also alleged that the adverse action was taken because of his temporary absence from work while on personal leave (prohibited by s 352) and in contravention of the discrimination provisions in s 351, because of his age. Alternatively the applicant alleged that, by dismissing him and by failing to provide reasonable notice of 12 months, Primesafe breached terms of reasonable notice and of mutual trust and confidence implied by law in the employment agreement between the applicant and Primesafe. The applicant also alleged that, by failing to pay a redundancy payment equal to 12 weeks' notice, Primesafe breached the National Employment Standards set out in Part 2-2 of the Fair Work Act. The applicant also made claims of misrepresentation from which the applicant alleged Primesafe was estopped from resiling, and claims under ss 18 and 31 of the Australian Consumer Law, as set out in Sch 2 to the *Competition and Consumer Act 2010* (Cth)."

17) The applicant in the suit had claimed that the respondent's solicitor had 'accessorial liability' to the alleged unlawful conduct.Her Honour dealt with the law on this issue at [82], "The point made by Bromberg J in *McCorkell*232 IR 290; [2013] FCA 446 at [288]- [289] is illustrative of what might be required. His Honour said:

The CFMEU contended that whilst it is necessary to prove that the accessory knew what the principal contravener was doing, an accessory cannot know what the other person is feeling or thinking. It argued that whilst it was necessary for an accessory to have knowledge of the essential elements of a contravention, it was not necessary for an accessory to have knowledge of the principal contravener's motive for the contravention.

That submission must be wrong where a particular motive is a necessary element of the contravention. For instance, a person who assisted in the dismissal of an employee carried out by a contravener because of the employee's race, could not be an accessory to the discriminatory conduct in the absence of having assisted knowing that the contravener's conduct was motivated by race. Without that knowledge, it could not be said that the alleged accessory is "linked in purpose with the perpetrators".

18) Further at [83] as to why the proceedings against Humphrey-Smith were commenced without reasonable cause her Honour said;

"Adapting that example to the present facts, if, knowing Primesafe proposed to terminate the applicant's employment for what was obviously a prohibited reason (such as age), Mr Humphery-Smith did not advise against such a course, or in fact supported such a course and failed to alert his client to the unlawfulness of the proposed course of conduct because he wished to ensure Primesafe remained a client (or because he considered the applicant was too old for the job), then there might be some basis for an allegation pursuant to s 550. Alternatively, if Mr Humphery-Smith made the decision to terminate the applicant's employment instead of it being made by the responsible individuals within Primesafe, again there might be a basis for an allegation within the terms of s 550. The nature of such an allegation against a lawyer is obvious, and its gravity obliges the party making the allegation to set out a proper factual basis for it.

19) Her Honour found that the preconditions for a costs order in favour of Mr Humphery-Smith were met under the restrictions on such costs orders set out in section 550 of the Fair Work Act and there was a sufficient basis why the applicant's lawyer, McDonald should bear those costs.

20) An examination of the authorities which identified those rare occasions when costs might be ordered against an unsuccessful party's lawyer one must consider

whether the claim as pleaded was hopeless or unreasonable or one where there was no legal or factual foundation. In the absence of an explanation as to why such a pleading was filed or why a party was joined strong inferences or findings can be made,[92] and [93].

21) In a damning critique of McDonald her Honour found,

97. "Mr McDonald, and his client, were put on notice about the deficiencies in the allegations against Mr Humphery-Smith from the time they were made. The 11 April 2014 letter from Lander & Rogers could not have been clearer. In the absence of any evidence to the contrary, I find Mr McDonald must consciously have decided to allow the proceeding to continue in the Fair Work Commission in that form, and to commence proceedings in this Court in the same form, despite any articulated factual foundation. There was no evidence that the applicant specifically instructed Mr McDonald, against advice, to continue against Mr Humphery-Smith after receipt of the 11 April 2014 letter. Lander & Rogers expressly invited Mr McDonald to clarify this, properly conceding they would not apply for costs to be paid by Mr McDonald if this were the case.

98. Similarly, despite the generalised and sometimes irrelevant assertions in some of his correspondence, Mr McDonald never did provide any further factual foundation for the allegations, nor did he ever provide any authorities which might support the most unusual course he elected to take on behalf of his client, one which inevitably called into question Mr Humphery-Smith's professional conduct and thus was capable of affecting adversely his professional reputation. The authority referred to in Mr McDonald's letter dated 30 July 2014 to Hall& Wilcox, a decision of the Federal Circuit Court in *Sagona*[2014] FCCA 875 at [333], does no more than make the distinction (for the purposes of s 550 of the Fair Work Act) between knowledge of the conduct said to constitute the contravention, and knowledge that conduct was made unlawful by the Fair Work Act. So much may be accepted, but it provides no legal support for the

contention Mr McDonald needed to make good on behalf of the applicant: namely that a legal practitioner giving legal advice and assistance to an employer can, by the rendering of that advice and assistance, be found to have accessorial liability under s 550 of the Fair Work Act."

22) Finally I deal with *Sayed.* The applicant had applied for and obtained an union organiser's position with the Construction, Forestry ,Mining and Energy Union (CFMEU) to work in the Pilbara iron ore mining area.The CFMEU had entered into negotiations and had forged an alliance with the Australian Workers' Union . The alliance between the CFMEU and the AWU was historic as these two unions and their predecessor bodies had been in conflict by way of competition for members , demarcation disputes and general political antagonism for it was said upwards of 100 years. The alliance had come about by both unions desire to unionise the workforce anew and a recognition that their continued antipathy to each other would militate against that goal.

23) The applicant was employed firstly on a six month fixed term contract and worked a short time in Queensland with some CFMEU officials before he was transferred to Western Australia to work with and get to know the AWU officials . He did not last very long before the CFMEU dismissed him.

24) The applicant brought proceedings claiming that adverse action had been taken against him because of his political opinions , a ground prohibited under the Discrimination provisions of section 351 of the Fair Work Act.

25) After a very short time working in WA a complaint was made by Mr Paul Howes, the Secretary of the AWU, to Mr Tony Maher, the National President of the respondent, that the applicant was "a Trot" and was "bagging" AWU officials and delegates.[29]

26) Because of the importance of the alliance between the CFMEU and the AWU which the parties had pledged approximately $1 million to achieve.Once this complaint

about the applicant had been made by the National Secretary of the AWU the applicant was summoned to Sydney to a meeting of senior officials of the CFMEU to discuss with the applicant the allegations and his on-going employment with the CFMEU.

27) The dispute revolved a number of matters including those set out at [47] to [49] of Justice Mortimer's decision;

> 47. "On the first aspect, the applicant identified his political opinion in the following way:
>
> the Applicant's political opinion included political opinions he shared with the Socialist Alliance, his membership of the Socialist Alliance, his alleged belief in "Trotskyism", and the belief that he was a communist.
>
> 48. On the second aspect, the applicant gave the following particulars:
>
> (a) the Socialist Alliance is a political party insofar as it is a party with a political opinion;
>
> (b) the Applicant was a member insofar as he paid membership fees;
>
> 49. The respondent contended that the applicant's political opinion formed no part of the reasons for any of the actions, even if they were all properly characterised as adverse actions. It contended that, even if the Court were to find that the applicant's membership (past, present, or imputed) of the Socialist Alliance was a reason for any of the alleged adverse actions, membership of the Socialist Alliance did not constitute a "political opinion" as that phrase should properly be construed in s 351(1) of the Fair Work Act.

28) In a colourful exchange at the meeting the following is recorded in the decision at [101] ,

"It was Mr Maher who led the conversation with the applicant at the meeting about the remarks made by Mr Howes. The applicant's evidence, which I accept on these

issues, was that Mr Maher told the applicant he received a phone call from Mr Howes, who raised a "couple of concerns" with him — his association with the Socialist Alliance and his "bagging" of AWU officials. Mr Maher told the applicant what Mr Howes had said during his telephone call to Mr Maher — "once a Trot, always a Trot". Although it is not in Mr Weise's notes, Mr Vickers accepted this is what Mr Maher conveyed to the applicant at the meeting."

29) From [133] to [137] Justice Mortimer traverses ther authorities in the Federal Court dealing with adverse action proceedings .At [140] and following sets out summary form as to why the direction by the CFMEU to the applicant were based on a prohibited reason.

"140. If I am wrong about the characterisation of the direction to attend the 18 July 2013 meeting, then on the assumption it was adverse action within the meaning of s 342(1) of the Fair Work Act, for the reasons I express below, the direction was given for reasons which involved a prohibited reason. In that sense, as I explain in more detail below, all of the conduct and decision-making towards the applicant on and from 16 July 2014 was for reasons which included a prohibited reason. I make this finding despite Mr Vickers' express evidence that the appellant would still have been directed to attend the 18 July 2013 meeting even if Mr Vickers did not know anything about the applicant's membership of the Socialist Alliance. That evidence was given in answer to a leading question, with the benefit of hindsight, in the context of a proceeding alleging that Mr Vickers acted unlawfully. It is a reconstruction, and a self-serving one for the respondent. That is not to suggest Mr

Vickers gave dishonest evidence — rather, it is to find that it is not possible for Mr Vickers reliably to recreate circumstances in which he gave that direction, devoid of one of the central aspects — namely, the complaints by Mr Howes about the applicant's membership of the Socialist Alliance and Mr Vickers' very strong views about that political party and its methods of operation."

30) Her Honour dealt with the meaning of 'political opinion'as that expression is found in section 351 of the Fair Work Act. At [166] she stated,

"Treatment of a person because of the holding, and or alternatively the manifestation, of a political belief or opinion is a circumstance which is addressed in extradition and refugee law as well as anti-discrimination law. The commission of offences characterised as political did not generally expose a fugitive to extradition, and were considered an exception to a state's mutual obligations to extradite fugitives from justice. The development of political opinion as a protected attribute in anti-discrimination law needs to be seen in this wider context. The construction question centres on the meaning and interpretation of the adjective "political", whether the noun to which it is attached is "offence", or "opinion" or "belief."

31) Then having examined closely the many authorities dealing with "political opinion" her Honour found that,

175. "The respondent did not dispute the nature and extent of the applicant's involvement in the Socialist Alliance as described in the evidence (as opposed to what the applicant initially told Mr Vickers), nor was there any challenge to the way he expressed his political beliefs and explained why he had joined the Socialist Alliance.

176. To the extent the respondent submitted that membership of a political party is "not the same thing" as the holding and manifestation of a political opinion, if that submission was intended to apply to circumstances where the evidence demonstrated a person was a member of a party without any evidence the person shared the beliefs, policies and aims of that party, then further consideration may need to be given to whether a person in such a situation could be said to have a political opinion for the purposes of s 351 of the Fair Work Act. The example is hypothetical and is not the situation on the evidence in this proceeding. It need not be further considered. I note in any event that the situation posited by the respondent does not purport to deal with the imputations which might be made (relevantly, by an employer) out of an employee's "mere" membership of a political party. In that sense, bare or "mere" membership may still be sufficient to attract the protection of s 351, but these matters are inherently fact dependent.

177. Whatever may be the full extent of the meaning of "political opinion", there is no doubt that the applicant's membership of, and involvement in the activities of, the Socialist Alliance constituted the holding and manifestation of a political opinion within the meaning of that phrase in s 351 of the Fair Work Act."

32) The adverse action was found to be linked to the political opinion held by the applicant however his attached common law and statutory claims were not successful however he was able to secure modest compensation described as follows at [316] ,

"I consider the respondent should be ordered to pay the applicant a modest amount of general compensation for the unlawful way in which it terminated his employment. Taking into account the absence of any probative evidence other than the applicant's display of despondency, disappointment and anger, but recognising that he relocated from Melbourne to Queensland and then to Perth, and was dismissed summarily and placed directly on a plane back to Melbourne from Sydney, having been compelled to pack up and leave

Perth at short notice, any reasonable person in the applicant's position would find this humiliating and distressing. I propose to award the applicant $3000 in compensation for humiliation and distress."