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EMPLOYMENT LAW

GENERAL PROTECTION APPLICATIONS

Introduction

The Fair Work Act 2009 seeks to protect employees (and others)[1] who seek to exercise "workplace rights" from certain types of retribution by their employer (and others).[2]

This paper will focus on the application of these general protections provisions in respect to employment.

These general protections provisions provide protections for national system employers and national system employees.

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[1] The general protections provisions protect persons who are:

- employees (including prospective employees)
- employers (including prospective employers)
- independent contractors (including prospective independent contractors)
- a person (the principal) who has entered into a contract for services with an independent contractor (including a principal who proposes to enter into a contract), and
- an industrial association (including an officer or member of an industrial association)

[2] Action taken by a constitutionally-covered entity; action that affects the activities, functions, relationships or business of a constitutionally-covered entity (or is capable of affecting or is taken with intent to affect); action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity to take, or not take, particular action in relation to another person (or threatening to do so); action taken in a Territory or a Commonwealth place action taken by a trade and commerce employer, or a Territory employer that affects, is capable of affecting or is taken with intent to affect an employee of the employer, or action taken by an employee of: a trade and commerce employer, or a Territory employer that affects, is capable of affecting or is taken with intent to affect the employee's employer

These general protections provisions apply irrespective of the size of the employer, the length of service of the employee and the remuneration paid to the employee.

At the conclusion of the judicial/arbitration process the Court/Commission may make one or more of the following orders:

- an order for reinstatement of the person
- an order for the payment of compensation to the person
- an order for payment of an amount to the person for remuneration lost
- an order to maintain the continuity of the person's employment,
- an order to maintain the period of the person's continuous service with the employer, or
- imposition of a penalty.

The Act does not limit the scope of the compensation as it does in relation to unfair dismissal.

The terms employer and employee have their ordinary meaning for the purpose of general protections provisions. Other sections of the Act give specific definitions to these terms ('national system employer' and 'national system employee') which are not applicable to the general protections provisions.

An employer is a person who engages another to work under a contract of employment. An employee is a person who works under a contract of employment for an employer, rather than under some other kind of contract for work.

Section 340 Claims

Section 340 provides that a person must not take "*adverse action*" against another for the reasons there set forth. This section provides as follows:

(1) 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.

(2) 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.

Section 341(1) gives content to the phrase a "*workplace right*" as follows:

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.*

The phrase "*a workplace law*" is defined in s12, the *Dictionary* to the Act, as follows:

"workplace law" means:

(a) *this Act; or*

(b) *the Registered Organisations Act; or*

(c) *the Independent Contractors Act 2006; or*

(d) *any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).*

Section 342 sets out the "*meaning of adverse action*". The Table set forth in s342(1) provides in part (in respect to employees) as follows:

Meaning of *adverse action*

Column 1	**Column 2**
***Adverse action* taken by ...**	**is if ...**
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

An application under s340 of the Act does not provide an opportunity for the employee to raise whatever issues they wish to about the validity of the steps taken before dismissal[3].

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 of the Act. The issue is whether the person has done so because the employee had a workplace right or because the employee exercised that right[4].

Onus of Proof in s340 proceedings

A Court[5] when making findings of fact in respect to breaches of s340 of the Act must have due regard to the gravity of the matters alleged pursuant to s140(2) of the *Evidence Act.*[6] The standard of proof referred to in s140(2) is a re-statement of the standard of proof referred to by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336[7].

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[3] *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109 at [31]
[4] Idem
[5] And the Fair Work Commission in an arbitration
[6] Especially in light of the fact a breach may attract a civil penalty.
[7] *Liquor Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd* [2010] FCA 770 at [13] and *Darlaston v Parker* [2010] FCA 771 at [17]

Section 360 of the Act provides:

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

Section 361 of the Act provides:

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

The employee must establish on the balance of probabilities the objective facts upon which their claim is based before the reverse onus in s361 is triggered[8]. Sections 360 and 361 are directed to those contraventions which require proof that a person takes action "*for a particular reason*" or "*with a particular intent*" – as is the case in respect to contraventions of s340.

[8] *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399; (2010) 186 FCR 22 at [10]

When addressing s346 of the Act and the prohibition there contained against the taking of "*adverse action*" because (*inter alia*) a person was not a member of an industrial association, in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 French CJ and Crennan J observed in respect to that provision and s361:

[5] The task of a court in a proceeding alleging a contravention of s346 is to determine, on the balance of probabilities, why the employer took adverse action against the employee, and to ask whether it was for a prohibited reason or reasons which included a prohibited reason ...

Their Honours later continued:

[44] There is no warrant to be derived from the text of the relevant provisions of the Fair Work Act for treating the statutory expression "because" in s346, or the statutory presumption in s361, as requiring only an objective enquiry into a defendant employer's reason, including any unconscious reason, for taking adverse action. The imposition of the statutory presumption in s361, and the correlative onus on employers, naturally and ordinarily mean that direct evidence of a decision-maker as to state of mind, intent or purpose will bear upon the question of why adverse action was taken, although the central question remains "why was the adverse action taken?"

[45] This question is one of fact, which must be answered in the light of all the facts established in the proceeding. Generally, it will be extremely difficult to displace the statutory presumption in s361 if no direct testimony is given by the decision-maker acting on behalf of the employer. Direct evidence of the reason why a decision-

> *maker took adverse action, which may include positive evidence that the action was not taken for a prohibited reason, may be unreliable because of other contradictory evidence given by the decision-maker or because other objective facts are proven which contradict the decision-maker's evidence.* ***However, direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer even though an employee may be an officer or member of an industrial association and engage in industrial activity.*** (my emphasis and references omitted)

If the Court finds that an employee has exercised a "*workplace right*" and that "*adverse action*" has been taken, it is then presumed that the action was taken for the reason alleged unless the employer proves to the contrary[9].

The High Court in *Barclay* was considering the situation in which there was a single decision-maker, who made the decision to take adverse action against the employee concerned. It is necessary to read what was said in *Barclay* with the understanding that the Court was not faced with any issue of the possible involvement of more than one person in the making of the decision. Earlier authorities have dealt with that question, in circumstances where a decision is made by a committee or other deliberative body, but also in circumstances in which there is collaboration between officers of an employer at various levels in the employer's hierarchy, leading to an ultimate decision. The Court will need to make a finding as to the minds of which natural person or persons

[9] *Kennewell v MG & CG Atkins* [2015] FCA 716 at [52] and *Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740 at [14] to [15].

constitute the directing mind and will of a corporate body, for the purpose of determining the state of mind of that corporate body in respect of its conduct.

In *Voigtsberger v Council of the Shire of Pine Rivers (No 2)* (1981) 58 FLR 239, the question was whether an employee in local government had been dismissed from her employment for a proscribed reason. Although the local council itself had made the ultimate decision to dismiss, Evatt J found that it was an earlier decision of the finance committee that was the critical decision. The council had merely "rubber-stamped" the recommendation of the finance committee later on the same evening. The finance committee consisted of eight councillors, six of whom had not been called as witnesses. His Honour held that the decision to dismiss the employee had not been proved not to be actuated by the proscribed reason alleged.

In *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251 the Court dealt with a factual situation where Kodak adopted a redundancy process whereby two supervisors, assessed Mr Elliott for redundancy by reference to certain criteria. A third person, then made the ultimate decision to terminate Mr Elliott's employment. The Court held that, if the assessment made by either Mr Lay or Mr Shannon was influenced by a prohibited reason that would have impugned the decision of Mr Walshe even though it was not disclosed to him. The Court held at [37]:

The first difficulty with this argument is that Lay made an indispensable contribution to the rankings. He and Shannon co-operated in a joint assessment, with each giving an account of what influenced them individually. If it were the fact that Lay was influenced in giving a low

mark by a prohibited reason, it can be assumed that if the ranking were done without having regard to that prohibited reason, it is likely that a different ranking would have been given by Lay. This, inevitably, would have affected the ranking process, whatever the views of Shannon. It would have been a different assessment process. Furthermore, whatever debate there might be about the extent of Walshe's power or involvement in the decision, his evidence was that he took the Lay/Shannon assessment and worked from there. It follows that if the Lay/Shannon assessment is affected (or infected) by either Lay or Shannon having held an undisclosed prohibited reason, then he would have, in effect, inadvertently adopted it so that its force continued regardless of the lack of any express prohibited reason in the mind of Walshe.[10]

In considering the conduct of the employer the Court is required to examine the reasoning process employed by each person whose involvement had a material effect on the ultimate decision. This inquiry does not involve a roving search of the minds of the employees of the kind rejected by Heydon J in *Barclay* (at [146]). Nor does it involve an objective inquiry of the kind rejected in *Barclay* (at [44] and [126]), nor import some "unconscious" reasoning to the ultimate decision-maker that was also rejected in *Barclay* (at [124] per Gummow and Hayne JJ, and [146] per Heydon J). Instead, it focuses on the conscious reasoning processes of those who had a material effect on the ultimate outcome to determine whether their reasoning processes were free of the alleged prohibited reason or reasons. If one or more of the reasons employed by

[10] See also *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd (No 2)* [2015] FCA 265 at [99]; *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [78] and *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Limited* [2015] FCA 1014 at [121]

one or more of them was a prohibited reason that will impugn the ultimate decision.

Whether an employer has discharged the "*reverse onus of proof*" is a question to be resolved at the end of a proceeding and upon consideration of the entirety of the evidence adduced[11]. The standard of proof to be applied when seeking to rebut the presumption, the standard at that point in the analysis is the balance of probabilities[12].

Section 360 recognises that action may be taken for more than one reason. What an employer when seeking to rebut the presumption must do is to establish on the balance of probabilities that the alleged improper reason was not a reason for the taking of action. Generally (although as a matter of logic, not necessarily) the evidence as to the state of mind of the decision-maker will include evidence as to what are claimed to be the actual reasons for the decision. Even if the reasons advanced as actual reasons for the decision are accepted as such, the absence of evidence that there were no additional reasons, or that the actual reasons did not include the alleged proscribed reasons, will usually result in a failure to rebut the presumption.

In order to invoke the reverse onus of proof, the employee need only establish that "*the evidence is consistent with the hypothesis*" that the employer was actuated by a proscribed reason.

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[11] *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* (2015) 238 FCR 273 at 279

[12] *National Tertiary Education Union v Royal Melbourne Institute of Technology* (2013) 234 IR 139 at 146

The reverse onus of proof provision found in s361 does not apply to claims for accessorial liability under s550[13] (discussed more below).

Employee suffers adverse action

The first question to be addressed in a case under s340 is whether adverse action was taken[14]. If "*adverse action*" has been taken, attention is then focused on whether an employer has taken the adverse action for a proscribed reason[15].

A termination of an employee is clearly adverse action pursuant to Item1(a) of s342.

Injuring an employee in employment for the purpose of Item 1(b) of s342 covers injury of any compensable kind. Injuring an employee in employment has also been taken to have a wider meaning than financial injury or injury involving deprivation of rights which the employee has under a contract of service. It refers to a deprivation of one of the more immediate practical incidents of an employee's employment, such as loss of pay or reduction in rank[16]. It can be applicable to any circumstances where the employee in the course of employment is treated substantially differently to the manner in which the employee was ordinarily treated and where that treatment can be seen to be injurious or prejudicial[17].

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[13] *Port Kembla Coal Terminal Ltd v Construction, Forestry, Mining and Energy Union* [2016] FCAFC 99 at [448] and *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (No 3)* [2013] FCA 525 at [241]
[14] Ibid at [32]
[15] *Tsilibakis v Transfield Services (Australia) Pty Ltd* [2015] FCA 740 at [16]
[16] *Director of The Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors* [2014] FCCA 721 at [30] referring to *Childs v Metropolitan Transport Trust* (1981) 29 AILR 24 (Smithers J)
[17] *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155

Item 1(c) of s342(1) (alters the position of the employee to the employee's prejudice) is construed as a broad category of adverse action, extending beyond legal injury[18]. It includes any adverse effect on the advantages and benefits enjoyed by the employee in employment before the conduct in question, or any deterioration in such advantages and benefits[19]. A prejudicial alteration for the purposes of Item 1(c) may occur even though the employee suffers no loss or infringement of a legal right, and will occur where the alteration is real and substantial rather than merely possible or hypothetical[20].

Item 1(d) of s342 deals with discriminating between the employee and other employees of the employer. Discrimination between employees involves the employer deliberately treating the employee less favourably than its other employees[21]. The element of intent is central to establishing discrimination. To discriminate requires a conscious decision to make a distinction. The Act does not define the term "*discriminates*" as it appears in s342(1)(d). For this form of adverse action to exist there is the requirement that the employer "*discriminates between the employee and other employees of the employer.*" The Act does not specify whether the term "*discriminates*" incorporates both forms of discrimination i.e. direct discrimination (less favourable or unfavourable treatment) and indirect discrimination (where, for example, an imposed requirement is not or cannot be complied with and/or disadvantages people who have a particular attribute and where the requirement is not reasonable).

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[18] *The Employment Advocate v National Union of Workers and Anor* (2000) 100 FCR 454 at 468
[19] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 18; *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [84] *Australian and International Pilots Association v Qantas Airways Ltd* (2006) 160 IR 1 at [15]- [17] and *Director of The Fair Work Building Industry Inspectorate v Baulderstone Pty Ltd & Ors* [2014] FCCA 721 at [32]
[20] *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 at [84] and *Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association* (2012) 202 FCR 244 at [32].
[21] *Hodkinson v Commonwealth* (2011) 207 IR 129 at [178]

However, since s342(1)(d) requires a comparison of the treatment of the employee as between other employees, this is consistent with the differential treatment encapsulated by direct discrimination.

There must be more than a temporal connection between the protected attribute or activity and the taking of adverse action[22].

Exercise of Workplace Rights

The second matter that must be established is that the employee against whom the employer has allegedly taken adverse action has, among other things, a "*workplace right*", or has exercised or not exercised such right, or proposes to or proposes not to, exercise such right.

A person has a workplace right if the person:

- is entitled to the benefit of a workplace law, workplace instrument or an order made by an industrial body
- has a role or responsibility under a workplace law, workplace instrument or order made by an industrial body
- is able to initiate or participate in a process or proceedings under a workplace law or instrument
- is able to make a complaint or inquiry to a person or body with capacity to seek compliance with a workplace law or instrument, or
- is able to make a complaint or inquiry in relation to his or her employment.

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[22] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay (No 1)* (2012) 248 CLR 500 at [60] and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243 at [19].

Under s341(1) of the Act a person has a "*workplace right*" if, among other things, the person "*is entitled to the benefit of*" a "*workplace law*". The expression "*workplace law*" is defined in s12 of the FW Act to mean, among other things, "*any . . . law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)*".

Workers' compensation laws are directed to matters that both regulate and define the employer/employee relationship and therefore fall within the definition of 'workplace law'.

The fact that a law regulates other relationships as well as the employment relationship does not take it outside the definition of workplace law. A particular provision within an Act or regulation could be said to regulate the relationship between employers and employees, even though the Act or the regulations as a whole do not.

The Privacy Act has been found not to be a workplace law as it does not regulate the relationship between employers and employees.

A workplace law must be a statute law (including delegated legislation). It does not generally include rights arising under contracts of employment or other common law rights. A workplace instrument is an instrument that is made under, or recognised by a workplace law and concerns the relationships between employers and employees. The term 'workplace instrument' does not apply to the contract of employment itself.

Industrial body means:

- the Fair Work Commission

- a court or commission (however described) performing or exercising, under an industrial law, functions and powers corresponding to those conferred on the Fair Work Commission by the Act, or
- a court or commission (however described) performing or exercising, under a workplace law, functions and powers corresponding to those conferred on the Fair Work Commission by the *Fair Work (Registered Organisations) Act 2009* (Cth).

The role of a bargaining representative is a role or responsibility under a workplace law. An obligation to ensure workplace safety as a Health and Safety Officer is also a role or responsibility under a workplace law

An employee exercises a workplace right where they make a complaint or inquiry to a body having capacity to seek compliance with the law or a workplace instrument, even when the complaint concerns other employees.

An employee exercises a workplace right where they make a complaint or inquiry in relation to their employment. The Act does not restrict the person or body to whom such a complaint or inquiry could be directed. It can include situations where an employee makes an inquiry or complaint to his or her employer. Seeking legal advice in relation to a person's employment also falls within the meaning of a complaint or inquiry.

Although the words 'is able to' are taken to have a broad meaning, in order for the complaint or inquiry to be considered a workplace right, it is necessary that the complaint or inquiry concerns and is confined to the person's employment.

In *Evans v Trilab Pty Ltd* [2014] FCCA 2464 at [61] the Federal Circuit Court found that a complaint or inquiry need:

- not arise from a statutory, regulatory or contractual provision before it can be a complaint or inquiry in relation to a person's employment for the purposes of s.341(1)(c)(ii) of the Fair Work Act, and
- only have an indirect nexus with a person's terms or conditions of employment to come within the scope of s.341(1)(c)(ii), and may be a complaint about the conduct of another person in the workplace or about a workplace process which concerns or has implications for an employee's employment.

The meaning of a "complaint" in relation to a person's employment as a workplace right under s 341(1)(c)(ii) was considered by Dodds-Streeton J in *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346 at [29], her Honour summarised her principal findings as follows:

... in the context of s 341(1)(c)(ii) of the Act:
(a) a complaint is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used, conveys a grievance, a finding of fault or accusation;
(b) the grievance, finding of fault or accusation must be genuinely held or considered valid by the complainant;
(c) the grievance, finding of fault or accusation need not be substantiated, proved or ultimately established, but the exercise of the workplace right constituted by the making of the complaint must be in good faith and for a proper purpose;
(d) the proper purpose of making a complaint is giving notification of the grievance, accusation or finding of fault so that it may be, at least,

received and, where appropriate, investigated or redressed. If a grievance or accusation is communicated in order to achieve some extraneous purpose unrelated to its notification, investigation or redress, it is not a complaint made in good faith for a proper purpose and is not within the ambit of s 341(1)(c)(ii);

(e) a complaint may be made not only to an external authority or party with the power to enforce or require compliance or redress, but may be made to persons including an employer, or to an investigator appointed by the employer;

(f) a complaint that an employee is able to make in relation to his or her employment is not at large, but must be founded on a source of entitlement, whether instrumental or otherwise; and

(g) a complaint is limited to a grievance, finding of fault or accusation that satisfies the criteria in s 341(1)(c)(ii) and does not extend to other grievances merely because they are communicated contemporaneously or in association with the complaint. Nor does a complaint comprehend contemporaneous or associated conduct which is beyond what is reasonable for the communication of the grievance or accusation.

A complaint to the employer under s 341(1)(c)(ii) must relate to a person's employment[23]. Although some doubt has been expressed about that finding. In *Walsh v Greater Metropolitan Cemeteries Trust (No 2)* [2014] FCA 456 at [41]-[44]:

The words "in relation to" are words of wide import. The use of that phrase in s 341(1)(c)(ii) identifies that a relationship between the subject matter of the complaint and the complainant's employment is required. The nature of that relationship need not be direct and may be indirect:

[23] *Rowland v Alfred Health* [2014] FCA 2 at [37]-[38]

Construction, Forestry, Mining and Energy Union v Pilbara Iron Co (Services) Pty Ltd (No 3) [2012] FCA 697 at [61]- [64] (Katzmann J); Shea v TRUenergy Services Pty Ltd (No 6) [2014] FCA 271; (2014) 242 IR 1 at [631] (Dodds-Streeton J). I respectfully agree with Katzmann J's observation in Pilbara at [64] that if some limit on the broad language utilised in the phrase "in relation to his or her employment" is to be imposed, it needs to be "found in the nature and purpose of the legislation, which includes the protection of workplace rights".

Where the subject matter of the complaint raises an issue with potential implications for the complainant's employment, it is likely that the requisite nexus will be satisfied: Pilbara at [69].

In this case, Ms Walsh raised a probity issue in relation to a contract with a supplier who supplied services including to an operation which Ms Walsh managed in the course of her employment. Whether or not Ms Walsh was under a contractual duty to report the possible misdeed of others (see the discussion in Irving, The Contract of Employment (LexisNexis Butterworths, 2012) at [7.21]), her failure to report suspected wrong-doing had the potential to reflect badly upon her and cause prejudice to her in her employment. By reason of either of those two factors, the Alsco contract complaint made by Ms Walsh raised an issue with potential implications for Ms Walsh's employment and was "in relation to ... her employment" within the meaning of s [341(1)(c)(ii)] of the FW Act.

Relief

Section 345 of the Act provides in part (a breach of s340 of the Act is a civil remedy provision):

Federal Court and Federal Circuit Court

(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit Court may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 65(5), 76(4), 463(1) or 463(2) (which deal with reasonable business grounds and protected action ballot orders) (see subsections 44(2), 463(3) and 745(2)).

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

Principles for assessing compensation

Section s545(2)(b) of the Act provides that the court may make *"an order awarding compensation for loss that a person has suffered because of the contravention."* There must, therefore, be *"an appropriate causal connection between the contravention and the loss claimed"*.[24] However, the making of a compensation order is confined by the statutory precondition that there has been loss or damage suffered because of, or as a result of, the contravention.[25] In *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275 at [73] per Gilmour J observed that:

Both under the FW Act and the WR Act, the making of a compensation order is confined by the express purposes of such orders: "compensation for loss ... suffered because of the contravention" (FW Act, s 545(2)(b)) and "compensation for damage suffered ... as a result of the contravention" (WR Act, s 807(1)(b)). In both cases, the statutory precondition to a compensation order is that there has been loss or damage suffered because, or as a result of, the contravention. There must be "an appropriate causal connection between the contravention and the loss claimed":

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[24] See *Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd* [2011] FCA 333 at [423].
[25] See *Maritime Union of Australia v Fair Work Ombudsman* [2015] FCAFC 120 at [20]

The level of compensation is at the discretion of the Court but must be no greater than what is reasonable in all the circumstances.[26].

Although the award of compensation under s.545(2)(b) of the Act the usual approach to the calculation of economic compensation under s.545(2)(b) of the Act is, so far as a monetary amount can achieve, to place the employee in the position he or she would have been in, if the employer had not contravened the Act.

In addition the Court may award compensation for non-economic loss and that various sums have been awarded by the federal courts for non-economic loss under s545(2)(b) of the Act for example, *Hall v City Country Hotel Management Pty Ltd & Ors (No. 2)* [2014] FCCA 2317 at [26] and [27(d)] per Judge Manousaridis – $2500; *Dafallah v Fair Work Commission & Anor* [2014] FCA 328; (2014) 225 FCR 559; (2014) 242 IR 273 at [179] per Mortimer J – $3000; *International Aviation Service Assistance* at [450] per Barker J – $7500; and *Flavel* at [16] per Judge Simpson – $25 000.

A compensatory order for distress, hurt and humiliation is available but can only be made if the employee has in fact suffered distress, hurt, and humiliation as a result of the contravention.[27]

The assessment of economic compensation for the loss suffered by an employee, because of a contravention or contraventions of the Act, is not to be limited to circumstances where an employee has lost his or her

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[26] See *Aitken v Construction, Mining, Energy, Timberyards, Sawmills & Woodworkers Union of Australia - Western Australian Branch* (1995) 63 IR 1 at [9] per Lee J; *Fair Work Ombudsman v Skilled Offshore (Australia) Pty Ltd* [2015] FCA 275 at [72] per Gilmour J

[27] See *Hall v City Country Hotel Management Pty Ltd & Ors (No.2)* [2014] FCCA 2317 at [25]

particular job. It may extend to circumstances where the employee has suffered a loss of opportunity of the benefit.

As Menzies J opined in *Jones v Schiffmann* (1971) 124 CLR 303 at 308, the assessment of damages sometimes, of necessity, involves guesswork rather than estimation. This is such a case. It involves consideration of what might have happened after September 2012 in hypothetical circumstances.

Accessorial liability under s 550

Section 550 of the Act provides:

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

*Note: If a person (the **involved person**) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).*

(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*

(d) *has conspired with others to effect the contravention.*

The Full Court in *Construction, Forestry, Mining and Energy Union v Clarke* [2007] FCAFC 87 considered the nature of accessorial liability under the similar terms of the predecessor *Workplace Relations Act 1996* (Cth). The Court held at [26]:

Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the contravening conduct – the accessory should be linked in purpose with the perpetrators (per Gibbs CJ in Giorgianni v The Queen [1985] HCA 29; (1985) 156 CLR 473 at 479-480; see also Mason J at 493 and Wilson, Deane and Dawson JJ at 500). The words "party to, or concerned in" reflect that concept. The accessory must be implicated or involved in the contravention (Ashbury v Reid [1961] WAR 49 at 51; R v Tannous (1987) 10 NSWLR 303 per Lee J at 307E-308D (agreed with by Street CJ at 304 and Finlay J at 310)) or, as put by Kenny J in Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2002] FCA 61; (2002) 117 FCR 588; 112 IR 388 at [34], must participate in, or assent to, the contravention.

In *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* [2013] FCA 446 Bromberg J considered accessorial liability in the context of an adverse action claim and held at [289]-[290]):

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".

An accessory will often know the principal perpetrator's motive because the perpetrator will have revealed it. Alternatively, an accessory may know the perpetrator's motive because their conduct is so intertwined, that the motive of one will be the obvious motive of the other.

Process

There are two types of general protections application that the Commission can deal with:

- a dismissal dispute, and
- a non-dismissal dispute.

Dismissal Dispute

If:

- a person has been dismissed, and
- the person, or an industrial association that is entitled to represent them, alleges that the person was dismissed in contravention of the general protections;

then the person (or their industrial association) may apply to the Commission for the Commission to deal with the dispute.[28] If no such application is made, the person cannot take the matter to a Court.

If an employer argues that the employee left their employment for a reason other than dismissal (such as resignation), the Commission can conduct a conference in an attempt to resolve the dispute as long as:

- an application has been lodged, and
- on the face of the application, it is alleged that a dismissal has occurred in contravention of the general protections provisions.

The Commission does not need to make a determination that the employee in a s365 proceeding has been 'dismissed' from their employment (within the meaning of s.365), before the Commission can conduct a conference in relation to the dispute.

An application for a dismissal dispute must be lodged with the Fair Work Commission within 21 days after the dismissal takes effect.[29] The 21 days for lodgement does not include the date that the dismissal took effect. This means that day one commences the day following the dismissal. If the final day of the 21 day period falls on a weekend or on a national public holiday (when the Commission is closed) the timeframe will be extended until the next business day. Public holidays or weekends that fall during the 21 days will not extend the period of lodgement.

The Commission may allow a further period for lodgement in exceptional circumstances.

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[28] Section 365 of the Act
[29] Section 366

If the general protections dispute is not resolved during the Commission conference, a person has only 14 days after the day the certificate is issued by the Commission to make a general protections court application in relation to the dispute.

When the Commission issues the certificate, if the parties agree to the Commission arbitrating the dispute then a general protections court application cannot be made in relation to the dispute.

The process for Dismissal disputes is summarised in the flowchart at the end of this paper.

The one exception for a Dismissal dispute is where there is a general protections court application that includes an application for an interim injunction, then the dispute does not need to have had a conference with the Commission or a certificate issued.

Non Dismissal dispute

If:

- a person alleges a contravention of the general protections, and
- the person has NOT been dismissed;

then the person may apply to the Fair Work Commission to deal with the dispute.[30] Such an application can be bought within 6 years of the adverse action.

When an application is made the Commission will notify both parties that they can only deal with the dispute if both parties agree. The parties are also advised that if they do not agree to the Commission having a conference, the employee has the option of taking the dispute directly to the Court.

If the parties to the dispute agree to participate, the Commission may deal with a non-dismissal dispute by conference.

With a non-dismissal dispute, if the parties do not agree to the Commission conducting a conference the matter may proceed directly to Court as a general protections court application.

An employee in a non-dismissal dispute matter may make an application directly to the Court, an application does not need to be lodged with the Commission.

The process for non-dismissal disputes is summarised in the flowchart at the end of this paper.

Legal Representation

A lawyer or paid agent must seek the permission of the Fair Work Commission to represent a person in a matter before the Commission. This includes making an application or submission on another person's behalf.

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[30] Section 372

Only a Commission Member can give permission for a lawyer or paid agent to represent a party.

A party is entitled to legal representation in Court.

Costs

Persons who incur legal costs in a general protections matter before the Fair Work Commission or a court generally pay their own costs.

The Commission or a Court has the discretion to order one party to a general protections matter to pay the other party's legal or representational costs, but only where the Commission/Court is satisfied the matter was commenced or responded to:

- vexatiously or without reasonable cause, or
- with no reasonable prospect of success.

Costs may also be awarded to one party if the Commission or the Court is satisfied that the costs were incurred as a result of an unreasonable act or omission of the other party.

Costs may also be ordered against legal representatives.

The Fair Work Commission may make an order for costs[31] against a representative for costs incurred by the other party to the matter if satisfied that the representative caused those costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent

[31] Section 376

that the person had no reasonable prospect of success in the matter, or

- of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

There is no requirement that representatives be granted permission to appear before the Commission can make an order for costs against them.

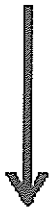
Anthony Britt
Sir Owen Dixon Chambers
Sydney
8076-6601

Flowchart – Dismissal dispute process

1. Application for general protections dismissal dispute [Form F8 [2]] lodged with Commission

2. Application listed for conference

   Response to general protections applications [Form F8A [3]] and submissions from both parties lodged with Commission



3. Telephone conciliation conducted by Conciliator

   1.

   Matter NOT settled

   Advice on arbitration or court application provided by Conciliator

   Referred to a Commission Member with Conciliator report

   2.

If Commission Member is **not satisfied** that reasonable attempts have been made to resolve the matter...

Supplementary conference

If Commission Member is **satisfied** that reasonable attempts have been made to resolve the matter...

3. **Matter settled**

Terms of settlement

Matter NOT settled

Advice on arbitration or court application may be provided by Commission

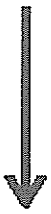
Certificate issued

4.

BOTH parties agree to arbitration by Commission [Form F8B [4]]

Application for consent arbitration made within 14 days of Certificate

Matter determined



Parties **DO NOT** agree to arbitration by Commission

General protections court application must be made within 14 days of Certificate

Matter determined

Flowchart – Non-dismissal dispute process

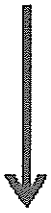
Note: An applicant in a non-dismissal dispute matter may make an application directly to the court, an application does not need to be lodged with the Commission.

1. Application for general protections non-dismissal dispute [Form F8C [5]] lodged with Commission

2. Application listed for conference

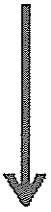
   Advised of need to consent

1.



1. **BOTH** parties agree to conference by Commission

   Employer response [Form F8A [3]] and submission from both parties lodged with Commission



2. Conference conducted by Commission Member

3. 

Matter settled

Terms of settlement

2.

1. 

Parties **DO NOT agree** to conference by Commission.

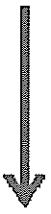
General protections court application made by applicant

Matter determined

2. 

Matter NOT settled

Advice on court application provided by Commission Member

3. 

General protections court application made by applicant

Matter determined