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

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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.

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I INTRODUCTION

The purpose of labour law is most famously stated by Otto Kahn-Freund, who said that it was ‘to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship’.¹ Trade union protection provisions are intended to protect employees in their attempts to counter the power imbalance that exists between employees and employers.² They do this by protecting employees’ ‘freedom of association’, allowing workers to form trade unions and use their collective strength to further their objectives.³ The purpose of the provisions is to ‘remove fear of adverse action by an employer against an employee taking union office and performing the functions of that office’⁴ and to ‘ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee’s right to join an industrial association and to take an active role in that association to promote industrial interests of both the employee and the association’.⁵

For more than a century, employment law in Australia has recognised the importance of role that industrial associations play in the representation of employee rights, and has recognised the importance of the right of employees to join such organisations. Since 1904, legislation has prohibited employers in Australia from treating an employee adversely by reason that they are associated with an industrial organisation.⁶ These protective provisions began as a protection from dismissal for employees who were officers or members of an industrial organisation or who were entitled to the benefit of an industrial agreement or award.⁷ Over the course of the century, these provisions have become broader, protecting a wider range of employees and prohibiting a wider range of detrimental actions by employers.

Today, the primary legislation for employment law in Australia is the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*). The object of the *Fair Work Act* is stated to be ‘to provide a balanced framework for cooperative and productive workplace relations

¹ Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons, 2nd ed, 1977) 6.

² Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 527.

³ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 6.

⁴ *Bowling v General Motors Holden* (1975) 8 ALR 197, 210 (Smithers and Evatt JJ).

⁵ *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550, 583 (Wilcox and Cooper JJ).

⁶ The first provisions appeared in the *Conciliation and Arbitration Act 1904* (Cth).

⁷ *Conciliation and Arbitration Act 1904* (Cth) s 9(1).

that promotes national economic prosperity and social inclusion for all'.⁸ Among other things, this balance is said to be achieved by providing laws which are flexible, fair, promote productivity and economic growth and take into account Australia's international labour obligations,⁹ and by enabling fairness and representation at work by the recognition of the right to freedom of association.¹⁰

Freedom of association is protected by Part 3-1 of the *Fair Work Act*. In particular, s 346 prohibits an employer from taking 'adverse action' against an employee because that person is an officer or a member of an industrial association or because he or she engages, proposes to engage or has engaged in industrial activity.¹¹ The *Fair Work Act*, in seeking to provide balance, has abolished the sole or dominant reason test, has removed the cap on damages and has extended the definition of industrial activity.

However, it has been argued that the current legislative provisions are too broad and do not strike a fair balance between the rights of employees and those of employers. More specifically, it is suggested that the potential scope of s 346 and other associated provisions is so broad that they cannot operate with certainty. As a result, the rights of employers to make decisions regarding their workforces have been adversely affected and employees with union associations are unjustifiably protected in their employment to the extent that they are effectively 'untouchable'.¹² The 'countervailing force' of labour law has become stronger than the power of employers and it is becoming difficult for the courts to determine where the scope of protection ends.

This thesis will examine the provisions of the *Fair Work Act*, which prohibits employers from taking adverse action against employees because of the employee's union membership or activity. It will comprise a detailed analysis of the provisions and the various cases which have determined and illustrated the ambit and operation of this legislative protection. This paper demonstrates that the legislative

⁸ *Fair Work Act (2009)* (Cth) s 3.

⁹ *Ibid* s 3(a).

¹⁰ *Ibid* s 3(e).

¹¹ *Ibid* s 346.

¹² John Wilson, 'Handle With Care: Action Against Employees Who are Also Union Delegates' (2011) 220 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 8, 8; Joellen Riley, 'Adverse Action Claims under the Fair Work Act 2009 (Cth): Some Lessons from the Early Cases' (2011) 25(3) *Commercial Law Quarterly* 12, 15.

mechanism, as it currently operates, does not provide sufficient certainty for employees and is not best suited to strike the balance that is required by the objectives of the Act. It will be shown that the most problematic aspect of the legislative prohibition against adverse action taken for proscribed purpose, namely an industrial association or action, is the causal nexus between the adverse action and the proscribed purpose. Various possible solutions will be discussed by which the prohibition may be more effectively implemented.

I will be analysing the application of the provisions in three parts: the scope of what constitutes industrial activity for the purpose of the protection provisions; the scope of what constitutes adverse action; and the application of the causal link requirement by the courts.

First, I will describe the history of the legislative protection of employees' rights to industrial associations in Australia, culminating in the *Fair Work Act*. This history shows a continuous progression in the scope of the types of activities and associations which are protected. This historical analysis highlights that the broad scope of the provisions cannot be attributed entirely to the *Fair Work Act*; these provisions have been getting broader with each iteration of labour legislation. It will also show how the role of trade unions in Australia has become more diverse over time and thus for the provisions to operate effectively to protect freedom of association, it is necessary for the legislation to provide protections in a wide range of circumstances.

Secondly, I will look at the legislative provisions which define the kinds of acts which, if done for a proscribed reason, will contravene the protection provisions. I will also look in detail at the historical progression of this section and how it has been interpreted by the courts. This will show how adverse action has progressed from merely being dismissed from employment to an exceptionally broad range of adverse acts and will analyse the reasoning behind this progression. It will be seen that the wide scope of adverse action is necessary in order to protect the rights of employees, as the benefit of work extends beyond financial gain to self respect and personal fulfilment.

I will then look at the *Fair Work Act* provisions which relate to the application of the protection provision. Once it has been established that an employee falls into a category of industrial protection, and that adverse action has been taken against

them, it must be established that the action was taken *because* of the proscribed reason. This step is often referred to as the causal link. It is in the court's application of this causal link where the problems with the scope of the protective provisions become apparent. This is because the acts of an employee who is associated with a union can often be characterised in two ways; the act of a good union official or the act of an unsatisfactory employee. The scope of the legislative provisions is such that an employee union representative can potentially be protected from adverse action for any act connected to their industrial association. I will also analyse in detail the effect that the recent High Court case of *Bendigo Regional Institute of Technical and Further Education v Barclay*¹³ has had on the application of the causal link and the apparent difficulties in dissociating an employee's union capacity from their capacity as an employee.

Finally, I suggest a number of possible solutions to this problem. As the difficulty lies in the judicial application of the test in relation to employees who hold the dual role of union representative and employee, each of the suggested solutions is a method which could be used by the judiciary in reconciling these two opposing positions. The first is a determination as to which loyalty overrides which: the loyalty an employee owes to their employer, or the loyalty a union delegate owes to their union. The second is an extension of a test which is applied in a discrete area of freedom of association law, called the reason / factor distinction. The third and final mechanism is a finding as to whether a comparison should be made between a non-union affiliated employee and a union affiliated employee, similar to that of anti-discrimination law.

¹³ [2012] HCA 32.

II LEGISLATIVE PROTECTIONS FOR EMPLOYEES ENGAGING IN INDUSTRIAL ACTIVITIES

A *History*

As we have seen, the need to provide legislative protection of employees' freedom to form trade unions and use their collective strength has long been recognised in Australian law.¹⁴ The purpose of such provisions is to 'remove fear of adverse action by an employer against an employee taking union office and performing the functions of that office'¹⁵ and to 'ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee's right to join an industrial association and to take an active role in that association to promote industrial interests of both the employee and the association'.¹⁶

These provisions were first implemented in Australia in the *Conciliation and Arbitration Act 1904* (Cth) ('*Conciliation and Arbitration Act*') and have been a part of Australian labour law ever since. Each of the acts which followed the *Conciliation and Arbitration Act*, the *Industrial Relations Act 1988* (Cth) ('*Industrial Relations Act*'), the *Workplace Relations Act 1996* (Cth) ('*Workplace Relations Act*') and the *Fair Work Act* have contained equivalent provisions. They form one of the most fundamental parts of Australian labour law, protecting employees in their right to form associations with unions and in their right to take industrial action.

As will be seen, there have been fundamental changes to both labour law generally and the role of unions specifically. Australian labour law have evolved from a system of compulsory arbitration to one which is focussed on enterprise bargaining, and unions have played a crucial role in all systems.¹⁷ Moreover, the nature of their role is still one which is considered by legislators as requiring protection. The relationship between employers and employees with industrial association is still one which generates a lot of conflict.¹⁸ However, rather than the reactive, antagonistic role which unions were required to play during the system of compulsory arbitration,

¹⁴ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 6.

¹⁵ *Bowling v General Motors Holden* (1975) 8 ALR 197, 210 (Smithers and Evatt JJ).

¹⁶ *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550, 583 (Wilcox and Cooper JJ).

¹⁷ John Wilson, 'Handle With Care: Action Against Employees Who are Also Union Delegates' (2011) 220 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 8.

¹⁸ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 2; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 56-57.

unions are playing a far more interactive and proactive role in ensuring rights for workers, which extends throughout all phases of the employment process and thus the scope of industrial activities has increased.

A review of the legislative history of the protection provisions reveals that each time the labour relations legislation changed, protections have been afforded to employees for a greater range of proscribed reasons, against a greater range of adverse actions.¹⁹ It will be argued that the scope of industrial activities has extended to a point which has created a difficulty for judges in the application of the causal link between an adverse act and the industrial associations and activities of an employee.

1 *Conciliation and Arbitration Act 1904 (Cth)*

The provisions first appeared in 1904 with the *Conciliation and Arbitration Act Conciliation and Arbitration Act*, when the industrial relations arena was significantly different to what it is today. The system of compulsory conciliation and arbitration adopted by Australia was unique amongst almost all industrialised societies.²⁰ Its purpose was to prevent the strikes and lockouts which had plagued the industrial relations arena for the previous 20 years.²¹ Tribunals were established with the power to compel organisations, employees and trade unions to attend conciliation conferences in order to resolve disputes. The result of the conciliation conference would be a determination (or ‘award’) which would have the force of statute.²² In practice, rather than turn to the tribunals as a last resort, unions would refer disputes early on (and in some cases manufacture artificial disputes²³) in order to force management to the bargaining table and to obtain one of these awards, which grew into a complex network of minimum conditions which protected the rights of employees.²⁴

¹⁹ *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 807, [34].

²⁰ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 15.

²¹ Alfred Deakin, Member for Ballarat, HOR, *Commonwealth Parliamentary Debates*, 22 March 1904, 765; Justice Henry Higgins, ‘A New Province for Law and Order’ (1915) 29 *Harvard Law Review* 221.

²² Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 15.

²³ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte GP Jones*(1914) 18 CLR 224.

²⁴ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 15.

The role of unions in the labour relations system as it stood during the time of the *Conciliation and Arbitration Act* was an antagonistic one.²⁵ They were responsible for bringing interstate disputes, enforcing compliance with awards and were required to be involved in collective negotiations.²⁶ In order to fulfil these roles, they were given rights of entry, rights to review the employers' books and given protections in employment.²⁷ The exercise of these functions and powers 'was capable of generating employer resistance and antagonism'.²⁸ Unions were a fragile institution which many employers were actively opposed to.²⁹ Therefore s 9(1) of the *Conciliation and Arbitration Act* was brought in to protect employees from employers who would seek to undermine this industrial relations system.³⁰

This provision originally protected employees from dismissal by reason merely of the fact that: 'the employee is an officer or member of an organisation'; or 'is entitled to the benefit of an industrial agreement or award'.³¹ This was in place due to the fact that many employers viewed unions as trouble makers.³² Further, as the only employees who were entitled to an award or the benefit of an industrial agreement were those associated with the union,³³ employers could simply dismiss those employees to avoid paying the higher wages or providing the better working conditions, or avoid attending conciliation altogether.³⁴ In 1914, the *Conciliation*

²⁵ *Australian Meat Industry Employees' Union v Beldra Pty Ltd* [2003] FCA 910, [34]; Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306, 319.

²⁶ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 38; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) 74.

²⁷ Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306.

²⁸ *Australian Meat Industry Employees' Union v Beldra Pty Ltd* [2003] FCA 910, [34]; Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306, 319.

²⁹ See for example *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67, *Pearce v W. D. Peacock & Co* (1917) 23 CLR 199, 207 (Isaacs J), and *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333.

³⁰ David Quinn, 'To be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act' (2004) 17 *Australian Journal of Labour Law* 1, 5-6; *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199, 205 (Isaacs J).

³¹ *Conciliation and Arbitration Act 1904* (Cth) s 9(1).

³² *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67.

³³ *Australian Boot Trade Employees Federation v Whybrow and Co* (1916) 21 CLR 642.

³⁴ This changed in 1935 after the High Court decision of *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387 held that the Arbitration Court had the power to make an award which bound employers to provide certain conditions to both union employees and non-union employees.

and Arbitration Act was amended to include a third category of protection, employees who have appeared as witnesses or given evidence in a proceeding under the *Conciliation and Arbitration Act*.³⁵

In 1920, a fourth category was added, which prohibited an employer from discriminating against an employee by reason of the circumstance that the employee ‘being a member of an organisation which is seeking better industrial conditions, is dissatisfied with his conditions’.³⁶ This category was added in direct response to the High Court decision of *Pearce v W D Peacock and Co*.³⁷

In this case, Mr Batchelor was a member of the Federated Engine-drivers’ and Firemen’s Association (of which Mr Pearce was the General Secretary). Mr Batchelor was called to his manager’s office and asked if he was dissatisfied with his working conditions and was asked to sign a document attesting to his satisfaction with his work conditions. The result of Mr Batchelor signing this would have been to stop an arbitration proceeding relating to work conditions with his union and the employer in the courts, as he was the only member of the union in his workplace. Mr Batchelor replied that he was not satisfied and refused to sign the document. His employer dismissed him immediately.

At first instance, the Court of Petty Sessions held that the decision to dismiss Mr Batchelor had been based on his employer’s desire not to retain dissatisfied employees, rather than on Mr Batchelor’s membership of the union.³⁸ This was upheld on appeal by a majority of the High Court; Barton J on the basis that dissatisfaction with wages and conditions is ordinarily grounds for dismissal and it should be no different when an employee is a unionist; and Gavan Duffy and Rich JJ on the basis that they were unable to review the evidence of the decision maker and therefore bound to follow the decision of the lower court.³⁹

However, it is the passionately dissenting judgment delivered by Isaacs J that is still quoted in cases today and which has become classic statement of the purpose of the

³⁵ *Commonwealth Conciliation and Arbitration (No 2) Act 1914* (Cth).

³⁶ *Conciliation and Arbitration Act 1904* (Cth) s 9(1)(d); inserted by Act No 31 of 1920.

³⁷ (1917) 23 CLR 199.

³⁸ *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199, 199.

³⁹ See the joint judgement of Gavan Duffy and Rich JJ and the judgement of Barton J.

protection provisions.⁴⁰ Further, the judgement of Isaacs J, and the other dissenting judgement of Higgins J illustrates the difficulties which arise out of the dual capacities of an employee who is associated with a union.

Isaacs J considered that enabling workers to join with a union in order to resolve dissatisfaction with working conditions was the very object of the protective provisions. His Honour pointed to the fact that the section was designed 'to preserve organisations so that the method selected by Parliament for settling disputes shall not be thwarted'.⁴¹ It was not considered a valid excuse to claim that the decision was made because of the employee's dissatisfaction with working conditions rather than because he was the member of a union. His Honour stated:

Such an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached. And if in such a case the accused swore that the horse was not intended to be taken, but only the halter, and it was no concern of his if the horse necessarily followed, and if the Magistrate accepted his explanation and excused him, I should nevertheless feel myself bound, sitting in this court of Appeal, to exercise my own reason, and notwithstanding the weight justly attaching in proper cases to the influence of demeanour of a witness, to say the Magistrate was palpably wrong.⁴²

Higgins J, likewise, considered that complaining about work conditions and using Federal arbitration to resolve those issues was an intrinsic part of being a member of an industrial association and therefore must have been a reason for the decision to dismiss Mr Batchelor.

As stated above, in 1920 the Act was amended to include dissatisfaction with work conditions in the definition of what it means to have an industrial association. This amendment negated the majority decision and endorsed the views of the minority, expanding the provisions in order to better protect freedom of association. Employees were now not only protected for belonging to a union, being entitled to the benefit of an award, and assisting the union in court proceedings, they were

⁴⁰ See for example *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14; *Elliot v Kodak Australasia Pty Ltd* [2001] FCA 807; *Greater Dandenong City Council v Australian Municipal Clerical and Services Union* [2001] FCA 349.

⁴¹ *Pearce v WD Peacock and Co* (1917) 23 CLR 199, 205.

⁴² *Ibid* 206-207.

protected for being dissatisfied, and therefore protected for bringing claims to the attention of their union for the purposes of relieving this dissatisfaction.

In 1947, the *Conciliation and Arbitration Act* was amended again to expand the scope of protections to officers of unions as well as delegates and introduced an additional category of protection,⁴³ being protection from dismissal by reason of the circumstance that the employee has absented himself from work without leave if:

- (i) his absence was for the purpose of carrying out his duties or exercising his rights as an officer or delegate of an organisation; and
- (ii) he applied for leave before he absented himself and leave was unreasonably refused or withheld.⁴⁴

In 1973, the protective provisions of the *Conciliation and Arbitration Act* were further expanded by the addition of a fifth category of protection.⁴⁵ Employers were thus prevented from dismissing an employee by reason of the circumstance that the employee

Being an officer, delegate or member of an organisation has done or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organisation or its members, being an act or thing done within the limits of authority expressly conferred on him by the organisation in accordance with the rules of the organisation.⁴⁶

2 *Industrial Relations Act 1988 (Cth)*

In 1988, following a review of the federal arbitration system, the *Conciliation and Arbitration Act* was replaced by the *Industrial Relations Act*.⁴⁷ Yet despite the change of legislation, the system of industrial relations did not change substantially.⁴⁸ The protection provisions in the *Conciliation and Arbitration Act* were largely reproduced in the s 334 of *Industrial Relations Act*.

However, in 1993, radical reforms were implemented in the *Industrial Relations Reform Act 1993 (Cth)* (*'Industrial Relations Reform Act'*) which recalibrated

⁴³ Act No 10 of 1947. These amendments also renumbered the provisions so s 9 became s 5.

⁴⁴ *Conciliation and Arbitration Act 1904 (Cth)* s 5(e).

⁴⁵ Act No 138 of 1973.

⁴⁶ *Conciliation and Arbitration Act 1904 (Cth)* s 5(f).

⁴⁷ Keith Hancock, 1985, Committee of Review into Australian Industrial Relations Law and Systems, *Report*, Vol 2 (AGOS, Canberra)

⁴⁸ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 36.

workplace relations and fundamentally altered the objects and operation of the legislation. These amendments saw a fundamental shift in the endorsed role of unions and the legislative protection afforded them. Whereas, under the *Conciliation and Arbitration Act* and *Industrial Relations Act*, the focus of industrial legislation had been on providing and overseeing compulsory arbitration scheme, under the reformed *Industrial Relations Act* it shifted to a system based on enterprise bargaining.⁴⁹ This new system encouraged management and labour to negotiate formal agreements where wages and working conditions were agreed from the outset.⁵⁰ The awards which had been set by the previous system remained vitally important, as they formed the minimum conditions which could be agreed in the enterprise agreements.⁵¹ The objective of this legislation was to lift the competitiveness and productivity of Australian workplaces.⁵²

It also fundamentally changed the functions of unions. Instead of battling employers in the conciliation and arbitration tribunals, they were negotiating with employers on behalf of employees for better wages and conditions from the beginning. This was a more proactive role, involving greater interaction between unions and employers.⁵³ Whereas previously the role of the unions was limited to dispute resolution and enforcement of awards, it expanded to agreement negotiation and renegotiation.⁵⁴

3 *Workplace Relations Act 1996 (Cth) and the Work Choices Amendments*

In 1996, the *Industrial Relations Act* was replaced with the *Workplace Relations Act 1996 (Cth)*. Due to a lack of control in the Senate, the intended changes were not as strong as they were originally intended to be,⁵⁵ and they did not do much more than incrementally extend the principles in the 1993 amendment.⁵⁶ It was not until November 2005 and the enactment of the *Workplace Relations Amendment (Work*

⁴⁹ Richard Naughton 'Ailing into uncharted seas: The role of unions under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1, 5.

⁵⁰ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 15.

⁵¹ *Ibid* 39.

⁵² Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1, 2; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 39.

⁵³ Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1, 5.

⁵⁴ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 39.

⁵⁵ *Ibid* 42.

⁵⁶ *Ibid* 42.

Choices) Act 2005 (Cth) ('*Work Choices* amendments') that substantial changes took effect.

These *Work Choices* amendments caused great concern to employee groups due to a reduction in rights and protections for employees and their union representatives.⁵⁷ These reforms were based on the notion that unions were an unnecessary third party interference.⁵⁸ Unions were actively restricted in their representation of employees through new limitations in freedom of entry, restrictions on strike pay, increase in the range of injunctions available, prohibition against secondary boycotts and in particular the introduction of individual Australian Workplace Agreements.⁵⁹

Most importantly in the context of unionism, was the introduction of Australian Workplace Agreements ('AWAs'). AWAs were individual agreements which could be negotiated between the employee and the employer to the exclusion of the applicable award.⁶⁰ This meant that the awards which had been worked for over the previous 90 years were rendered nugatory. The legislation also subverted the influence of trade unions by extending the scope for non-union collective agreements.⁶¹

The introduction of the concepts of enterprise bargaining and individual employment contracts represented a further shift away from the system of centralised compulsory arbitration. AWA's did not have the uptake which it was proposed they would have-meaning that unions still played a major role in making agreements.⁶² However,

⁵⁷ Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1, 2; Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306, 307; Andrew Stewart, 'A Question of Balance: Labor's New Vision for Workplace Regulation' (2009) 22 *Australian Journal of Labour Law* 3.

⁵⁸ Commonwealth, *Parliamentary Debates* House of Representatives, 23 May 1996 (Peter Reith).

⁵⁹ Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1; Richard Naughton 'Ailing into uncharted seas: The role of unions under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1.

⁶⁰ *Workplace Relations Act 1996* (Cth) Part 8; Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 42. This was originally subject to a non-disadvantage test, which was removed in the 2005 reforms.

⁶¹ Greg McCarry, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *Australian Journal of Labour Law* 1, 9.

⁶² Ron McCallum 'Australian Workplace Agreements- an analysis' (1997) 10 *Australian Journal of Labour Law* 50, 61; Richard Mitchell and Joel Fetter 'Human Resource Management and Individualisation in Australian labour Law' (2003) 45(3) *The Journal of Industrial Relations* 294.

this, operating together with the other restrictions on unions has had a significant impact on the role which unions have performed since 1904.⁶³

As might be expected, the philosophical shift that was effected in the *Workplace Relations Act* was echoed in changes to the protection provisions. The protection afforded to unions and of employees freedom to associate in unions was diluted. Actions which had formerly constituted criminal offences were sanctioned only by civil penalty provisions.⁶⁴ Furthermore, protections against victimisation on the grounds of *non-membership* of a union were added to the protection provisions.⁶⁵ Although this addition was not for the benefit of unions, it had the effect of further expanding the scope of the industrial association protection.

These changes were controversial and they were met with much resistance from unions, employee groups and the Federal Opposition (at that time, the Labor Party).⁶⁶ The public perception of the legislation was that it was ‘tilted’ in favour of the interests of the business community,⁶⁷ with restrictions on the capacity of trade unions to take action on behalf of employees and with the immunity of companies with less than 100 employees from unfair dismissal laws.⁶⁸ This (real or perceived) loss of protections for employees is what is credited as being the reason for the defeat of the Howard Government two years later.⁶⁹

4 *Fair Work Act 2009 (Cth)*

The political response to the public concerns over these amendments came in the form of the *Fair Work Act*, which restored many of the old protections and extended

⁶³ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* [2003] FCA 910; Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 22 *Australian Journal of Labour Law* 306.

⁶⁴ *Workplace Relations Act 1996* (Cth) s 298K.

⁶⁵ *Workplace Relations Act 1996* (Cth) Part XA; Richard Naughton ‘Sailing into uncharted seas: The role of unions under the Workplace Relations Act 1996 (Cth)’ (1997) 10 *Australian Journal of Labour Law* 1, 18-19.

⁶⁶ Kevin Rudd and Julia Gillard, *Forward with Fairness: Policy Implementation Plan*, Australian Labor Party, Canberra 2007; Commonwealth, *Parliamentary Debates* House of Representatives, 25 November 2008 (Julia Gillard); Andrew Stewart ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 3.

⁶⁷ Andrew Stewart ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 4.

⁶⁸ *Workplace Relations Act 1996* (Cth) s 638; Andrew Stewart ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 4.

⁶⁹ Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 3 and 5.

many rights.⁷⁰ The political campaign in the lead up to the legislation emphasised the need to ‘restore balance’ and swiftly ‘fix the state of Australian labour law.’⁷¹

The *Fair Work Act* is the current industrial relations legislation. There is no longer any provision for the conciliation or arbitration of disputes, except in the context of certain bargaining disputes.⁷² The old award system, however, is important in setting the minimum standards by which an employee may be employed.⁷³

Unions were extended rights and privileges significantly greater than those which existed under the *Workplace Relations Act*, and even the previous acts. The abolition of individual agreements, the enactment of good faith bargaining principles in collective bargaining negotiations, and the inclusion of the requirement that bargaining representatives must not undermine the rights of freedom of association all strengthened the unions’ position during negotiation periods.⁷⁴ Also extended was the union right of entry, including the right to inspect books and call meetings of employees.⁷⁵ Although these changes do not directly affect the protections against adverse action because of an industrial activity, they extend the influence which unions have within organisations, therefore increasing the scope of situations in which an employee with union associations may be said to be taking part in an industrial activity.

B *The Current Provisions*

The current protections for employees on the basis of their industrial association are found within the General Protection provisions of the *Fair Work Act*.⁷⁶ Section 346 provisions that it is unlawful for a person to take ‘adverse action’ against another person on the grounds of their ‘industrial activities’.⁷⁷

⁷⁰ Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3.

⁷¹ Kevin Rudd and Julia Gillard, *Forward with Fairness: Policy Implementation Plan*, Australian Labor Party, Canberra 2007.

⁷² Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 15.

⁷³ *Ibid* 16.

⁷⁴ Shae McCrystal, ‘The Fair Work Act 2009 (Cth) and the Right to Strike’ (2009) 23 *Australian Journal of Labour Law* 3, 4.

⁷⁵ Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 42.

⁷⁶ *Fair Work Act (2009)* (Cth) Part 3-1, Division 4. Note that within the General Protection provisions, there are two other proscribed reasons, for which adverse action cannot be taken: workplace rights, Division 3 and discrimination, Division 5.

⁷⁷ *Fair Work Act (2009)* (Cth) s 346.

These provisions were intended to correct the imbalance of power, by promoting ‘fairness and representation at the workplace through streamlined and simple general protections dealing with workplace and industrial rights, including the rights to freedom of association and protection against discrimination, unlawful termination and sham arrangements’.⁷⁸ The *Fair Work Act* altered the format and ordering of the provisions, taking what was a ‘bewildering array’⁷⁹ of protective provisions and reconceptualising them as a prohibition against adverse action on the basis of industrial associations and activities.

1 *Proscribed Reasons: Industrial Activities*

Section 346 of the *Fair Work Act* provides:

A person must not take adverse action against another person because the other person:

- (a) is or is not, or was or was not, an officer or member of an industrial association; or
- (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
- (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Section 347 of the *Fair Work Act* provides:

A person ***engages in industrial activity*** if the person:

- (a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or
- (b) does, or does not:
 - (i) become involved in establishing an industrial association; or
 - (ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
 - (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
 - (iv) comply with a lawful request made by, or requirement of, an industrial association; or
 - (v) represent or advance the views, claims or interests of an industrial association; or

⁷⁸ Explanatory Memorandum, Fair Work Bill 2008, page *ii*.

⁷⁹ Breen Creighton and Andrew Stewart, *Labour Law*, (Federation Press, 5th ed, 2010) 557.

- (vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or
- (vii) seek to be represented by an industrial association; or
- (c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or
- (d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or
- (e) complies with an unlawful request made by, or requirement of, an industrial association; or
- (f) takes part in industrial action; or
- (g) makes a payment:
 - (i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or
 - (ii) to which an employee is not entitled because of that Division.

The concept of ‘lawful industrial activity’ has been extended to include ‘representing or advancing the views, claims or interest of an industrial association’.⁸⁰ It is important to note that the employee does not need to be a member of this association. This extension has been criticised as being at odds with the duties that an employee owes to their employer.⁸¹ An employee has the potential to create much embarrassment to their employer in the course of representing the claims of their industrial association.⁸² This is one of the categories of protection which is causing difficulties for judges in determining whether a decision was made for a particular reason. The court must determine whether the employee was disciplined because they caused embarrassment to the employer, or because they were representing the views of the industrial organisation. The two loyalties (as will be explored further below) are intertwined.

The provisions now also include registered and unregistered bodies, and formally and informally formed associations of employees.⁸³ This is a further expansion and would alter the outcome of *Hyde v Chrysler (Australia) Ltd*⁸⁴ if it were heard today. The key issue in that case was that an employee was made redundant because he had

⁸⁰ See comparable provision of the *Workplace Relations Act 1996* (Cth) s 420.

⁸¹ Master Builders Association, *Submission to the Fair Work Act Review Panel*, Report, 2012.

⁸² See for example *Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd* [2000] FCA 441 and *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284.

⁸³ *Fair Work Act 2009* (Cth) s 12.

⁸⁴ (1977) 23 ALR 97.

been advancing the views of an informal group of employees who were considered to be trouble makers.

Northrop J held a company is entitled to dismiss employees who come within the category of troublemakers. His Honour referred to the High Court decision of *General Motors Holdens Pty Ltd v Bowling*⁸⁵ and stated that the protective provisions are ‘not designed to afford a protection to the employee for his activities which fall outside his authority as an officer of the organisation’.⁸⁶ As the employee was not authorised as an officer of an organisation, he was not entitled to the protections of the Act.

With the new change, Mr Hyde would be protected from dismissal, as he had been acting on behalf of an informal industrial organisation. The ‘trouble’ which Mr Hyde was creating was on behalf of an unregistered union. In this way, to discipline him for acting as a trouble maker would be to discipline him in his ‘industrial activities’, which by the current legislation is a breach of the Act.

These amendments and expansions clarify the scope which the provisions protecting industrial associations are intended to cover.⁸⁷ Today, the prohibition against adverse action because of an employee’s union association refers not only to the limited fact of union membership, but to the broader concepts of what activities and values are incorporated in union membership.⁸⁸ For example, protection on the basis of union membership has been held to include the right to have terms and conditions of employment regulated on a collective basis.⁸⁹ Even before it was expressly legislated against, it had been accepted that the freedom of association rights extend to more than merely the right to join or not join a union, but that the purpose of the provisions need to be considered.⁹⁰

⁸⁵ (1976) 12 ALR 605.

⁸⁶ *Hyde v Chrysler (Australia) Ltd* (1977) 23 ALR 97, 107 (Northrop J).

⁸⁷ *National Union of Workers v Quenos Pty Ltd* [2001] FCA 179, [125] (Weinberg J); *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* [2003] FCA 910, [139] (North J); Joellen Riley, ‘Adverse Action Claims Under the Fair Work Act 2009 (Cth): Some Lessons from the Early Cases’ (2011) 25(3) *Commercial Law Quarterly* 12.

⁸⁸ See *Australian Workers’ Union v BHP Iron Ore Pty Ltd* [2000] FCA 39, [35]-[36] (Gray J); *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, 500 (Wilcox and Cooper JJ).

⁸⁹ *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, 500; cf *Australian Workers’ Union v BHP Iron-Ore Pty Ltd* [2001] FCA 3.

⁹⁰ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* [2003] FCA 910, [204]: unions need to be able to secure a sufficient amount of memberships and must be legally protected while conducting certain activities. *Pearce v W. D. Peacock & Co* (1917) 23 CLR 199, 205.

2 *Proscribed Reasons: Workplace Rights*

Another category of protection within the General Protection provisions, which does not directly relate to industrial organisations but has the potential to provide greater protection for unions in their functional capacity, is that of ‘workplace rights’. This concept of workplace rights is unique to the *Fair Work Act*⁹¹ and is certainly an extension of the protections provided for in previous acts.⁹²

These provisions provide an additional avenue of protection. For example, s 341(1)(a) provides employees with protections if they are entitled to the benefit of, or have a role or responsibility under, a ‘workplace law, workplace instrument or order made by an industrial body’, which can protect the rights of employees obtained through union negotiations. This can also protect employees who have responsibilities as a union representative.

Further, s 341(c)(i) provides protections for employees who are able to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek compliance with that law or workplace instrument, and s 341(ii) protects any employee able to make a complaint or inquiry in relation to their employment. As ‘workplace law’ is defined to include the *Fair Work Act* itself,⁹³ this also increases protections for union officials who seek to make complaints about rights and wages. It is important to note that s 341(ii) does not specify who the complaint should be made to, so includes complaints made to unions, and even other employees.⁹⁴

A detailed analysis of the ‘workplace rights’ section of the General Protection provisions is beyond the scope of this paper. However it is important to note that the protections extended to employees with industrial associations is not necessarily limited to that specific section of the General Protection provisions. There is the potential for further protections to be extended if these workplace rights provisions are utilised.

⁹¹ See comparative provisions in *Workplace Relations Act 1996* (Cth), ss 793 and 659(2)(e). Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 558.

⁹² Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 558, 561.

⁹³ *Fair Work Act 2009* (Cth) s 12.

⁹⁴ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 560.

C *Conclusion*

As demonstrated above, the role which unions have played in the industrial relations arena has become more varied as this area has progressed. During the time of the compulsory arbitration system, unions played a role which was reactive and antagonistic, reporting and in some instances creating disputes in order to secure better wages and conditions for their members. As such, their members were protected from dismissal by reason of their membership, or by reason of their entitlement to their award. This situation has evolved over the last century, and now unions play a more varied role. Unions are endowed with many rights and privileges, which allow them to work with with organisations for the benefit of all workers. As such, the definition of what constitutes an industrial activity for the purpose of the protection provisions is also very broad.

It is not my contention that this scope should be reduced. The broader the scope of this provision, the better protected employees will be if and when they chose to participate in industrial activities. It is my contention that the scope of this provision, together with the scope of the definition of adverse action, as will be discussed further below, is contributing to the difficulties in the application of the causal link between an employee's industrial activities and the adverse action which is allegedly taken against them.

III Adverse Action

An employer may not take ‘adverse action’ against an employee because of that employee’s industrial activities.⁹⁵ The definition of ‘adverse action’ is found in s 342.⁹⁶ Adverse action by an employer against a current employee is defined as dismissal, prejudice in employment, injury to employment and/or discrimination, and includes threatening to take such action.⁹⁷ This means that an employer may not do such things as stand an employee down on full pay,⁹⁸ raise their voice at the employee,⁹⁹ or deny an employee a wage increase,¹⁰⁰ for a reason that is prohibited in the Act.

A History

As we have seen,¹⁰¹ the reasons for which an employer may not take action (within the category of industrial activities) have steadily expanded over the years. In addition, the range of actions which employers are prohibited from taking has also expanded since its inception.

The Commonwealth Parliament originally only legislated to protect employees being *dismissed* on the basis of their union affiliation.¹⁰² Subsequently, the *Conciliation and Arbitration Act* was amended in 1914 to include the additional prohibitions against:

- b) Being caused injury in their employment; and
- c) Having their employment altered to their prejudice.¹⁰³

These provisions were added to the Act to overcome a situation in which an employer did something short of dismissing an employee, but which could still be said to be harmful to the employee.¹⁰⁴ There are many situations, as will be seen below, where an employer could exercise undue pressure on an employee without

⁹⁵ *Fair Work Act (2009)* (Cth) s 346.

⁹⁶ The definition of adverse action will differ depending on who is allegedly taking the adverse action and who the adverse action is being taken against.

⁹⁷ *Fair Work Act (2009)* (Cth) s 342.

⁹⁸ *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155.

⁹⁹ *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* (2011) 201 IR 441.

¹⁰⁰ *Health Services Union of Australia v Tasmania* (1996) 73 IR 140.

¹⁰¹ Pages 5-19.

¹⁰² *Conciliation and Arbitration Act 1904* (Cth) s 9(1).

¹⁰³ *Ibid* s 9(1)(b)-(c).

¹⁰⁴ *Blair v Australian Motor Industries Ltd* (1982) 61 FLR 283, 290-2 (Evatt J).

going to the extent of dismissal. In 1988, the *Industrial Relations Act* provided for two additional prohibited acts: refusing to employ a person because of their union affiliation and discriminating against an employee because of their union affiliation.¹⁰⁵

B *The Current Provisions*

These prohibited acts were consolidated by the *Fair Work Act* in the one prohibition against ‘adverse action’.¹⁰⁶ The phrase ‘adverse’ action’ is new to legislation, but has been used in case law to describe the various actions of employers which can contravene the Act since the time of the *Conciliation and Arbitration Act*.¹⁰⁷ Under the *Fair Work Act*, the prohibition extends to organising or even threatening to take adverse action.¹⁰⁸ The definition of adverse action is set out in a table in s 342(1) of the *Fair Work Act*, according to which adverse action by an employer against an employee occurs if 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.¹⁰⁹

It was acknowledged in the Explanatory Memorandum that the consolidation of the provisions will protect persons against ‘a broader range of adverse action’.¹¹⁰ The Explanatory Memorandum uses the example that under s 659(2)(e) of the *Workplace Relations Act* an employee was only protected from being *dismissed* because they had participated in proceedings against their employer, but under these provisions they are protected from the full range of adverse action, including threatening to take adverse action.¹¹¹

¹⁰⁵ *Industrial Relations (Consequential Provisions) Act 1988* (Cth).

¹⁰⁶ Andrew Stewart, ‘A Question of Balance: Labor’s New Vision for Workplace Regulation’ (2009) 22 *Australian Journal of Labour Law* 3, 39.

¹⁰⁷ See for example *Jones v Thiess Bros Pty Ltd* [1977] FCA 4; (1977) 30 FLR 422; *Teterycz and Public Service Association of New South Wales* [1997] NSWIRComm 159; *Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd* [2000] FCA 441.

¹⁰⁸ *Fair Work Act 2009* (Cth) s 342 (2).

¹⁰⁹ *Fair Work Act 2009* (Cth) s 342(1). Note that there are further definitions relating to different employment relationships, including independent contractors, unions and future employees.

¹¹⁰ Explanatory Memorandum, Fair Work Bill 2008, 221 [1386].

¹¹¹ *Ibid.*

The scope of adverse action was also expanded by the additional category of ‘discrimination’.¹¹² This in itself extends the potential scope of adverse action, although the extent to which it does this is unclear, because discrimination is not defined in the *Fair Work Act* and it is yet to be judicially tested.

C *Judicial Application*

The oldest prohibited action and the paradigm example of an ‘adverse action’ is that of dismissal.¹¹³ This not only includes actual dismissal, but constructive dismissal, which incorporates situations where an employee resigns but was forced to do so because of the conduct of their employer.¹¹⁴

However, it is clear that ‘adverse action’ includes actions that fall short of dismissal. Subsection (b) of the definition of adverse action refers to injury to employment, which involves the infliction of compensable harm.¹¹⁵ It does not refer only to financial injury, or deprivation of rights, but to ‘any circumstances where an employee in the course of his employment is treated substantially differently from the manner in which he or she is ordinarily treated and where that treatment can be seen as injurious or prejudicial’.¹¹⁶

In *Squires v Flight Stewards Association of Australia*,¹¹⁷ the injury to employment complained of was standing the employee down on full pay. In *Health Services Union of Australia v Tasmania*,¹¹⁸ the injury occurred when the employee was singled out by being denied a wage increase. Both of these actions amounted to an ‘injury to employment’.

Prejudicial alteration of an employee’s employment position is prohibited by subsection (c) of s 342(1). It has been defined as a ‘broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the

¹¹² *Fair Work Act 2009* (Cth) s 342(1)(d); cf *Workplace Relations Act 1996* (Cth) ss 792(1)(e) and (5)(e), which provide that discrimination is only relevant in so far as it applies to ‘the terms or conditions on which the employer offers to employ’ a person as an employee.

¹¹³ The first protective provision only included dismissal as a prohibited action; *Conciliation and Arbitration Act 1904* (Cth) s 9(1).

¹¹⁴ *Fair Work Act 2009* (Cth) s 386; *Ramos v Good Samaritan Industries* [2011] FMCA 341.

¹¹⁵ Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5th ed, 2010) 563.

¹¹⁶ *Squires v Flight Stewards Association of Australia* (1982) 2 IR 155, 164.

¹¹⁷ (1982) 2 IR 155, 164.

¹¹⁸ (1996) 73 IR 140.

advantages enjoyed by the employee before the conduct in question'.¹¹⁹ For example, a conversation which involved raised voices and a lack of patience has been held not to amount to an injury to employment, but would have amounted to a prejudicial alteration of the complainant's position.¹²⁰ This is in recognition of the fact that fear of alteration of any of the terms or of the entitlements of the employment contract 'would be as potent a factor inhibiting an employee from operating the Act as fear of dismissal, or loss of pay or something in the nature of an immediate injury'.¹²¹

The concepts of injury to employment and prejudicial alteration are 'concepts of wide operation'.¹²² The deterioration does not have to be direct. It is sufficient that the risk of prejudicial alteration is 'real and substantial, rather than merely possible or hypothetical', for it to be adverse action.¹²³

Under the *Fair Work Act*, it is not necessary to prove that the employer intended that the action would have an adverse affect on the employee.¹²⁴ There is 'nothing in the language or context of those provisions to suggest that the adverse action must be 'an intentional act''.¹²⁵ There is no need to prove a mental element in order to establish 'adverse action'. The employer's intention is relevant only with respect to whether that action was 'because of' one of the proscribed purposes.¹²⁶ Therefore, for instance, revoking benefits for all staff can be seen as adverse action against one particular staff member.¹²⁷

¹¹⁹ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30; (1998) 195 CLR 1 at 18[4] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ).

¹²⁰ *Australian Licensed Aircraft Engineers Association v Qantas Airways Ltd* (2011) 201 IR 441, however Raphael FM was bound by the pleadings only to consider 'injury to employment', so his Honour could not provide relief on this point.

¹²¹ *Childs v Metropolitan Transport Trust* (1981) 29 AILR 24, cited in *Commonwealth Bank of Australia and Anor v Finance Sector Union of Australia* (2007) 157 FCR 329, [71].

¹²² *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 77 FCR 456 at 462; 153 ALR 602.

¹²³ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* [1998] HCA 30, [18].

¹²⁴ There had formerly been a requirement to establish intent under *Workplace Relations Act* section 298(K),¹²⁴ because it used language which suggested the conduct had to be *directed* at a person-expressed in active verbs.

¹²⁵ *Australian Licensed Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333, [306].

¹²⁶ Confirmed in *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333, [304].

¹²⁷ *Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd & Anor* [2011] FMCA 58.

D Conclusion

Adverse action has been construed very broadly by the courts. Indeed it is clear that suspension, even on full pay, may still constitute adverse action.¹²⁸ The courts have accepted that the benefits of work extend beyond financial gain and include non economic benefits related to self esteem and personal fulfilment.¹²⁹ Work gives life ‘direction and purpose ... with the loss of work comes a loss of dignity’.¹³⁰ Suspension with full pay has been found to be ‘adverse action’ as it deprives the employee of the opportunity to work and is demeaning.¹³¹

The courts have also held that adverse action includes the commencement of investigations into alleged misconduct.¹³² The commencement of investigations is adverse because it exposes the employee to the imposition of a penalty if the charges are ultimately proven,¹³³ and the investigations may have an effect on the employee’s reputation and standing among their peers.¹³⁴

Accepting the importance of all aspects of an employee’s position, the breadth of adverse action is understandable. An employer has far greater influence over an employee than simply their ability to fire them. A demotion or a detrimental change in work hours may have just as strong an effect. It is suggested that even with the breadth of adverse action today, employers are finding devious ways of getting around union representation,¹³⁵ such as getting rid of an entire workforce in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*¹³⁶ or insisting on individual agreements in *Australian Workers’ Union v BHP Iron Ore Pty Ltd*.¹³⁷ It is my argument, as will be discussed below, that it is the extension of this concept,

¹²⁸ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284.

¹²⁹ *Ramos v Good Samaritan Industries (No 2)* [2011] FMCA 341.

¹³⁰ Prime Minister Julia Gillard MP, Speech for the Robert Garran Memorial Oration Institute of Public Administration, 26th August 2011.

¹³¹ *Byrne v Australian Ophthalmic Supplies Pty Ltd* [2008] FCA 66; Terri Butler, ‘Protection from dismissal and ‘adverse action’ for discriminatory reasons’ (2009) 94 *Precedent* 10, 12.

¹³² *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399; cf *Ramos v Good Samaritan Industries* [2011] FMCA 341, which held investigations were not adverse action.

¹³³ *Community and Public Sector Union* [2001] 107 FCR 93, 100.

¹³⁴ *Police Federation of Australia v Nixon* (2008) 168 FCR 340.

¹³⁵ David Quinn, ‘To Be or Not to Be a Member – Is That the Only Question? Freedom of Association under the Workplace Relations Act’ (2002) 17 *Australian Journal of Labour Law* 1.

¹³⁶ [1998] HCA 30.

¹³⁷ (2000) 102 FCR 97; 97 IR 266.

together with the extension of the concept of industrial activity that is creating difficulties in applying the test for causation.

IV Causal Link –The Motivation of the Decision Maker

Once it has been established that an employee falls into the protected category of industrial association and activities, and that they have been subject to adverse action, it then falls to the court to determine whether that action was taken *because of* the prohibited reason. This is sometimes called the causal nexus or causation, but it is not causation in the strictly legal sense.¹³⁸ The question for the court to determine is what was in the decision maker's mind when they made the decision to take adverse action against an employee.¹³⁹ This is simply a finding of fact.¹⁴⁰

However, given that there are such a broad array of activities which can constitute industrial activity and that there is such a low threshold for what constitutes an adverse act, the motivations of an employer are particularly difficult to ascertain. For example, if an employer is unaware that the employee is currently acting in an industrial capacity and they take adverse action in relation to that employee, have they taken that decision for a prohibited reason? Further, if an employee is an active and disruptive union representative who breaches their employment contract in an activity unrelated to their union capacity and adverse action is taken, has this action been taken because of their breach, or because the employer was looking for reasons to be free of that particular worker?

There are two legislative provisions related to ascertaining the motivations of the decision maker. These are the imposition of a reverse onus of proof in s 361, whereby employers must prove that they did not take action for a proscribed reason, and s 360, which states that the prohibited reason need only be one of the proscribed reasons for a contravention of the Act to be established.

A *Reverse Onus*

Perhaps the most important feature of this part of the prohibition is that the employee is relieved of the onus of proving that the adverse action was taken for one of the proscribed purposes. Instead it is for the employer to prove that his actions were not

¹³⁸ *Khiani v Australian Bureau of Statistics* [2011] FCAFC 109; *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333, [332].

¹³⁹ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [27].

¹⁴⁰ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284; *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

so motivated. The onus is on the applicant to establish the objective facts relevant to the contravention of the Act;¹⁴¹ i.e. that they fall within an industrial association protection and that adverse action has been taken against them. However once this has been established, the onus shifts to the employer to prove on the balance of probabilities that they did not make the decision for a prohibited reason.¹⁴²

The reverse onus of proof has existed since 1914,¹⁴³ and is one of the most consistent features of this area of law.¹⁴⁴ The imposition of the reverse onus by the legislation constitutes a recognition that ‘the circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly with the knowledge of the employer’.¹⁴⁵ Without this clause, ‘it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason’.¹⁴⁶

The current legislative provision which sets this out is s 361(1), which provides that if it is alleged that a person took, or is taking, action for a particular reason or with a particular intent and taking that action for that reason or with that intent would constitute a contravention of that part of the Act, then it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.¹⁴⁷

While there is technically no requirement that the employer give evidence of what their actual motivations were, but this evidence is usually crucial to displacing the onus of proof.¹⁴⁸ Similarly, there is no requirement that the employee provides evidence as to the reasons for the employer’s decision, due to the presumption, but it is often the case that this sort of evidence is introduced to increase the strength of the

¹⁴¹ *Rojas v Esselte Australia Pty Limited (No 2)* [2008] FCA 1585; (2008) 177 IR 306, [49]-[50] (Moore J); *Jones v Queensland Tertiary Admissions Centre Ltd (No 2)* [2010] FCA 399 (Collier J); *Australian Licenced Aircraft Engineers Association v Qantas Airways Ltd & Anor* [2011] FMCA 58.

¹⁴² Explanatory Memorandum, Fair Work Bill 2008, [1461].

¹⁴³ *Conciliation and Arbitration Act 1904* (Cth) s 5(4).

¹⁴⁴ Ian Colgrave, ‘Employee Protections in the Fair Work Act: Adverse Action Against Employees Exercising Workplace Rights’ (2010) 32(9) *Bulletin (Law Society of South Australia)* 12; John Colvin, Graeme Watson and Nicholas Ogilvie, *An introduction to Industrial Relations Reforms* (Lexis Nexis, 2006) at 114; Simon Rice and Cameron Roles, ‘It’s Discrimination Julia, But Not As We Know It’: Part 3-1 of the *Fair Work Act*’ (2010) 21(1) *The Economic and Labour Relations Review* 13, 20.

¹⁴⁵ *Heidt v Chrysler Australia Ltd* (1976) 13 ALR 365; 26 FLR 257 at ALR 373; FLR 267; see also *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197.

¹⁴⁶ Explanatory Memorandum, Fair Work Bill 2008, [1461].

¹⁴⁷ *Fair Work Act 2009* (Cth) s 361.

¹⁴⁸ *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 251,[34]; *Seymour v Saint-Gobain Abrasives Pty Ltd* [2006] FCA 1452, [14].

case.¹⁴⁹ This assists the court to ascertain the objective circumstances surrounding the decision to take adverse action. As will be seen below, these objective circumstances will be relevant to assessing the veracity of the evidence of the decision maker.

The reverse onus is the source of many complaints from employer groups who feel that it is unfair, and makes it too easy for employees and their unions to bring claims against the employer, with the employer left to prove otherwise.¹⁵⁰ Many employer representatives have called for the reverse onus to be removed entirely.¹⁵¹ Given the breadth of the category of protection and definition of adverse action, it is understandable that employers feel that it is easy to bring a claim. However, it is well documented that there is great difficulty in establishing what is in the mind of another person.¹⁵² The injustice in removing this provision would outweigh any associated relief for the employer. The idea of removing the reverse onus was considered by the recent review, *Towards More Productive and Equitable Workplaces: an Evaluation of the Fair Work Legislation*, which concluded that the reverse onus is not producing unanticipated results and recommended that it be left the way it is.¹⁵³

For many, the reverse onus is not by itself the issue, it is the reverse onus coupled with the extensions of the protected categories of employees and the actions which are protected against, together with the potentially unlimited range of compensation which could be ordered and requirement that the prohibited reason need only be one

¹⁴⁹ See for example *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257; *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197; and *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* [2011] FCA 333.

¹⁵⁰ Master Builders Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 52; Joellen Riley, 'Adverse Action Claims Under the Fair Work Act 2009 (Cth): Some Lessons From the Early Cases' (2011) September-November *Commercial Law Quarterly* 12.

¹⁵¹ Australian Chamber of Commerce and Industry, *Submission to the Fair Work Act Review Panel*, Report, 2012, 19; Accommodation Association of Australia, *Submission to the Fair Work Act Review Panel*, Report, 2012, 4; Australian Industry Group, *Submission to the Fair Work Act Review Panel*, Report, 2012, 21; Australian Mines and Minerals Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 16; Chamber of Commerce and Industry Western Australia, *Submission to the Fair Work Act Review Panel*, Report, 2012, 19; Institute of Public Affairs, *Submission to the Fair Work Act Review Panel*, Report, 2012, 8; Master Grocers Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 15.

¹⁵² Simon Rice and Cameron Roles, 'It's a Discrimination Law Julia, But Not As We Know It': Part 3-1 of the *Fair Work Act*' (2010) 21(1) *The Economic and Labour Relations Review* 13, 19.

¹⁵³ Australian Government, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, 2012, Report, 238.

of the prohibited reasons (discussed further below).¹⁵⁴ The reverse onus has always, and necessarily, been a provision which favours employees, because of the inherent difficulty in determining what is in the mind of another person. However, coupled with these other factors, it is one of the key provisions which amplifies the difficulties faced by employers in the application of this provision.

B *Multiple Reasons*

Section 360 of the *Fair Work 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.

Therefore, when determining whether or not the decision maker has acted *because of* a proscribed reason, it is not necessary that the prohibited reason for the decision was the only reason. There may have been many reasons for the employer's decision to take action which adversely affects the employee. It will be sufficient under the *Fair Work Act* that the proscribed reason is *one* of those multiple reasons. This is another of the provisions associated with the industrial associations protections which is blamed for the apparent imbalance in favour of employees.¹⁵⁵

It has always been the case that the reason need only be one of the reasons, even though it was not always explicitly stated in the legislation. The *Conciliation and Arbitration Act* did not expressly state whether the reason had to be the only reason or not. However, Isaacs J in his influential dissent in *Pearce v W D Peacock and Co*,¹⁵⁶ held that:

The provision casting the onus on the defendant employer means that the fact that the dismissed employee was a member of an organization must not enter in any way into the reason of the defendant, if he desires exculpation.

¹⁵⁴ Master Builders Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 50.

¹⁵⁵ Australian Hotels Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 23; Australian Mines and Metals Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 15-16; Business Council of Australia, *Submission to the Fair Work Act Review Panel*, Report, 2012, 67; BHP Billiton, *Submission to the Fair Work Act Review Panel*, Report, 2012, 18; Institute of Public Affairs, *Submission to the Fair Work Act Review Panel*, Report, 2012, 8; Master Builders Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 56.

¹⁵⁶ (1917) 23 CLR 199 at 205.

Subsequently, this formulation was rejected by Mason J of the High Court in *General Motors Holden Pty Ltd v Bowling*¹⁵⁷ as being too extreme.¹⁵⁸ His Honour¹⁵⁹ took a more moderate approach, holding that the employee need only prove that the prohibited reason or circumstance was a ‘substantial and operative’ factor, but did not have to be the ‘sole or predominant factor’ influencing him to make that decision. Mason J considered that this test would enable the court to establish the ‘real reason’ for the dismissal.¹⁶⁰ It is this interpretation of s 360 that has been followed¹⁶¹ and now constitutes an accepted interpretation of that provision.

The requirement that the prohibited reason need only be one of many reasons, so long as it was an ‘operative’ reason remained law up until the pre-reform *Workplace Relations Act*.¹⁶² However, in 2009, a new subsection (4) was introduced into s 792 by the *Work Choices* amendments.¹⁶³ Section 792(4) provided that an employer did not contravene the Act unless the person’s entitlement to the benefit of an industrial instrument or an order of an industrial body was the *sole or dominant reason* for the decision.¹⁶⁴

The test was therefore changed from the ‘substantial and operative factor’ to the ‘sole or dominant reason’ test, which placed a greater evidentiary burden on the applicant.¹⁶⁵ This subsection made it significantly harder for employees and unions to prosecute freedom of association cases.¹⁶⁶ It operated essentially as a defence for employers, who simply needed to establish that their action was taken for a range of reasons, of which the prohibited reason was simply one.¹⁶⁷

¹⁵⁷ (1976) 12 ALR 605, 616-7 (Mason J).

¹⁵⁸ *General Motors Holden Pty Ltd v Bowling* (1975) 12 ALR 605, 616.

¹⁵⁹ Gibbs, Stephen and Jacobs JJ agreeing; Barwick J dissenting.

¹⁶⁰ *General Motors Holden Pty Ltd v Bowling* (1975) 12 ALR 605, 617.

¹⁶¹ *Lewis Construction Co Pty Ltd v Martin* (1986) 70 ALR 135, 137; *Australasian Meat Industry Employees’ Union v Sunland Enterprises Pty Ltd* (1988) 24 IR 467, 477; *Curran v Cornwall’s (Wholesale) Meat Co Pty Ltd* (1988) 25 IR 394, 394; *Johns v Gunns Ltd* (1995) 60 IR 258, 267 and 271; *Kelly v Construction, Forestry, Mining and Energy Union (No 3)* (1995) 63 IR 119, 126.

¹⁶² *Workplace Relations Act 1996* (Cth) s 298K.

¹⁶³ Incorporated into the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) by the *Workplace Relations Amendment (Work Choices) Bill 2005*.

¹⁶⁴ *Workplace Relations Act 1996* (Cth) s 792(4).

¹⁶⁵ Justice Shane Marshall ‘Workchoices and the Federal Court’ [2006] *Federal Judicial Scholarship* 16.

¹⁶⁶ Andrew Stewart, ‘Work Choices in Overview: Big Bang or Slow Burn?’ (2006) 16(2) *The Economic and Labour Relations Review* 25.

¹⁶⁷ Andrew Gray, ‘Employment Law: Protection Against Adverse Action: The New Protections Available to Employees Under the *Fair Work Act*’ (2011) 63(4) *Keeping Good Companies* 233, 234.

This test was short lived, and was rejected by the *Fair Work Act*, s 360 expressly stating that the prohibited reason only needed to be one of many reasons for the actions taken.¹⁶⁸ It has been described as a ‘short-term and limited departure from the traditional evidentiary burden placed on employers’.¹⁶⁹ It was considered to be one of the many ways in which the *Work Choices* legislation diminished the protections for employees.¹⁷⁰

However, this test found favour with many employer groups. In submissions to the *Fair Work Act Review* many organisations recommended that the ‘sole or dominant’ reason test be reinstated and incorporated into the *Fair Work Act*.¹⁷¹ The concern for employers is that the prohibited reason need only be part of the reason for the adverse action, even where other more significant reasons exist, such as misconduct or poor performance.¹⁷² They submitted that this would have the effect of evening out the imbalance in the current application of these provisions and would provide greater clarity.¹⁷³

However, this test reduced the effectiveness of the dismissal provisions.¹⁷⁴ One of the objects of the provision is to protect employees in their associations with unions and in their participation in industrial activities.¹⁷⁵ As early as 1917¹⁷⁶ and conclusively determined in 1976,¹⁷⁷ the protective provisions have been interpreted

¹⁶⁸ See also Explanatory Memorandum, Fair Work Bill 2009, [1453], which states that the new clauses do ‘not include a ‘sole or dominant purpose’ reason formulation’.

¹⁶⁹ Australian Government, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, 2012, Report, 238.

¹⁷⁰ Anthony Forsyth, ‘Australian Regulation of Economic Dismissals: Before, During and After ‘Work Choices’ (2008) 30 *Sydney Law Review* 506, 532.

¹⁷¹ Australian Industry Group, *Submission to the Fair Work Act Review Panel*, Report, 2012, 21; Australian Hotels Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 23; Australian Mines and Metals Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 15-16; Business Council of Australia, *Submission to the Fair Work Act Review Panel*, Report, 2012, 67; BHP Billiton, *Submission to the Fair Work Act Review Panel*, Report, 2012, 18; Chamber of Commerce and Industry Western Australia *Submission to the Fair Work Act Review Panel*, Report, 2012, 19; Institute of Public Affairs, *Submission to the Fair Work Act Review Panel*, Report, 2012, 8; Master Builders Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 56.

¹⁷² Australian Mines and Metals Association, *Finding Fairness: A Review of the First 12 Months of the Fair Work Act 2009*, July 2010, 90.

¹⁷³ Australian Industry Group, *Submission to the Fair Work Act Review Panel*, Report, 2012, 21; Australian Mines and Metals Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 15-16; Chamber of Commerce and Industry Western Australia *Submission to the Fair Work Act Review Panel*, Report, 2012, 19; Master Builders Association, *Submission to the Fair Work Act Review Panel*, Report, 2012, 56.

¹⁷⁴ Carolyn Sutherland and Joellen Riley, ‘Industrial Legislation in 2007’ (2008) 50(3) *Journal of Industrial Relations* 417, 424.

¹⁷⁵ *Fair Work Act 2009*(Cth) s 336.

¹⁷⁶ *Pearce v WD Peacock & Company Limited* (1917) 23 CLR 190.

¹⁷⁷ *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605, 616.

to mean that the prohibited reason may not form any operative part of the decision making. To allow an employer to take actions which are adverse to an employee because of an industrial association or activity so long as there is another reason for the decision does not provide employees with sufficient protections.

It remains the law today that a prohibited reason need only be one of multiple reasons for a decision. However, it is worth noting that this reason still has to be an *operative* reason, it cannot be a peripheral or potential reason.¹⁷⁸

C *Judicial difficulty in determining the reasons of the decision maker*

Thus, once the applicant has shown that adverse action was taken against them and that they are associated with a union or engaged in industrial activity, it is for the employer to prove on the balance of probabilities that the proscribed reason was not one of the operative reasons for their decision. It is this step where the breadth of the provisions is making it difficult for judges to make a determination.

The recent Full Federal Court decision of *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education*,¹⁷⁹ and subsequent High Court case of *Bendigo Regional Institute of Technical and Further Education v Barclay*¹⁸⁰ have been the pivotal cases in this regard. These cases illustrated that, while it is comparatively straightforward to work out whether an act can be classified as an adverse act and whether a person falls into the category of a protected person, the difficulty lies in determining what was in the mind of the decision maker when they made their decision. This difficulty is exacerbated by the broad scope of the law.

The difficulty in the application of the causal link is best illustrated when dealing with employee union representatives. This is due to the dual roles which these employees are required to play, which in many cases are directly opposed. In particular, the difficulties faced by the courts are best illustrated in two situations: where the employee being disciplined is a particularly active union delegate; and where a union delegate is forced to choose between their employer and union in the performance of a particular act.

¹⁷⁸ Carolyn Sutherland and Joellen Riley, 'Industrial Legislation in 2007' (2008) 50(3) *Journal of Industrial Relations* 417.

¹⁷⁹ [2011] FCAFC 14.

¹⁸⁰ [2012] HCA 32.

1 *What is the Test for Determining Intent - Subjective v Objective Intent?
Neither or both?*

Over the years, when the courts have sought to determine what was in the mind of a decision maker when they made their decision to take action which was adverse to an employee, this determination was made by looking at the *subjective* intentions of the decision maker, i.e. what was actually in their mind at the time they made their decision. The evidence of the decision maker has been critical in this regard.¹⁸¹

The *Barclay* case created great interest within Australian labour law, as it was the first case under the *Fair Work Act* industrial relations protections to be appealed to the Full Federal Court, thus would be the most authoritative statement of the law under the new Act. In what was considered a surprising decision,¹⁸² the Full Federal Court held that subjective reasons of the decision maker were only peripherally relevant. The Court held that, in order to appropriately satisfy the objects of the Act, the pertinent inquiry ought to be what was the *real reason* for the decision, with reference to the objective circumstances of the case. On this view, it was possible for an employer to make a decision for a prohibited reason *without being consciously aware of that reason*. This had the effect of dramatically extending the potential scope of the already broad provisions and increasing uncertainty for employers. Employers were now required to rebut the presumption that they had taken action for reasons that included a prohibited reason, when they may not have been consciously aware of those reasons.

This decision has since been overturned by the High Court and the subjective intentions of the decision maker have been reinstated as the relevant enquiry. However, this series of decisions highlights the inherent difficulty in the application of the causal link, especially when dealing with employees who also hold the position of union representative.

¹⁸¹ *Seymour v Saint-Gobain Abrasives Pty Ltd* [2006] FCA 1452, [14]; *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605; *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349.

¹⁸² Emma Goodwin and Bianca Friedman, 'General Protections in Pt 3-1 of the Fair Work Act on Trial: Controversy and Contradiction in the Courts' (2011) 17(5) *Employment Law Bulletin* 81; John Wilson, 'Handle With Care: Action Against Employees Who are Also Union Delegates' (2011) 220 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 8.

(a) *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education*

Mr Barclay was the union representative for his workplace. In that capacity, he sent an email to all employees who were members of the Australian Education Union which stated that he had received tips from an anonymous source that the Bendigo Regional Institute of Technical and Further Education ('BRIT') were asking employees to produce fraudulent and false documents for an audit and that employees should not agree to participate in these activities. It was sent from Mr Barclay's BRIT email account, but was signed as President of BRIT Australian Education Union Sub-branch.

This email came to the attention of Dr Harvey, Chief Executive Officer of BRIT, who took the view that it was a breach of the employee Code of Conduct and possibly constituted serious misconduct. She issued a letter asked Mr Barclay to show cause why he should not be subject to disciplinary action for the public way he raised the allegation, for not bringing the allegation to the attention of managers and refusing to provide particulars of the tips he received. He was temporarily banned on full pay from attending BRIT campuses, suspended from using his email account and subjected to a disciplinary investigation.

It was not contested that the actions of Dr Harvey towards Mr Barclay constituted adverse action. Neither was it contested that Mr Barclay held a position as an industrial officer and as such fell into a protected category of the Act. The main question at trial was whether the adverse action was taken *because of* a reason proscribed by the Act. More particularly, the issue was whether the search for the reason for the decision needs to stretch beyond the subjective intention of the decision maker, into the objective circumstances, or the unconscious of the decision maker.

(i) *First Instance-A Subjective Approach*

At first instance Mr Barclay relied on the change in the legislation from the phrase 'by reason of' to 'because of' and submitted that this changed the existing jurisprudence. He submitted that 'in determining whether or not prejudicial action had been taken 'because' of the status or activities of the victim, the actor's subjective reason for taking the prejudicial action was wholly irrelevant and was not

to be taken into account. The test was argued to be purely objective'.¹⁸³ The case was heard by Tracey J of the Federal Court of Australia. His Honour considered that this construction was 'inconsistent with the legislative history, relevant principles of statutory construction and authority'.¹⁸⁴

Dr Harvey gave evidence at the hearing and this evidence was cross examined. Tracey J considered that she 'provided convincing and credible explanations of why it was that she took the steps that she did'.¹⁸⁵ His Honour found that she was concerned only about the reputation of BRIT and wished to investigate the allegations made in the email. At no stage had she turned her mind to Mr Barclay's position as a union official. The case for breach of the freedom of association provisions was not made out.

(ii) *Appeal – An Objective Approach / the 'Real Reason'*

This decision was appealed to the Full Federal Court. Mr Barclay did not challenge the factual findings of Tracey J in relation to Dr Harvey's subjective reasons. It was instead argued that Tracey J erred in law by applying a subjective test, rather than an objective test. In a controversial decision, Gray and Bromberg JJ upheld the appeal and agreed that the relevant consideration should be the objective circumstances of the case.

Their Honours took a broad policy approach, relying heavily on the objects of the Act, in relation to the provisions protecting freedom of association, the history of the provisions and international obligations.¹⁸⁶ Their Honours considered that it was 'clear that the provisions are intended to be both facilitative and protective'.¹⁸⁷ They referred to the fact that the protection was designed not merely to protect an

¹⁸³ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284, [23].

¹⁸⁴ *Ibid* [24].

¹⁸⁵ *Ibid* [54].

¹⁸⁶ Specifically the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1996, 993 UNTS 3. (entered into force 10 March 1976) (esp art 8); the *International Covenant on Civil and Political Rights*, Opened for signature 19 December 1966, 999 UNTS 171. (entered into force 13 November 1980); and the *International Labour Organisation Convention (No 87) concerning Freedom of Association and Protection of the Rights to Organise*, Opened for signature 9 July 1948, 68 UNTS 17. (entered into force 28 February 1973). See also art 20 of the *Universal Declaration of Human Rights* G/A Res. 217A (III) UN. Doc. A/810 (10 December 1948).

¹⁸⁷ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [22].

employee's right to be a member of a union, but to ensure that employees are free to be actively involved in industrial activities.¹⁸⁸

They agreed with the primary judge that the change from 'by reason of' to 'because of' did not render the subjective intention irrelevant. However they found that in searching for the 'real reason' for the actions, subjective reasons were not decisive. In fact, the real reason for a person's conduct may not even be what the decision maker genuinely believes they were motivated by.¹⁸⁹ Their Honours considered that a subjective enquiry into the mind of an employer may be misleading:

The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.¹⁹⁰

They held that instead that if the objective circumstances of the case were such that it appeared on the balance of probabilities that the prohibited reason was one of the operative reasons for the decision, then it would be open to the court to find that there had been a breach of the provisions. This would be determinative despite the fact that the decision maker may be able to satisfy the court that in their own minds, that was not an operative reason.

Their Honours considered that the circumstances of the case were such that an 'objective connexion' was apparent.¹⁹¹ Mr Barclay was approached in his union capacity with concerns of employees, he sent an email in this capacity to union members and he refused to breach the confidence of his fellow employees by giving Dr Harvey the names of the people who had initially reported the alleged fraudulent

¹⁸⁸ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [14]-[20], citing *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197 at 210 (Smithers and Evatt JJ): 'Clearly the purposes of the Act will be frustrated unless employees are able to act as union representatives on the shop floor and elsewhere and negotiate with the representatives of employers without fear that on that account they will suffer in their employment.'

¹⁸⁹ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [27].

¹⁹⁰ *Ibid* [28].

¹⁹¹ *Ibid* [27].

behaviour. He had been at all times acting in his capacity as a union official and any failures were failures in that capacity, not in his capacity as an employee.¹⁹²

They accepted Tracey J's findings that Dr Harvey had never (consciously) taken into account a proscribed reason. However they held that his Honour had erred in law by not finding that the objective circumstances dictated that his role as a union official must have been a reason for the decision. In fact, they then went even further to state that where a person is acting in their capacity as a union representative, it is *impossible* to ignore the connexion, and thus could not be disciplined in their capacity as an employee without breaching the protective provisions.¹⁹³

This decision increased the potential scope of the general protection provisions and was met with widespread criticism for making union officials a 'protected species'.¹⁹⁴

Lander J, in dissent, agreed with Tracey J that the 'subjective intention of the alleged contravenor if accepted by the Court to be the actual intention will be determinative'.¹⁹⁵ Therefore in the absence of a challenge to Tracey J's factual findings, his Honour held that there could be no argument that BRIT had contravened the General Protection provisions.¹⁹⁶ He also expressly disagreed with the proposition of Gray and Bromberg JJ that an employee who was acting in their capacity as a union representative could not be disciplined without breaching the industrial protections.

(iii) High Court Decision- A Subjective Assessment in Light of Objective Circumstances

In September 2012, the High Court upheld BRIT's appeal, reversed the decision of the Full Court and restored the judgement of Tracey J. Each of the High Court justices found that, in determining the reason for taking adverse action, the relevant enquiry is into the subjective intentions of the decision maker. However, it was

¹⁹² *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [73].

¹⁹³ *Ibid* [74].

¹⁹⁴ John Wilson, 'Handle With Care: Action Against Employees Who are Also Union Delegates' (2011) 220 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 8.

¹⁹⁵ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [199].

¹⁹⁶ *Ibid* [226].

emphasised that objective circumstances always had, and would continue to be, relevant in assessing the evidence of the subjective intention of the decision maker.

French CJ and Crennan J confirmed that the approach taken by Tracey J at first instance was correct. Once the evidence of the decision maker as to their subjective reasons was accepted, on the balance of probabilities, in light of all other evidence, then the employer has discharged their onus.¹⁹⁷ Their Honours considered that this had been appropriately done by Tracey J and that it was not open to the Full Federal Court to dismiss this finding. They referred to the statutory presumption in s 361, and the reverse onus that arises from that provision as evidence of the fact that the decision maker's state of mind will be the central question.¹⁹⁸ Their Honours considered that to require an employer to endure a reverse onus of proof in relation to facts which are objectively determinable would 'destroy the balance' between employers and employees which the Act is trying to uphold.¹⁹⁹

Heydon J agreed that the onus of proof would be discharged once the subjective reasons of a decision maker had been accepted by the court. His Honour described the Full Court majority's approach of looking beyond the proven subjective intentions of Dr Harvey to her 'unconscious reasons' as 'indefensible',²⁰⁰ and as creating an 'impossible burden on employers'.²⁰¹ His Honour considered that the 'objective test' as proposed by the Full Federal Court carried the risk of being applied by higher courts as a way to substitute its own view of the matter in circumstances where it was not open to them to overturn the finding of fact from a lower court.²⁰² Tracey J had the opportunity to view Dr Harvey's evidence in chief, cross examination and re-examination. Heydon J considered that only in 'exceptional circumstances' should a court of appeal substitute their own judgment regarding a witness for that of the trial judge.²⁰³

Gummow and Hayne JJ agreed that the appeal should be allowed and the judgment of Tracey J restored. However, their Honours emphasised that the question of

¹⁹⁷ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, [62] and [65] (French CJ and Crennan J).

¹⁹⁸ *Ibid* [44].

¹⁹⁹ *Ibid*, [61].

²⁰⁰ *Ibid* [145] (Heydon J).

²⁰¹ *Ibid* [146].

²⁰² *Ibid* [121].

²⁰³ *Ibid* [141].

subjective and objective intentions detracted from the question of what was the substantial and operative reason for the decision. Although the reason is found in the mind of the decision maker, ‘the reliability and weight of such evidence was to be balanced against evidence adduced by the employee and the overall facts and circumstances of each case’.²⁰⁴ Therefore, in reality, both objective facts and subjective intentions were relevant.

The decision by the High Court provided a certain amount of relief to employer and employer representative groups. The ‘balance’ between employees and employers has been somewhat restored. However we are still left with the situation where the definition of industrial activity is broad enough to encompass activities which could reasonably be classified as the actions of an unsatisfactory employee. This continues to be an area of law which is creating great uncertainty for both employees and employers.

(iv) Both: The Search for the ‘Real Reason’

Thus now it seems to be clear that the enquiry as to the employer’s reason for taking adverse action is an enquiry into the subjective reasons of the decision maker. However certainty in relation to the test to be applied does not necessarily mean that there is certainty in the outcome of its application. The objective circumstances of a case have always been taken into account in determining an employer’s motive or reason for a decision.²⁰⁵ Evidence is not considered in a vacuum.²⁰⁶ The factual context in which a decision is made plays a critical role in assessing the employer’s evidence as to what was their subjective reason for a decision. There will be circumstances where the evidence of the decision maker does not square with the circumstances of that case, and it is within the judicial officer’s discretion to dismiss that evidence. In that way, the ‘real reason’ is established.

²⁰⁴ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, [127] (Gummow and Hayne JJ).

²⁰⁵ *Ibid* [62] and [45] (French CJ and Crennan J).

²⁰⁶ *Barclay v the Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284, [198] (Lander J), affirmed by *Australian Licenced Aircraft Engineers Association v International Aviations Service Assistance Pty Ltd* (2011) 193 FCR 526, 310.

There have been several instances in which the court has rejected the evidence of decision makers in light of the surrounding circumstances.²⁰⁷ For example, one of the considerations which is taken into account is the company's stance on unions.²⁰⁸ In *Cuevas v Freeman Motors Pty Ltd*,²⁰⁹ the anti-union attitude of the company was considered a relevant factor in dismissing the evidence of the decision maker.

Furthermore, there is nothing unusual about judges making value judgements about the credibility of a witness. After all, the question of purpose is one of fact, not law.²¹⁰ Determining causation or purpose in the protection provisions is a common sense test,²¹¹ which looks to what, in truth, is in the mind of a decision maker.²¹² As stated by Isaacs J in *Pearce v W D Peacock and Co*:²¹³

You cannot peer into a man's mind. You can only test his statement as to his mental attitude by his acts. And if his acts contradict his verbal statement, then there is reason to doubt his testimony, and I think we should use our own judgement on the matter.

This necessarily means that the factual context of the case will always play an important role, especially as an employee's position as a union delegate 'cannot be easily dissociated' from their employee capacity²¹⁴ In fact those circumstances create a 'very real possibility that the dismissal was associated with the circumstance that that employee was an official or delegate'.²¹⁵ The High Court has held this is not 'impossible', as claimed by the majority of the Full Federal Court in *Barclay*. However it is still uncertain how actions taken in relation to employees who are also union delegates will be classified by the courts, due to the intertwined nature of these two roles.

²⁰⁷ *Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd* [2000] FCA 441, [76]; *Australian Licenced Aircraft Engineers Association v International Aviations Service Pty Ltd* [2011] FCA 333.

²⁰⁸ *Hyde v Chrysler (Australia) Ltd* (1977) 30 FLR 318.

²⁰⁹ (1975) 25 FLR 67.

²¹⁰ *Wood v City of Melbourne* (1979) 41 FLR 1, 10.

²¹¹ *National Insurance Co of New Zealand v Espagne* (1961) 105 CLR 569, 591-6.

²¹² *Crofter Hand Woven Harris Tweed Corp Ltd v Veitch* [1942] AC 435, 445; [1942] 1 All ER 142; *Tillmann's Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367, 383.

²¹³ (1917) 23 CLR 199, 206.

²¹⁴ *General Motors Holdens Pty Ltd v Bowling* (1976) 12 ALR 605, 620.

²¹⁵ *Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd* [2000] FCA 441, [72].

2 *Serving Two Masters: Opposing Loyalties of Employee Union Representatives*

Union delegates in the workplace are being asked to perform two seemingly incompatible roles: they are to be faithful and productive employees, but they are also required to promote the views of the union, to query management as to safety and job security and campaign on behalf of the worker. Sometimes these two roles collide and the employee is dismissed or disciplined. Then the question for the court becomes: ‘why was that employee dismissed? Was it because of their role as a union representative? Or was it because they were acting in a manner which was unacceptable for employees?’ And in circumstances where a delegate does breach a workplace law, does the role of union delegate offer that employee a licence or protection for that behaviour?’²¹⁶

A union delegate, especially an active representative, will not always be the most desirable employee. Often, the interests of employees are in direct opposition to the interests of the employer. They may ‘be responsible for recurring incidents irritating to management’,²¹⁷ or considered ‘a thorn in the side of the company’.²¹⁸ However the public utility in the role of unions is considered to be of such importance that protections from adverse action are in place. A person ought to be protected in the lawful exercise of their union activities. The protective provisions which are in place create ‘hard rights, and there is no apparent scope for an employer to argue that it is unfair that they should be required to tolerate the inconvenient exercise of those rights by employees’.²¹⁹

Two situations provide the clearest examples of the difficulties faced in this regard by the courts: the first is where a union delegate has been actively and extensively involved supporting employee rights, to an extent which the employer considers inconvenient; and the second is where a single activity needs to be undertaken by an employee who is also a union delegate in which their loyalties to their employer and their loyalties to their union collide.

²¹⁶ John Wilson, ‘Handle With Care: Action Against Employees Who are Also Union Delegates’ (2011) 220 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 8.

²¹⁷ *Cuevas v Freeman Motors Pty Ltd* (1975) 25 FLR 67, 78 (Smithers and Evatt JJ).

²¹⁸ *Hyde v Chrysler (Australia) Ltd* (1977) 23 ALR 97, 102.

²¹⁹ Joellen Riley, ‘Adverse Action Claims Under the Fair Work Act 2009 (Cth): Some Lessons from the Early Cases’ (2011) 25(3) *Commercial Law Quarterly* 12, 14.

(a) *Active Union Delegates*

A union delegate may be involved in many activities in support of the rights of employees. Union delegates who are particularly active are at higher risk of coming into conflict with their employers. For example, the case of *General Motors Holdens Pty Ltd v Bowling* involved a union delegate who was actively promoting a ‘work to rule’ campaign, which was affecting the productivity of his employer. At first instance, Smithers and Evatt JJ made the following statement about the issues which arise with an active shop steward.

It is basic ... that active representatives of employees may well incur the displeasure of management with consequent risks and worries to those representatives. As the informant in this case said ‘you are brought into the firing line’. Clearly the purposes of the Act will be frustrated unless employees are able to act as union representatives on the shop floor and elsewhere and negotiate with the representatives of employers without fear that on that account they will suffer in their employment.²²⁰

An excellent example of this is the case of *Cuevas v Freeman Motors Pty Ltd*²²¹ (*‘Cuevas v Freeman Motors’*). Mr Cuevas was a very active union delegate, in a workplace that viewed union membership and activities ‘unfavourably’.²²² He was vocal in his support of the rights and duties of the defendant and its employees, in many instances causing ‘considerable annoyance to the defendant’s management’.²²³ He was ‘distinctly harassed and subjected to pressures unreasonably disproportionate to any fault on his part’.²²⁴ For instance, one of the issues which caused strain was a ban which had been placed on a tanker which was in the yard to be fixed. The tanker had not been drained of its load of aviation fuel, which Mr Cuevas considered dangerous. He raised the issue with the union who imposed a black ban and the tanker was towed away. This incident cost the company time and money. Mr Cuevas was involved in a number of incidents in support of employees’ rights.

This is the background against which his dismissal had to be considered. The circumstances for his dismissal were this: Mr Cuevas was transferred into a different work area after a workplace accident restricted his abilities. He was not trained in

²²⁰ *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197, 210.

²²¹ (1975) 25 FLR 67.

²²² *Cuevas v Freeman Motors Pty Ltd* (1975) 25 FLR 67, 75.

²²³ *Ibid.*

²²⁴ *Ibid* 75-76.

this area and his employers were concerned that he was not working fast enough. Management assigned certain people to check over his work. However, the evidence given had a ‘certain unreality about it’,²²⁵ and Smithers and Evatt JJ clearly suspected that Mr Cuevas had been being set up. They rejected the proposition that Mr Cuevas was an inefficient worker.

In relation to the contradictory roles of a union representative, Smithers and Evatt JJ stated:

... There are, of course, active shop stewards and passive shop stewards. It is apparent that an active shop steward may be responsible for recurring incidents irritating to management and creating in the mind of the employer a desire to be rid of the employee because although otherwise he may be a satisfactory workman, nevertheless as a shop steward his capacity for stirring up what the employer regards as trouble is to the employer quite intolerable.

If, in such a case, the employer dismisses the employee not because of any particular item of conduct but because of his propensity as such to stir up such trouble then, in our opinion, the dismissal must be characterized as a dismissal arising by reason of the circumstance that the employee is a shop steward. In a sense such a dismissal arises out of past conduct as a shop steward, but it is more than that. It is a dismissal to escape trouble arising from conduct and situations likely to arise in future out of the circumstance that and because the particular employee holds the position of shop steward.²²⁶

This goes directly to the issue of determining the subjective intentions of a decision maker when the objective circumstances suggest that the employee’s union capacity may have had an effect on the decision. Notwithstanding that Mr Cuevas’ employer was able to point to poor performance as the basis of their decision to dismiss him, in light of the circumstances, the court considered that poor performance was simply an excuse to get rid of a troublesome union delegate.

Smithers and Evatt JJ considered circumstances including the anti-union attitude of the organisation Mr Cuevas’ record as an active shop steward and the likelihood that Mr Cuevas would cause further ‘trouble’ as creating the ‘very strong’ possibility that

²²⁵ *Cuevas v Freeman Motors Pty Ltd* (1975) 25 FLR 67, 81.

²²⁶ *Ibid* 78-79.

his industrial association was one of the reasons for the decision to dismiss him.²²⁷ They concluded that, in the circumstances, 'it is highly probable that they were actuated by a desire to dispense with the services of Mr Cuevas because he was a shop steward'.²²⁸

This case illustrates the difficulty which confronts employers in such circumstances. One must ask, could the employer ever safely take the decision to take disciplinary action against an employee in Mr Cuevas' position? It seems quite possible that, in the course of carrying out his role as a union representative, and employee might be so disruptive that this must enter the mind of the employer when making a decision to take adverse action. Given the operation of the reverse onus and the requirement that the reason need be only one of the reasons for the decision, how can an employer ever securely take action against an employee who is also a union representative?

(b) Activities where Union and Employment Loyalties Collide

The second situation where the protective provisions encounter problems is where an activity is undertaken for a union purpose, which directly and negatively affects the employer. In this situation, is there scope for discipline? Or is that activity simply too close to any prohibited reason that it must have entered into the mind of the decision maker? The Full Court decision in *Barclay*, which held that it was impossible to dissociate an employee's industrial association from their actions if that action was in the course of industrial activity, has since been overturned by the High Court. Thus it is possible at law to make a decision to take disciplinary action against an employee who has, in participating in industrial activity, simultaneously breached an employment obligation.

However, as has been seen, a court may look to the objective circumstances surrounding the decision and determine that the testimony of the employer is not consistent with the facts and dismiss that evidence. There is no circumstance in which an employer may, with certainty, take action against an employee who happens to be taking part in industrial activity.

²²⁷ *Cuevas v Freeman Motors Pty Ltd* (1975) 25 FLR 67, 87-88.

²²⁸ *Ibid* 88.

One example of where the contradiction becomes most apparent is where negotiations for a new contract are on foot.²²⁹ In the case of *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd*,²³⁰ the manager of a bank concurrently held the position of President of the state branch of the Finance Sector Union ('FSU'). A disagreement arose between the FSU and the bank during negotiations for a new Certified Agreement. The bank requested that all bank managers promote the bank's position to their employees and requested that managers report to senior management whether their employees would be participating in a strike. Senior managers at the bank felt that Ms Buckland was not doing this and instead was advancing the views of the union. She was sent clarification letters and a warning letter.

Wilcox J found that employees are not under an obligation to actively promote the views of their employer on contentious issues.²³¹ 'She was entitled to her own view about those issues and to maintain her integrity in relation to them. To require her actively to promote a position which she regarded as inadequate, and in her capacity as an FSU negotiator had already rejected, would be to require her to engage in hypocritical deception of her staff'.²³² Wilcox J found that Ms Buckland's allegation of breach of the freedom of association provisions was made out.

This is a clear example of the way that a union delegate can be placed in a position where they must serve two masters, each of whom with completely opposing interests. There was no middle ground for Ms Buckland to take, she either supported the company position or she supported the union position. This case seems to indicate that where the two loyalties collide, the loyalty to the employer gives way to the duties of loyalty to the union.

Another area of difficulty is where the employee is campaigning publicly outside their role in the workplace, but that is affecting the employer.²³³ For example, in the

²²⁹ *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* [2002] FCA 631; *Australian Municipal, Administrative, Clerical & Services Union v Ansett Australia Ltd* [2000] FCA 441.

²³⁰ [2002] FCA 631.

²³¹ *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* [2002] FCA 631, [98].

²³² *Ibid* [98].

²³³ *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* [2002] FCA 631; *General Motors Holdens Pty Ltd v Bowling* (1976) 12 ALR 605.

case of *Bennett v Human Rights & Equal Opportunity Commission*,²³⁴ Mr Bennett was the federal president of the Customs Officers' Association and an employee of the Australian Customs Service. He made a number of comments to the media concerning the structure of Customs. He was directed by the company not to make any further comments, either in his capacity as an officer of Customs or in his capacity as an officer of an industrial organisation. Mr Bennett did not comply with this direction and he was disciplined. His comments were made in his capacity as a trade union official.²³⁵ After examining the circumstances of the case, Finn J suggested that the capacity in which Mr Bennett was acting should be the determinant factor and suggested that discipline flowing from this incident would have been in breach of the industrial protections.²³⁶

This decision contrasts with the situation in *Barclay*. In that case, the disciplinary action taken against Mr Barclay after he sent an email in his industrial capacity, was held by Tracey J (and affirmed by the High Court) not to be for a prohibited purpose. Implicit in this decision is the assumption that it is possible for an employer to put out of their mind this industrial capacity, and view the conduct in the context of their capacity as an employee.

It is submitted that these divergent decisions indicate an unacceptable degree of uncertainty in the law. An employer cannot take disciplinary action against an employee and be certain that their decision will not be interpreted to be in breach of the industrial protection provisions. Similarly, an employee cannot be certain whether an action which they take in support of their union will be interpreted as being in breach of their obligations as an employee, or whether that action will be protected by the industrial protection provisions.

²³⁴ (2003) 204 ALR 119.

²³⁵ *Bennett v Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119, 364 [130].

²³⁶ His Honour was not required to make a determination, the matter was remitted to a lower court. This comment was a direction as to his Honour's views.

V ADDITIONAL CONSIDERATIONS

The negative impact of uncertainty in the law is exacerbated by a two additional factors. These are the broad range of penalties available to litigants and the length of time which an employee has to bring an action.

A *Compensation, penalties and other orders*

The impact of uncertainty with respect to the prohibition against adverse actions is even greater in view of the extensive range of compensation, penalties and other orders that are available against those that breach it. Unlike the previous versions of this protective provision, there is no cap on compensation.²³⁷ Compensation orders can include claims for hurt, distress and humiliation. For example, in *Australian Licensed Aircraft Engineers Association v International Aviation Services Assistance Pty Ltd*,²³⁸ an aircraft engineer who lost his job as a result of various adverse acts was awarded \$84,892.58 plus interest comprising economic loss, loss of wages and remuneration and non-economic loss (hurt, distress and humiliation of \$7,500).

Further, the court has the power to order that the company pay penalties for breaching this provision of up to \$33,000.²³⁹ This penalty may be paid to the Commonwealth, to a particular organisation or to a particular person.²⁴⁰

Additionally, the Court is empowered to make ‘any order the court considered appropriate’.²⁴¹ In *Stephens v Australian Postal Corporation*,²⁴² a postal worker was reinstated, even though by the time it went to trial, the worker’s employment agreement would have expired.

Many employers claim that they must resort to paying ‘go away money’, whereby claims are settled regardless of their merit.²⁴³ There is, of course, no direct evidence

²³⁷ The cap for compensation under the former *Workplace Relations Act 1996* was \$10,000 (s 170CR(1)(a)).

²³⁸ (2011) 193 FCR 526.

²³⁹ *Fair Work Act 2009* (Cth) s 539.

²⁴⁰ *Ibid* s 546(3).

²⁴¹ *Ibid* s 545.

²⁴² [2011] FMCA 448.

²⁴³ Joellen Riley, ‘Adverse Action Claims Under the Fair Work Act 2009 (Cth): Some Lessons from the Early Cases’ (2011) 25(3) *Commercial Law Quarterly* 12, 15.

of this practice.²⁴⁴ However there is significant concern among the business community.²⁴⁵

It should be noted that despite the vast scope for damages, the courts have shown themselves to be restrictive with penalties. In *Australian Licensed Aircraft Engineers Association v International Aviation Services Assistance Pty Ltd*,²⁴⁶ pecuniary penalties of only \$10,000 were imposed, to be paid to the employee's union, despite the numerous breaches and the calculated and deliberate nature of those breaches.²⁴⁷ In *Fair Work Ombudsman v Drivecam Pty Ltd*,²⁴⁸ the Court took into account the small size of the business, the rural location, the fact that an apology was issued, the lack of prior complaints and the swift response to the investigation when imposing a penalty of \$1,500 per contravention (instead of a \$33,000).

B Time Limit

Furthermore, the length of time allowed to bring an application under the General Protection provisions has been extensively criticised.²⁴⁹ The time limit to bring an adverse action claim is 60 days where the adverse action resulted in dismissal and 6 years where the adverse action did not result in dismissal.²⁵⁰ This compares to the time limit for bringing an unfair dismissal claim, which is only 14 days.²⁵¹

The recent *Fair Work Act Review* has recommended that the time limit for adverse action claims which result in dismissal be reduced to 21 days.²⁵² However, the Panel declined to make any changes to the six year limitation for claims which did not result in a dismissal.

²⁴⁴ As out-of-court settlements are confidential.

²⁴⁵ Master Builders Association, *Submission to the Fair Work Act Review*, Report, 2012, 52; Heather Ridout, Chief Executive of the Australian Industry Group, Speech to the 10th Annual Workforce Conference, 'The Fair Work Act-The Barriers to Productivity Improvement Need to be Addressed' 5 September 2011, 13; Australian Industry Group, *Submission to the Fair Work Act Review*, Report, 2012.

²⁴⁶ (2011) 193 FCR 526.

²⁴⁷ The potential total of damages was \$66,000.

²⁴⁸ [2011] FMCA 600.

²⁴⁹ Australian Industry Group, *Submission to the Fair Work Act Review*, Report, 2012, 14; Heather Ridout, Chief Executive of the Australian Industry Group, Speech to the 10th Annual Workforce Conference, 'The Fair Work Act-The Barriers to Productivity Improvement Need to be Addressed' 5 September 2011.

²⁵⁰ *Fair Work Act 2009* (Cth) s 366.

²⁵¹ *Ibid* s 394.

²⁵² Australian Government, *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation*, 2012, Report, 245, recommendation 49.

The six year time limit is not unique to the *Fair Work Act*, as this is a general limitation for any legal action.²⁵³ It is not my intention to debate the necessity for this, suffice to note that given the uncertainty which exists in relation to decisions relating to union representatives, six years is a long time to have a potential claim hanging over an employer's head. Furthermore, in the context of a reverse onus, this time limit has the potential to make it increasingly difficult for employers to defend claims, given the effect that the passage of time has on evidence.

²⁵³ The limitation period is that of the state jurisdiction the offence occurred in, as it is not specified in the Act: *Judiciary Act 1903* (Cth) s 79. The general limitation period in Western Australia is governed by the *Limitation Act 2005* (WA) s 13.

VI POTENTIAL SOLUTIONS

The two legislative categories of industrial activities and adverse action are now so broad that it is difficult to ever say with certainty that a prohibited reason was not in the mind of an employer when a decision was made. The High Court decision in *Barclay* has diminished some of the anxiety felt by those involved in industrial relations with respect to the test used to determine an employer's reason for taking adverse action. However, it is still difficult for employers and employees to make a secure decision especially in situations where an employee is also a union representative, who often find themselves in a position of conflicting loyalties.

Where these situations arise, the courts need clarification as to how to reconcile the contradictory positions between the rights of an employee to industrial rights and associations and the rights of an employer to a profitable business and loyal staff.

I will discuss in detail below three methods which could be used by the courts in order to provide certainty in the application of the causal link. The first is a determination as to which loyalty overrides which: the loyalty an employee owes to their employer, or the loyalty a union delegate owes to their union. The second is an extension of a test which is applied in a discrete area of freedom of association law, called the reason / factor distinction. The third and final mechanism is a finding as to whether a comparison should be made between a non-union affiliated employee and a union affiliated employee, similar to that of anti-discrimination law.

1 *Loyalty an Employee owes to their Employer v Loyalty a Union Delegate owes to their Union*

As we have seen, employees who serve as union representatives frequently find themselves in circumstances of conflicted duties of loyalty. Neither the legislation nor the case law provides any guidance as to which the employee may or should prefer. In a situation where they are forced to choose between the two, such as in contractual negotiations or in public speaking engagements outside their workplace which adversely affects their employer, it ought to be clear whether their duties to their union outweigh their duties to their employer, or vice versa.

All employees owe a common law duty to their employer of loyalty and fidelity.²⁵⁴ This duty is interpreted as an implied contractual duty and breach of this duty may validly form the basis of a termination.²⁵⁵ The fact that an employee holds an office in an industrial organisation does not alter these obligations to their employer.²⁵⁶ Any activities which undermine the duty of loyalty or fidelity owed to an employer leaves the employee in breach of their employment contract, whether those activities were undertaken in their capacity as an employee or a union representative.²⁵⁷

The freedom of association provisions stipulate that an employer may not take adverse action against an employee *because* they are associated with a union or undertaking union activities. However an employee may be dismissed for breaching their duty of loyalty and fidelity to an employer. Where it is the employee's union responsibilities that are contributing to their failures as a dutiful employee, the employer is in the unenviable position that he is unable to securely take the steps that he would otherwise take to protect his business by dismissing or otherwise taking disciplinary action against the employee.

However with the breadth of what constitutes adverse action, and the breadth of what constitutes an industrial activity, together with the reverse onus of proof and the fact that the reason need only be one of the reason for the decision, the probability of a decision maker being able to discharge their onus of proof in relation to situations the action complained of is actually an industrial action is very low. It is my submission that there must be clear law on which triumphs over the other. Otherwise union representatives are not going to know what to do, and employers are not going to know when they have a right to discipline them.

(a) *Loyalties to an Employer Overriding Loyalties to a Union*

One solution to this apparent contradiction was suggested by the Chamber of Commerce and Industry in their *Submission to the Fair Work Act Review*.²⁵⁸ They

²⁵⁴ *Concut Pty Ltd v Worrell* [2000] HCA 64; 104 IR 160; *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 72-73 and 81.

²⁵⁵ *Ibid.*

²⁵⁶ *Finance Sector Union of Australia v Australian & New Zealand Banking Group Ltd* (2002) 120 FCR 107, 125; *McCann v Mt Isa Mines Ltd* [2003] FCA 1031 (unreported, Spender J, 19 September 2003, BC200305638).

²⁵⁷ John Wilson, 'Handle With Care: Action Against Employees Who are Also Union Delegates' (2011) 220 *Ethos: Official Publication of the Law Society of the Australian Capital Territory* 8.

²⁵⁸ Chamber of Commerce and Industry, *Submission to the Fair Work Act Review*, 2012, Report.

suggested that the employee's common law duties, such as the duties of fidelity, good faith, trust, to use care etc, be codified, in order to provide clarification to both parties as to their rights and obligations.²⁵⁹ They also suggested that an employee's union role within the workplace should be expressly stated to be subordinate to their duties to the employer.²⁶⁰

This approach appears to be supported by the High Court decision in *Barclay*. The Full Federal Court had held that when acting in an industrial capacity, it could not objectively be said that the industrial capacity did not form some operative part of the reasoning behind the decision to take adverse action. This point was completely rejected by the High Court on appeal.²⁶¹ Their Honours upheld the original finding of Tracey J, which stated that an employer was entitled to take action against their employee for misconduct even if they were acting in an industrial capacity at the time. Union activities were no excuse for Mr Barclay's failures as an employee. It was found as a matter of fact that the decision maker, Dr Harvey, had not turned her mind to his union affiliations at all and that was sufficient to discharge the onus of proof against the company.

(b) Loyalties to a Union overriding Loyalties to an Employer

However other cases have suggested that the loyalties to a union should override the loyalties owed to an employer, and thus a breach of this duty of loyalty and fidelity cannot form a valid reason to take action against an employee union representative. One suggestion that has been made is that the duty of loyalty should be suspended in situations where it is in conflict with a legitimate trade union activity, which would otherwise constitute a breach of this duty.²⁶²

In *Bennett v Human Rights & Equal Opportunity Commission*,²⁶³ where Mr Bennett had made adverse comments about his employer to the media in his capacity as

²⁵⁹ Chamber of Commerce and Industry, *Submission to the Fair Work Act Review*, 2012, Report, 99, Recommendation 60.

²⁶⁰ *Ibid.*

²⁶¹ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, [60] (French CJ and Crennan J), [145] (Heydon J).

²⁶² Lucy Kirwan 'Freedom of expression and the employment relationship' (2004) 17 *Australian Journal of Labour Law* 1, 5.

²⁶³ (2003) 204 ALR 119; 78 ALD 93.

president of a union after being specifically directed not to by his employer,²⁶⁴ Finn J suggested that the content of the loyalty obligation of such an employee must address the explicit dual loyalties which the employee holds. Mr Bennett was described as being in the position of ‘serving two masters whose respective interests in particular matters could be antagonistic’.²⁶⁵

His Honour noted that the obligation of loyalty and fidelity to an employer does not privilege the position of the employer to the exclusion of the union²⁶⁶ and suggested that account needs to be taken of the nature and purpose of any action the employee was undertaking, if those actions involved legitimate trade union activities.²⁶⁷ His Honour referred to the case of *X v Commonwealth*,²⁶⁸ which held that an employee who is unable to carry out duties of loyalty and fidelity due to any mental, emotional or physical disability, should be protected by the provisions of the *Disability Discrimination Act 1992 (Cth)*.²⁶⁹ Finn J concludes that, despite these duties of loyalty and fidelity, the conduct of an employee who is acting in their trade union capacity should not be classified as disloyalty to an employer.²⁷⁰

This view is supported by the decision of *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd*,²⁷¹ where it was held that adverse action taken on the basis of a number of media interviews which the employee gave while ‘wearing her FSU ‘hat’’,²⁷² stating her negative opinion of her workplace was in breach of the protections for industrial activities.

In these cases, it was apparent that the employer made their decision *because* of certain conduct, in both cases because of unfavourable media interviews. The question for the court was whether or not the industrial nature of this conduct could be put out of the decision makers’ minds and the employee disciplined on the basis

²⁶⁴ The facts of this case were outlined in detail under the heading ‘Activities where Union and Employment Loyalties Collide’ above.

²⁶⁵ *Bennett v Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119, [147].

²⁶⁶ *Bennett v Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119, [126] (Finn J), citing *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* (2002) 120 FCR 107; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 in support.

²⁶⁷ *Bennett v Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119, [125].

²⁶⁸ (1999) 200 CLR 177.

²⁶⁹ *X v Commonwealth* (1999) 200 CLR 177, 187-188 (McHugh J).

²⁷⁰ *Bennett v Human Rights & Equal Opportunity Commission* (2003) 204 ALR 119, 367 [149].

²⁷¹ [2002] FCA 631.

²⁷² *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* [2002] FCA 631, [173].

of disloyalty. What was suggested, particularly in *Bennett*, was that an industrial act should not be classified as disloyalty to an employer.

(c) *Conclusion*

The law, following the High Court case of *Barclay*, is that it is possible to put the industrial nature of certain acts out of the mind of a decision maker and that the employee is still bound to act with regard to their employment contract, company policies and duties of loyalty and fidelity. This supports the view that loyalties to an employer will need to be upheld, even during times of industrial activity.

It is my submission that this reduces certainty for both employees and employers. A decision can be made on the basis of a particular act done in an industrial capacity, but the *reason* for the decision may be held to be either the employee's failures as an employee, or the employee's industrial activities. An employer cannot take action in these circumstances and be confident that a court will not find them in breach of the protective provisions.

I submit that an act which is classified as an industrial activity should not form the basis of a decision to take adverse action against an employee. The importance of protecting employees who undertake the additional responsibilities of a union representative is accepted in Australian labour law.²⁷³ If an employee union representative is in a position where their union position requires them to do one act and their employment position requires them to do a different act, and that employee must choose between the two, it is my submission that the objects of the Act can best be satisfied if that employee is free to choose to support their union.

Furthermore, the duty of loyalty to an employer is an implied contractual duty and duties arising under an employment contract are contractual, whereas protections from adverse action on the basis of union affiliations are statutory. A statutory prohibition should override a common law duty.²⁷⁴

²⁷³ *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550, 583 (Wilcox and Cooper JJ).

²⁷⁴ Lucy Kirwan 'Freedom of expression and the employment relationship' (2004) 17 *Australian Journal of Labour Law* 1, 4.

2 Reason / Cause Distinction

One of the ways that judges have tried to reconcile apparently intertwined reasons for acting is by distinguishing between the ‘reason’ for the action and the ‘cause’ of the action. This distinction is used in cases where it is alleged that adverse action was taken against an employee because of their rights to a particular industrial instrument or award from an industrial body.²⁷⁵

The provision was designed to prevent employers victimising employees with rights to a particular award, but the reason/cause distinction was established so that an employer who could not maintain a profitable business due to the award could dismiss their workforce without fear of breaching the Act.²⁷⁶ In summary, it is concluded that the *reason* for the decision was the high cost of the employees, and that the industrial award was simply the *cause* of that cost. Its purpose was to protect the integrity of the award system, as without it ‘the whole system of industrial arbitration would be threatened with destruction’.²⁷⁷ It has been used by judges to prevent ‘consequences sometimes absurd, sometimes oppressive’.²⁷⁸

Below, I explore the possibility of applying this test to the whole of the industrial activities provision in order to provide assist judges in ascertaining the reason for particular decisions, especially in the context of the two contentious areas highlighted above: where a union representative is particularly active; and where a single act could be classified as the act of a union representative or the act of an unsatisfactory employee.

(a) *The Test*

The most famous and often cited application of this distinction is that of *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union*²⁷⁹ (‘*Greater Dandenong*’). In this case, the Greater Dandenong City Council, who had been employing their own employees, put out a tender to other companies to provide their organisation with employees. Only two tenders were received, the in-house bid

²⁷⁵ See for example *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349; *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513.

²⁷⁶ *Grayndler v Cunich* (1939) 62 CLR 573.

²⁷⁷ *Ibid* 594, (Evatt J).

²⁷⁸ *Eaton v McKenzie* (1916) 12 Tas R 94.

²⁷⁹ [2001] FCA 349.

and a bid from Silver Circle. The Evaluation Committee set up by the Council determined that the Silver Circle bid was the most favourable.

The only major difference between the two bids was the cost of the staff. In-house council staff were employed under a different award than the Silver Circle staff would be. The Silver Circle staff were not entitled to be paid as much as the in-house staff. The result of accepting this bid was that the relevant employees of the Council would be made redundant and replaced by Silver Circle staff. It was undisputed that in reality, most of the redundant Council staff would become Silver Circle staff and perform the exact same task for a lesser rate of pay.

The question for the Court was this: Did the Council decide to dismiss their workforce *because of* their rights to higher pay under the award? If they had, then they would have breached the protection provisions (by making a decision on the basis of their ‘entitlement to an award’). At first instance, Madgwick J found that the Council was motivated by a desire to avoid the industrial instrument and held that the Council had breached the Act.²⁸⁰

The Full Federal Court (Wilcox, Merkel and Finkelstein JJ) unanimously dismissed the Council’s appeal due to a failure to call enough decision makers to discharge their onus of proof. However they found that the primary judge had failed to distinguish between the operative (or immediate) reason for the Council’s conduct and the cause (or proximate reason) for the conduct.²⁸¹

Merkel J formulated the test as follows:

... the cases demonstrate that s 298K is not concerned with the *cause* of the prejudicial conduct. Rather, it is concerned with the employer’s *reason or reasons* for engaging in that conduct. Thus, there can be a significant difference between the employer’s subjective reason for engaging in prejudicial conduct and the objective circumstances that led to the employer engaging in the conduct.²⁸²

²⁸⁰ The *Workplace Relations Act 1996* (Cth) (before the *Work Choices* amendments).

²⁸¹ This was the *ratio* as determined by Branson J in *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513 at [54], who stated that the ratio of *Greater Dandenong* was ‘difficult, if not impossible’ to ascertain.

²⁸² *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349, [164] (Merkel J).

Applied to this case, Merkel J held that while ‘higher entitlements may be causally linked to the Council’s acceptance of the Silver Circle tender, the evidence does not support the primary judge’s conclusion that they were an operative reason for the Council’s acceptance of the tender’.²⁸³

This test was put by Finkelstein J as this:

... to decide whether an employee has been unlawfully dismissed, it is necessary to ascertain the true motive for, or purpose of, the dismissal. If there is some legitimate reason for the dismissal, such as the desire to avoid bankruptcy or the need to maintain a profitable operation, the dismissal will be lawful. It matters not that the cause of the impending bankruptcy or the unprofitable trading is the high rate of wages payable under an award or certified agreement.. That is to say, although the benefits produced by an award or certified agreement have caused the problem which the employer seeks to address, that does not necessarily make those benefits the ‘reason’ or motive for his act.²⁸⁴

The reason/cause distinction was further analysed in *Maritime Union of Australia v CSL Australia Pty Ltd*²⁸⁵ (*MUA v CSL Australia*). In this case, the owners of the vessel CSL Yarra agreed to sell the vessel to a related company, who would operate the vessel under a foreign flag and replace the Australian crew with a crew from the Ukraine. The reason cited by the owners of the CSL Yarra was that this would enable the vessel to operate as part of the international fleet. The Australian employees claimed that the reason for the decision was that they were entitled to be paid at a higher rate (as specified in their industrial instrument) than the Ukrainian crew.

The evidence showed that on more than one occasion, the decision maker had considered the price differential of the Australian and Ukrainian crews. Under cross examination, the decision maker admitted that wages and conditions were not irrelevant considerations. However the decision as a whole was considered in a very broad context.

²⁸³ *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349, [167] (Merkel J).

²⁸⁴ *Ibid* [199] (Finkelstein J).

²⁸⁵ [2002] FCA 513.

Branson J considered that the correct way of identifying what an employer's reason or reason was that set out by Merkel and Finkelstein JJ in *Greater Dandenong*. His Honour stated:

... I am satisfied that the Company has proved on the balance of probabilities that the operative or immediate reason (or perhaps reasons) for the conduct of the Company with which this proceeding is concerned was Mr Jones' desire that each of the CSL Pacific and CSL Yarra should have the flexibility to trade as part of the CSL International fleet not only on the Australian coast but elsewhere in a cost effective way. I do not doubt, indeed Mr Jones did not deny, that the process of reaching his decision that the CSL Yarra should be sold and reflagged, he gave consideration to the cost differential between an Australian crew and a foreign crew ... However, it seems to me that the fact that the crew of the CSL Yarra were entitled to the protection of the industrial instruments, while in part a cause of the decision taken by Mr Jones, was not an operative reason for his decision in the sense identified [in *Greater Dandenong* and *MUA v Geraldton*].²⁸⁶

(b) *Discussion*

This test is applied mainly in cases involving alleged breaches of the protective provisions relating to employee rights to an industrial instrument.²⁸⁷ It has been rejected in a number of cases regarding the other areas of industrial protection.²⁸⁸ However the Explanatory Memorandum to the *Fair Work Act* explicitly included reference to the cases of *Greater Dandenong* and *Maritime Union of Australia v CSL*, when referring to the fact that Parliament intended to retain existing jurisprudence relating to industrial protections.²⁸⁹

This distinction was used outside the specific category of rights to an industrial instrument in *Bayford v Maxxia*²⁹⁰ to rebut the presumption that a decision was made for a proscribed reason (specifically a workplace right) used under General Protection provisions of the *Fair Work Act*. An employee was frequently late for

²⁸⁶ *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513, [55].

²⁸⁷ See for example *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union* [2001] FCA 349; *Maritime Union of Australia v CSL Australia Pty Ltd* [2002] FCA 513. David Quinn, 'To Be or Not to be a Member – Is that the only question? Freedom of Association under the Workplace Relations Act' (2004) 17 *Australian Journal of Labour Law* 1, 20.

²⁸⁸ *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14; *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165; *Lewis Construction Co Pty Ltd v Martin* (1986) 70 ALR 135.

²⁸⁹ Explanatory Memorandum, Fair Work Bill 2009, [1458].

²⁹⁰ [2011] FMCA 202.

work, but claimed that his lateness was ‘part and parcel’ of his family responsibilities and that any decision on this basis would be discriminating against him on the basis of his family responsibilities.²⁹¹ The employer argued that they were not concerned with the cause of his lateness, he was dismissed for being late, as would any other employee who was consistently late. This argument was accepted by Riley FM,²⁹² who held that the relevant inquiry was into the reason for his dismissal, which was his lateness.

Most recently, this distinction was rejected by the majority of the Full Federal Court in the now overturned decision of *Barclay v Board of Bendigo Regional Institute of Technical and Further Education*.²⁹³ Their Honours conclude that ‘no distinction is to be drawn between the cause of conduct and the reason for the conduct’ because the distinction is ‘not helpful’.²⁹⁴

Further judicial criticism can be found in the judgement of North J in *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd*,²⁹⁵ who considered that the distinction between cause and reason obscured the facts.²⁹⁶ His Honour relied on the fact that there was no requirement in the Act to make this distinction and the fact that the terms ‘reason’ and ‘factor’ had been used interchangeably in *General Motors-Holdens Pty Ltd v Bowling*.²⁹⁷ The distinction was also rejected in *Lewis Construction Co Pty Ltd v Martin*.²⁹⁸ In this case, the employer dismissed an employee in order to counter a campaign which was begun by the employee’s union. Gray J²⁹⁹ rejected the argument that the employee’s union membership was not a reason for the decision.³⁰⁰ His Honour considered that consideration of what was a factor in a reason and what made up the reason itself ‘tends to distract from the essential question’.³⁰¹

²⁹¹ Prohibited by *Fair Work Act 2009* (Cth) s 340 and 341.

²⁹² *Bayford v Maxxia* [2011] FMCA 202, [119].

²⁹³ [2011] FCAFC 14.

²⁹⁴ *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14, [31].

²⁹⁵ (2003) 126 IR 165.

²⁹⁶ *Australasian Meat Industry Employees’ Union v Belandra Pty Ltd* (2003) 126 IR 165, [98].

²⁹⁷ *Ibid.*

²⁹⁸ (1986) 70 ALR 135.

²⁹⁹ With whom Woodward and Jenkinson JJ agreed.

³⁰⁰ *Lewis Construction Co Pty Ltd v Martin* (1986) 70 ALR 135, 137.

³⁰¹ *Ibid* 139.

The strongest academic criticism of this test comes from David Quinn, who argues that applying this distinction to all of the protections against industrial activity would render the provisions ‘nugatory’.³⁰² He provides the example that an employer could then take adverse action against employees associated with unions on the basis that they are more expensive, or do not put the employer first, and then the court, after applying the distinction, could not conclude that the action was taken for a proscribed reason.³⁰³ The *reason* was the expense or priorities of that employee. The *cause* of that may have been industrial affiliations or activities, but that can be distinguished. For example, in *Maritime Union of Australia v CSL Australia*, it was held that the employer’s reason was not to avoid these benefits but was the ‘strategic advantages’ of not being subject to them.³⁰⁴

Therefore a breach of the Act could only be made out if it could be shown that the decision was made simply because of the fact that the employee belonged to a union, or because they took industrial action, but not because the employer found that employee’s union role expensive or disruptive. However it is these effects which will cause the employer the greatest resentment; most employers do not object in principle to an employee simply being a member of a union.³⁰⁵

In applying this distinction to the two problem areas related to employee union representatives, it is clear that this distinction has the potential to be abused. An employee who gives a media interview in their capacity of officer of a union could be disciplined or terminated for the *reason* that they brought the company into disrepute, but that the employee’s role within the union was simply the *cause* of that action. Furthermore, with particular reference to the example given by David Quinn, a restless, disruptive employee who causes considerable annoyance to an employer, such as was the case in *Cuevas v Freeman Motors Pty Ltd*,³⁰⁶ could be terminated on that basis, regardless of the fact that the cause of that annoyance was the fact that the employee had been active in supporting the rights of employees in their capacity as union representative.

³⁰²David Quinn, ‘To Be or Not to be a Member – Is that the only question? Freedom of Association under the Workplace Relations Act’ (2004) 17 *Australian Journal of Labour Law* 1, 20.

³⁰³ *Ibid.*

³⁰⁴ *Maritime Union of Australia v CSL Australia Pty Ltd*[2002] FCA 513, [31]-[34], [37], [55].

³⁰⁵ David Quinn, ‘To Be or Not to be a Member – Is that the only question? Freedom of Association under the Workplace Relations Act’ (2004) 17 *Australian Journal of Labour Law* 1, 29.

³⁰⁶ (1975) 25 FLR 67.

This would not further the object of the Act to protect freedom of association. It in fact restricts the provisions to the point where the protection is illusory. It is my submission that this distinction is best restricted to the subcategory of industrial protection which protects an employee from adverse action on the basis of their right to an industrial instrument or agreement.

3 *Comparator*

Another test which is sometimes used in this context is that of a comparison between the action taken against an employee union delegate and the action which would have been taken against another employee who had behaved in the same manner but did not have any industrial association. There is however judicial uncertainty as to whether this comparative test is appropriate.

(a) *The Test*

This comparative test was used, for example, in the case of *Pearce v W D Peacock*. The facts of this case were discussed in detail earlier. In summary, Mr Batchelor was dismissed because he was dissatisfied in his employment. His dissatisfaction became apparent to his employer when they were approached by his union with a log of complaints. The Court of Petty Sessions at first instance held that he was dismissed because of his dissatisfaction, not because of his industrial affiliations. This was affirmed by the High Court.³⁰⁷

Barton J, of the majority made the following statement regarding the relevance of a comparison:

An employee who is dissatisfied with his work and wages may or may not be a unionist. Where the dissatisfaction exists it would be absurd to say that a dismissal on that account is justified when he is not a unionist but is a contravention of the section in question when he is a unionist, and beyond the fact that Batchelor was a member of the organization, I do not think there is anything substantial on which it can be said that the case is altered because he is a member of the organization.³⁰⁸

³⁰⁷ *Pearce v W D Peacock & Company Limited* (1917) 23 CLR 199.

³⁰⁸ *Pearce v W D Peacock & Company Limited* (1917) 23 CLR 199, 203 (Barton J (Gavan Duffy and Rich JJ agreeing)).

A comparator was also used in the more recent case of *Lewis v Qantas Airways Ltd.*³⁰⁹ In that case, Mr Lewis was dismissed following an incident where his 'bundy card' (a type of time card) was endorsed at the end of the day by a fellow employee. The evidence showed that it was common knowledge in the workplace that this misconduct would form the basis for summary dismissal. He and the fellow employee who endorsed the card (Mr Macfarlane) were both dismissed. It is important to note that Mr Macfarlane was not a union representative. Mr Lewis brought an action against his employer claiming that the decision was made for reasons which included the fact that he was a union representative who had recently participated in an industrial dispute.

However the employer's evidence that every breach of the timekeeping policy had resulted in dismissal was persuasive. Their actions were consistent with other offences and with their own policy. Both men had been offered the opportunity to explain themselves and declined to do so. Morling J found that although Mr Lewis had caused the company embarrassment with regard to the previous industrial dispute, it did not have any effect on the decision that was made.³¹⁰ It was highly relevant that he was treated the same as another non-union representative.³¹¹

Thus it is clear that the comparator is being utilised in some cases involving the industrial relations protections. I explore below the possibility that it be made clear that a comparison which shows that an employer would have taken the same action against any employee who did that particular act will always allow an employer to rebut their onus of proof.

(b) Discussion

The question to be resolved is thus, if it can be said that an employer would have taken the same action against an employee who did not have union associations, should that enable an employer to rebut their onus of proof that the decision was made for a prohibited industrial reason? Should a union representative be treated differently than other employees? The resolution of these questions has the potential to benefit both the employee and the employer in different circumstances.

³⁰⁹ (1981) 54 FLR 101.

³¹⁰ *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 112 (Morling J).

³¹¹ *Ibid.*

It was suggested by the Master Builders' Association that the requirement for a comparative test should be written into the legislation.³¹² They argue that the practical effect of the protective provisions is that union representatives are being subject to a sort of 'reverse discrimination', where they are effectively immune from any disciplinary action by the employer in circumstances where the same behaviour would have reasonably resulted in some form of adverse action.

The majority in *Barclay v the Board of Bendigo Institute of Technical and Further Education*³¹³ expressed their disapproval at the use of a comparator. Their Honours considered that there was nothing in the Act to require such a comparison to be taken and that the use of a comparator would not be appropriate.³¹⁴ This was due to the fact that an employee union representative was necessarily different from other employees. They undertook more activities which had the potential to cause irritation to management. As stated in *Bowling v General Motors-Holdens Pty Ltd*,³¹⁵ the position of union representative brings employees 'into the firing line'.³¹⁶

The protections are in place because the law recognises the importance of the role played by unions and their employee representatives and acknowledges that in the course of their roles they may take actions which are not in the best interests of their employer, but are in order to counteract the power imbalance which exists between employees and employers. An employee who refuses to work may reasonably be dismissed, but an employee who is on strike in an attempt to secure better wages may not be. An employee who does not promote the company line may be reasonably dismissed, but an employee who is actively representing the views of their union, which happen to be contrary to the line of the company, may not be. It is these situations where a comparator will not be helpful.

It is my submission that the comparator is a useful tool which employers may use as evidence that they did not take action for a particular reason. However, it cannot be said that in all situations, proving that the same action would have been taken against

³¹² Master Builders' Association, *Submission to the Fair Work Act Review*, Report, 2012, 53-54.

³¹³ [2011] FCAFC 14.

³¹⁴ *Barclay v the Board of Bendigo Institute of Technical and Further Education* [2011] FCAFC 14, [35]-[36].

³¹⁵ (1975) 8 ALR 197.

³¹⁶ *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197, 210.

any other employee would prove on the balance of probabilities that the employer did not make a particular decision for a proscribed reason.

VII CONCLUSION

It is a fundamental premise of Australian labour law, that employees have the right to join industrial associations and participate in industrial activities. This right has been continuously reflected in Australian legislation since 1904. These provisions protecting freedom of association serve the purpose of counteracting the power imbalance which is inherent in the relationship of employees and employers.

However, the current freedom of association provisions of the *Fair Work Act* are not operating with sufficient certainty. This is in part due to the expansion of the two legislative categories of industrial activities and adverse action. However the most problematic area of these provisions is in the court's application of the causal link between these two categories. In particular, there is no mechanism for the court to reconcile the dual roles of employees who are also union representatives.

As has been seen, the expanding category of industrial activities is necessary in light of the changing role of unions within Australian labour law. With the change from a primary focus on compulsory conciliation and arbitration to enterprise bargaining came a diversification in the roles played by unions. As such, the breadth of the provisions required to protect employees who play a role in these unions has necessarily expanded.

Similarly, the definition of adverse action has expanded to encapsulate a greater range of acts which may affect an employee in their employment. This is a reflection of the fact that the true benefit of work extends beyond mere financial gain to personal fulfilment and self respect. Legislative protection of a broad range of actions thus protects employees in the whole of their employment capacity.

The difficulty lies in the application of the causal link between the prohibited industrial reasons and the adverse actions taken by employers, when the court needs to determine what was in the mind of an employer when they made the decision to take adverse action against an employee. This has most recently been illustrated by the series of *Barclay* decisions. The test for the court to apply has been settled as the subjective test, however objective circumstances can and do operate to vitiate the evidence of decision makers. It is therefore uncertain, especially in light of the dual roles of employee union delegates, whether a court will interpret a particular decision

as being directed at the employee as a union delegate, or at the employee in their employment capacity.

The result of this uncertainty is that employers are unable to make confident decisions relating to their employees and employees with union associations are being protected in their employment to the extent that they are 'untouchable'. This is amplified by the legislative provisions which impose a reverse onus on employers, and the requirement that the reason need only be one of multiple reasons. Together with the reverse onus of proof, requirement that the reason need only be one of multiple reasons, the unlimited potential award of compensation and six year time limit, this has created a serious issue in Australian labour law.

I submit that there ought to be a method for the courts to reconcile the issue with the dual roles of employees who concurrently hold the position of union delegate. A determination which holds that the loyalty an employee owes to their union will override their loyalty to the employer in times of industrial activity has the potential to provide clarity for both employees and employers. An employee will be free to act in an industrial capacity without fear of adverse action simply on the basis that the employer was able to dissociate this industrial capacity from their employment capacity when making the decision.

The reason / cause distinction which is effectively used in freedom of association cases involving the specific category of rights to an industrial instrument or award is not appropriate to be applied to the whole of protection provisions. This is due to the fact that the application of this test has the potential to render the protections illusory by being unduly specific. An employee union representative who has adverse action taken against them because they are more expensive, or more disruptive are being treated adversely because of their position. The object of the Act to preserve the rights to freedom of association cannot be satisfied by the imposition of this test.

The final solution which was discussed was a determination as to whether or not a comparator is appropriate when considering why an action was taken. This test has the potential to be helpful in some situations, but not in others. It is not appropriate to recommend this as a test to be applied in all cases, as employee union representatives are necessarily different from employees who do not hold industrial positions. This type of comparison may be a useful factor in the court's decision as to what was in the mind of a decision maker, but it should not be determinative.

The balance between employees and employers within Australian labour law will always, necessarily, involve an element of uncertainty. However, application of the causal link, in light of the breadth of the associated legislative provisions, is too tenuous to provide a 'balanced framework' for employers and employees. In particular, courts have no mechanism for reconciling the dual capacity of employee union representatives. It is submitted that a determination that an employee cannot be disciplined or dismissed for an action undertaken in support of their union, by reason of the fact that their union loyalties override their employment loyalties, has the potential to increase certainty in this area.

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