
**Uncertainty and Imbalance: the Freedom of Association Provisions of the
Fair Work Act 2009 (Cth)**

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This is my own account of the research which I have undertaken.

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ABSTRACT

Freedom of association is a fundamental right in Australian labour law. As such, employees have been protected from adverse action on the basis of these industrial associations and industrial activities by legislation for more than a century.

A historical analysis of the legislative protection shows that there has also been a significant expansion in breadth of the protective provisions, and a shift in the roles which unions have played in the industrial relations arena. The range of activities which constitutes industrial activity for the purpose of the protective provisions has expanded, as has the scope of actions which an employer may not take against an employee on the basis of these activities. It is submitted that the breadth of both of these legislative categories is necessary in order to best protect employees' freedom of association.

The legislative provisions and judicial application of the causal link between these two categories is analysed. This analysis illustrates two things: the difficulties faced by employers by the imposition of a reverse onus of proof and the requirement that the prohibited reason need only be one of many reasons for a decision; and the difficulty which the courts face in assessing what was in the mind of a decision maker at the time they made their decision.

These difficulties in the application of the causal link are particularly apparent in two situations: when an employee union representative who is particularly active and has caused significant irritation to their employer is dismissed or disciplined for an apparently unrelated reason; and when a single act of an employee union representative could be classified as the act of a union representative, or as the act of an unsatisfactory employee.

Finally, a number of potential solutions to this problem are analysed. The most effective of these is the suggestion that the loyalty which an employee union delegate owes to their union be determined to override their duty of loyalty to their employer. This has the potential to provide certainty to both the employer making the decision to take action and the employee in deciding whether or not to take a particular action. Furthermore, it does so while still protecting an employee's fundamental right to freedom of association.

CONTENTS

I	Introduction	1
II	Legislative Protections For Employees Engaging In Industrial Activities	5
A	History	5
1	<i>Conciliation and Arbitration Act 1904 (Cth)</i>	6
2	<i>Industrial Relations Act 1988 (Cth)</i>	10
3	<i>Workplace Relations Act 1996 (Cth) and the Work Choices Amendments</i>	11
4	<i>Fair Work Act 2009 (Cth)</i>	13
B	The Current Provisions.....	14
1	Proscribed Reasons: Industrial Activities	15
2	Proscribed Reasons: Workplace Rights	18
C	Conclusion.....	19
III	Adverse Action	20
A	History	20
B	The Current Provisions.....	21
C	Judicial Application.....	22
D	Conclusion.....	24
IV	Causal Link –The Motivation of the Decision Maker	26
A	Reverse Onus.....	26
B	Multiple Reasons	29
C	Judicial difficulty in determining the reasons of the decision maker.....	32
1	What is the Test for Determining Intent - Subjective v Objective Intention? Neither or both?	33
2	Serving Two Masters: Opposing Loyalties of Employee Union Representatives	41
V	Additional Considerations.....	47
A	Compensation, penalties and other orders.....	47

B	Time Limit.....	48
VI	Potential Solutions	50
1	Loyalty an Employee owes to their Employer v Loyalty a Union Delegate owes to their Union.....	50
2	Reason / Cause Distinction	55
3	Comparator.....	61
VII	Conclusion	65