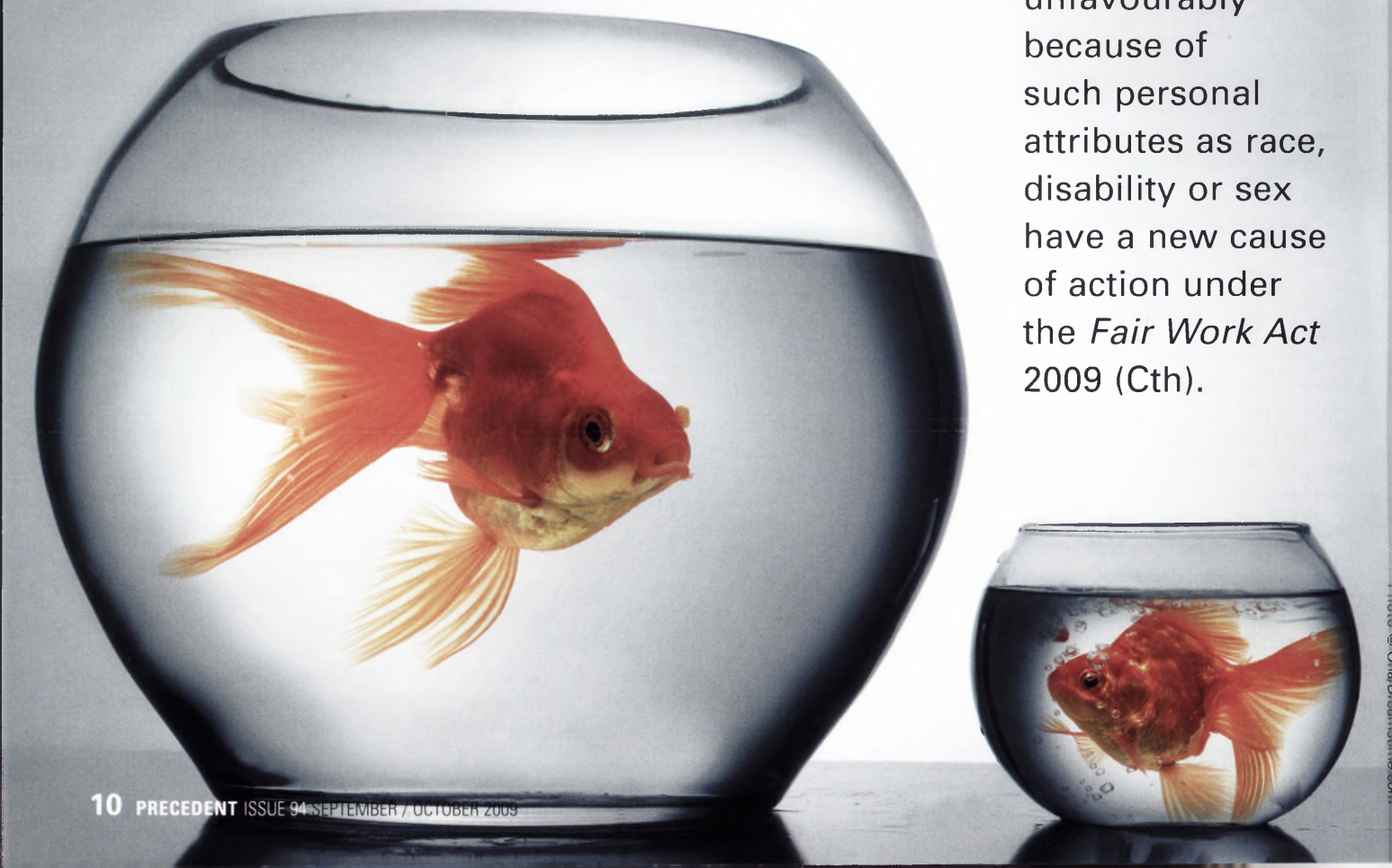
Protection from dismissal and 'adverse action' for discriminatory reasons

The new *Fair Work Act* provisions

By Terri Butler

Workers who have been treated unfavourably because of such personal attributes as race, disability or sex have a new cause of action under the *Fair Work Act* 2009 (Cth).



The *Fair Work Act* departs from its predecessor in that it provides a general cause of action for discrimination. Previously, Commonwealth industrial laws provided a remedy for dismissal because of a range of attributes, but not a general discrimination cause of action.

In contrast, the *Fair Work Act* provides:

'351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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

Complainants and practitioners have had to choose between state and commonwealth discrimination laws; s351 now gives them a further alternative.[1]

Practitioners have to attempt to predict how the new law will operate, and also to anticipate the differences, to help clients make the right choice as to jurisdiction.

Anti-discrimination laws are not new. Since 1975, the Commonwealth and states have enacted various legislation providing for complaints-based discrimination causes of action.

Also, and as indicated above, since the introduction of the *Industrial Relations Reform Act* amendments in 1993,[2] the Industrial and then Workplace Relations Acts have prohibited dismissal for substantially the same discriminatory reasons[3] as appear in s351. (Note the addition of 'carer's responsibilities' in s351.)

The new provision is the direct descendant of that unlawful termination prohibition. It adapts the list of attributes, which list was itself derived from international conventions.[4]

Even older is a prohibition on termination for what might be considered 'freedom of association' reasons. Remedies for what can broadly be called 'freedom of association breaches' have themselves evolved since the first such provision was included in what was then the *Conciliation and Arbitration Act* 1904. It provided for offences relating to terminating an employee's employment for particular proscribed reasons, which would now be considered 'freedom of association' reasons, including union membership. The concept of 'adverse action', and the 'reverse onus' which, as will be seen, are both central to the new cause of action, have developed from freedom of association provisions.

To be understood, therefore, the new cause of action has to be considered in light of the jurisprudence of anti-discrimination laws generally, unlawful termination, and the freedom of association provisions of successive industrial relations laws.

There are a number of aspects that are included for discussion in this article:

The *Fair Work Act* departs from its predecessor in providing a new general cause of action of discrimination.

- 'adverse action';
- the applicable test; and
- the presumption in favour of the complainant.

There are many other issues that would inform the decision as to jurisdiction: differences as to exemptions and defences, procedure, remedies, and costs. They are beyond the scope of this article.

ADVERSE ACTION

The types of action that are prohibited are set out in s342(1) of the Act and include dismissal, injury in employment, alteration of a person's position to their prejudice, or discrimination (the latter being somewhat circular in the context of the discrimination provision in >>

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s351). Threats to take action and organising action are also included.

The adverse action definitions are very similar to the current freedom of association 'prohibited conduct' provisions (see, for example, s792(1) of the current legislation). The provisions setting out the type of conduct that can be the subject of a freedom of association claim have been construed broadly. In *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)*, Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ:[5]

- referred to injury in employment as a term which '*covers injury of any compensable kind*'; and
- referred to alteration to an employee's position to the employee's prejudice as:

> '... a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question.'

Types of conduct that have fallen within injury in employment or alteration to one's prejudice have included suspension or stand down,[6] including on full pay – both for depriving the employee of the opportunity for work, and for being demeaning disciplinary action, and transfer involving onerous travel requirements.[7]

The test – injury and alteration

In *Unsworth v Tristar Steering and Suspension Australia Limited*,[8] the Federal Court considered injury and alteration, referring to a 'before and after test':

> '24 A "before and after" test is usually applied to see whether there has been any injury to, or prejudicial alteration of, the position of the employee by reason of any act of the employer ..., it was succinctly put by Kenny J in *Australian Workers' Union v BHP Iron-Ore Pty Ltd*[9] as follows:
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> "Before s 298K(1) can apply, it must be possible to say of an employee that he or she is, individually speaking, in a worse situation after the employer's acts than before them; that the deterioration has been caused by those acts; and that the acts were intentional in the sense that the employer intended the deterioration to occur."'[10]

It follows that the 'adverse action' provisions will be construed broadly, consistently with their predecessors such as s792(1) of the *Workplace Relations Act*.

THE TEST FOR DISCRIMINATION

The test in s351(1) appears to be fairly straightforward. It relates to a situation where, because of someone's attribute (sex, race, age, disability, etc), they are subjected to adverse action. (Note that 'because of' likely means situations where the discriminatory reason is only one of a range of reasons for the action: s360.)

Discrimination law has a more nuanced approach, in that it recognises two main types of discrimination: direct and indirect.

Section 351 is similar to direct discrimination. It is unlikely that it would apply to factual situations that could give rise to indirect discrimination claims. Indirect discrimination is for situations where the cause of conduct is not discriminatory, but the effect of the conduct is discriminatory. Indirect and direct discrimination (under Commonwealth anti-discrimination legislation) have been considered mutually exclusive in the Courts.[11]

The Australian Human Rights Commission sought an amendment to the Fair Work Bill, through the Senate Inquiry,[12] to provide that s351 relates to both direct and indirect discrimination. This did not occur and, contrary to the apparent views of some commentators,[13] it seems the better view is that s351 provides for direct discrimination only.

For direct discrimination, a complainant would have to show that their attribute (say, sex) is one of the grounds

of, or part of the basis for, or a reason for,[14] a particular incident or incidents of adverse (less favourable) treatment. That test is similar to that set out in s351(1). However, for anti-discrimination law claims, that of itself is not sufficient to make out direct discrimination.

For direct discrimination, to demonstrate that the less favourable treatment is on the grounds of or on the basis of the attribute, a complainant must show that they have been treated less favourably than someone without that particular attribute would have been treated in circumstances that are the same or are not materially different.

This test is notoriously difficult to apply. It involves pointing to a 'hypothetical comparator', and comparing the position of the complainant to that of the hypothetical other-sexed/other-aged/different-race/non-impaired, etc, person, and working out what 'circumstances' have to be taken into account.

The High Court considered the issue in *Purvis v New South Wales*.[15] A student with a functional disorder had an incapacity or diminished capacity to control his behaviour. The student was violent.

The student asserted that the violence effectively formed part of the disability. In comparing the way he was treated, with the way someone without his disability would have been treated, the court should look at a student who did not have the poor behaviour (including violence) that arose from the disability. The Court rejected that proposition. Gleeson CJ noted that students with no disorder but who were still as violent would also have been suspended and expelled.[16]

The majority held[17] that the 'circumstances' are:

> '... all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the 'discriminator'. It would be artificial to exclude ... from consideration some of these circumstances because they are identified as being connected with that person's disability. ...'

In *Gauld v Qld Breweries*,[18] the Anti-Discrimination Tribunal Queensland, applying *Purvis*, took a similar approach to an injured worker. Mr Gauld had an impairment that prevented him from working safely. The Tribunal held that the 'circumstances' included someone who was not able to work for a long period, who had been on paid leave for a long period, and who was not fit to work, among other things.

In effect, the Tribunal said: put aside the fact of the impairment. Would a person *without* the impairment, but who could not safely work, have been treated any more favourably?

Of course, the answer was no and Mr Gauld's claim for direct discrimination failed.

Purvis and *Gauld* make clear the difficulties faced by complainants in meeting the 'hypothetical comparator' test.

From 8 July 2009, federal disability discrimination laws were amended[19] to seek to ameliorate the decision in *Purvis*, including additional provisions about reasonable adjustments, and a specific change for injured workers. Those amendments are beyond the scope of this paper.

The absence of this test in s351(1) (combined with the burden of proof discussed below), would seem to make it easier for the complainant to claim for discrimination under that section, than it would be to claim under anti-discrimination laws. That is:

- instead of having to show that a complainant was treated less favourably than someone else would have been, it is sufficient to show that they have been treated 'adversely';
- complainants would seem likely to be able to avoid embarking on a hypothetical exercise of comparing their own position with that of a person without the attribute – they can just focus on showing that their age/sex/etc, was one of the reasons for the adverse action.

However, decisions in relation to s659 and its predecessors often do compare the position of the terminated employee with that of employees without the relevant attribute. So, it may be that the difference is one only of emphasis. That is, instead of it being a jurisdictional pre-requisite (as in anti-discrimination legislation cases) to show that the complainant has been treated differently to others without the complainant's attribute, it would likely be an issue (and probably an important one) considered in determining whether the facts support the proposition that the reasons for the adverse action included the sex/race/age/disability, etc, attribute.

This is particularly the case because, for reasons discussed below, discrimination claims generally depend on inferences >>

How the new law is likely to operate, and its differences with state laws, will inform the decision as to jurisdiction.

being drawn from the whole of the facts and circumstances of the case.

There is another significant difference between industrial law claims and most anti-discrimination law complaints: the presumption in favour of the complainant.

PRESUMPTION IN FAVOUR OF THE COMPLAINANT

The *Workplace Relations Act* cast the burden of proof on (for the purposes of our discussions) the employer, by including a presumption that the conduct was carried out for a proscribed or prohibited reason.

The *Fair Work Act* contains a similar presumption: the employer must prove, to the civil standard, that the reasons for the action did not include a discriminatory reason.[20]

This 'reverse onus' goes some way to mitigating the difficulty faced by the complainant.

The employer will usually be better placed to lead direct evidence about the reasons for the adverse action. As has been recognised, this is something peculiarly within the knowledge of the employer.[21]

The employee's evidence will be about what the employer purported to be the reasons for the adverse action, and also, and generally more importantly, about facts and circumstances that cast doubt on any assertion by the employer that the reasons did not include a discriminatory reason.[22]

In the absence of the reverse onus, the employee would be at a significant disadvantage. The reverse onus goes some way to redressing that imbalance.

The operation of the reverse onus was considered in *Galvin v Renito Pty Ltd*.[23] In that case, Ryan JR applied the reasoning of Moore J in *Stojanovic v The Commonwealth Club Ltd*[24] to the operation of the then s170CK of the *Workplace Relations Act*:

> '28 His Honor adopted a formulation of the onus on the employer approved by the High Court of Australia … He found the employee was entitled to succeed if the evidence was consistent with the hypothesis that the employer was so actuated and that hypothesis was not displaced by the employer. He said:
>
> > "To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the defendant the onus of proving that which lies peculiarly within his own knowledge."'

In *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union*,[25] in dissent, Finkelstein J[26] observed that the presumption in the predecessor to new s361 did not arise where there is sufficient evidence to enable the court to make a positive finding whether conduct has been carried out for the alleged reason or with the alleged intent.

A complainant may find a claim under the *Fair Work Act* less onerous because of the presumption in their favour and the absence of the statutory requirement to point to the treatment that would have been afforded to a hypothetical comparator.

However, it could be argued that there will be little practical difference in running the employee's case because:

- notwithstanding the reverse onus, the complainant will usually have to bring evidence to contradict the employer's evidence as to the reasons for the adverse action – that is, if the employer leads evidence that the

reasons were other reasons, which did not include sex/race/age/disability, etc, then that evidence, *if uncontested or if otherwise accepted*, would likely discharge their onus and the employee's claim will fail;

- the question of comparison with other employees without the attribute will likely still be relevant to the court's consideration of what the reasons were for the adverse treatment:
  - to meet their burden under s361, an employer might point to other employees, without the attribute, who suffered the same treatment; or
  - to contradict an employer's argument that discrimination did not form part of the reasons for the adverse treatment, an employee might point to inconsistent treatment, compared to persons without the attribute.

An example of how the comparison process might work under a *Fair Work Act* claim can be found in *Barhoum v All Districts Coating Pty Ltd & Anor*.[27] In that case, Federal Magistrate Nicholls compared the position of the complainant, who had been dismissed, with that of his non-injured colleagues, who had been dismissed but also re-employed by an associated company.

> 'In the freedom of association context, the Federal Court has decided that doing something for reasons that include a prohibited reason implies 'singling out' – ie treating differently – employees or classes of employees: see *McIlwan v Ramsey Food Packaging Pty Ltd*.[28] Of course, this also accords with the ordinary meaning of the word 'discrimination': differentiating, making distinctions, treating people according to the group, class, or category to which that person belongs rather than on individual merit.'

So, even in the absence of a statutory test about whether someone has been treated 'less favourably than a person without the attribute in circumstances that are the same or not materially different', comparisons with other employees will remain relevant. However, and unlike anti-discrimination legislation matters, there is no express 'hypothetical-comparator' provision.

Further, the treatment of others without the attribute would be taken into account as part of the exercise of considering all of the relevant facts and circumstances, not as a discrete test.

CONCLUSION

The new cause of action is a significant development and must be considered as an option for workers who have been discriminated against. The issues canvassed, along with a number of other factors, will inform the decision as to jurisdiction. ■

Notes: **1** See para 140, explanatory memorandum. **2** *Industrial Relations Reform Act* 1993 (Cth). **3** *Industrial Relations Act* 1988, s170DF, and following the Work Choices amendments to the *Workplace Relations Act* 1996, s659. **4** The Termination of Employment Convention; the Termination of Employment Recommendation, 1982, which the General Conference of the International Labour Organisation adopted on 22 June 1982; in relation to sexual preference, age and physical and mental disability, the Convention concerning Discrimination in respect of Employment and Occupation; in respect of parental leave, the Family Responsibilities Convention and Recommendation. **5** [1998] HCA 30; (1998) 195 CLR 1 at 18. **6** *Community & Public Sector Union v Telstra Corporation Ltd* [2001] FCA 267; (2001) 104 IR 195 at 199. **7** *Byrne v Australian Ophthalmic Supplies Pty Ltd* [2008] FCA 66. **8** [2008] FCA 1224. **9** [2001] FCA 3; (2001) 106 FCR 482 at [54]. **10** References omitted. **11** *Australian Medical Council v Human Rights and Equal Opportunity Commission* (1995) 68 FCR 46 at 55 per Sackville J. **12** At para 36 of its submission of 23 January 2009. **13** 'New bill widens reach of discrimination regime, says lawyer', *Workplace Express*, 5 December 2008. **14** There are different formulations in the various legislation. **15** [2003] HCA 62; 217 CLR 92; 202 ALR 133; 78 ALJR 1 (11 November 2003). **16** At para 11. **17** At para 224. **18** *Gauld v Qld Breweries Pty Ltd* [2007] QADT 20 (6 August 2007). **19** *Disability Discrimination and Other Human Rights Legislation Amendment Act* 2009 (Cth). **20** Section 361. **21** *General Motors Holden Pty Ltd -v- Bowling*, referred to below. **22** *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257. **23** [1999] FCA 1005. **24** (Industrial Relations Court of Australia, unreported, 8 December 1995). **25** [2001] FCA 349 (4 April 2001). **26** At para 219. **27** [2008] FMCA 172. **28** [2006] FCA 828 at paragraph 347, cited with approval in *CPSU, the Community and Public Sector Union and Anor v Commonwealth of Australia* [2006] FCA 1589.

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