

ADVERSE ACTION PROTECTIONS UNDER THE *FAIR WORK ACT*: FASHIONING THE FASHIONABLE

THE HON CHRISTOPHER JESSUP*

The concern of this paper is the adverse action prohibitions in pt 3-1 of the *Fair Work Act 2009* (Cth) (the ‘Act’). They are the subject of divs 3 and 4 of that Part. Broadly, div 3 deals with the protection of those who have, or who exercise, ‘workplace rights’; and div 4 deals with the protection of those who engage in ‘industrial activities’. The Act renders unlawful conduct by others that has a tendency — to use a neutral expression at this point — to compromise the enjoyment of workplace rights or the ability to engage in industrial activities.

Recently, at a Victorian Bar seminar, Justin Bourke QC suggested that the adverse action provisions were ‘the new black’.¹ He had a point. Over about the last 10 years or so, these provisions have been much in fashion, as their forebears had been at various times previously. Then, as now, the popularity of the provisions was in no small measure the result of the reverse onus of proof section, which has always been a feature of the legislation and is now to be found in s 361 of the Act. And it is with a brief historical survey that I propose to commence.

At the point of its repeal in the late 1980s, s 5 of the *Conciliation and Arbitration Act 1904* (Cth) made it an offence for an employer to ‘dismiss an employee, ... [to] injure him in his employment, or [to] alter his position to his prejudice, by reason of the circumstances that the employee’ had been a member or officer of a registered organisation, or proposed to become a member or officer, or had engaged in conduct of various specified kinds (or in some instances proposed to do so), all connected with the integrity of the system of awards and certified agreements for which that Act provided, or with protecting the viability of organisations and their place in that system. Although criminal in nature, proceedings under s 5 could be taken by any person² and tended to be taken in the name of the dismissed or injured employee or his or her organisation.

There was something of a spike in the popularity of s 5 in the mid-1970s, most famously exemplified in a case called *General Motors-Holden’s Pty Ltd v Bowling*³ which reached the High Court, and to which I shall return. But matters settled down and, by the time of the enactment of the *Industrial Relations Act 1988* (Cth), this provision had resumed its historical low profile on the landscape

* Adjunct Professor, Faculty of Law, Monash University; Judge of the Federal Court of Australia 2006 to 2017. The paper was presented on 22 August 2017 at the Monash University Law Chambers in Melbourne at a seminar for the Monash Centre for Commercial Law and Regulatory Studies and the Australian Labour Law Association.

1 Justin Bourke, (Speech delivered at Owen Dixon Chambers, 11 November 2015).

2 *Ferguson v George Foster & Sons Pty Ltd* (1969) 14 FLR 370, 372–3.

3 (1976) 12 ALR 605 (‘Bowling’).

of litigation and, for that matter, public interest.⁴ Consistently with that, s 334 of that Act effectively re-enacted the previous s 5 with drafting amendments only.⁵

Although some changes of substance were made in 1992⁶ and 1993,⁷ it was the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) that introduced amendments which were significant in the philosophy, and the practicalities, of what had by then become a series of related provisions. Those provisions were now to be found in pt XA of the renamed *Workplace Relations Act 1996* (Cth) (*'Workplace Relations Act'*), headed 'Freedom of association'.⁸ That heading reflected the change in philosophy to which I referred. No longer was the purpose of the provisions the protection of organisations and their members, and the viability of the activities in which they engaged. Now, the objects (as they were called) of the provisions were 'ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association';⁹ and

- (a) to ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations; and
- (b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations.¹⁰

Consistently with this changed focus, many of the protections in the new pt XA now worked both ways, as it were. For example, it was now a contravention of the *Workplace Relations Act* for an employer to dismiss an employee because he or she was or proposed to become, or was not or proposed not to become, a member of an industrial association.¹¹ The reference to an 'industrial association' was another marker of the new philosophy: the provisions were no longer confined in their operation to the circumstances of registered organisations. And direct prohibitions on broadly corresponding actions taken to the detriment of 'independent contractors' were, for the first time, introduced in relation to conduct by any person (amounting to an extension of the limited protections available to individuals who were not employees enacted as s 336 in the *Industrial Relations Act 1988* (Cth)).

4 The otherwise comprehensive report of the Committee of Review of Australian Industrial Relations Law and Systems, published in April 1985, did not deal with s 5: Keith Hancock, *Australian Industrial Relations Law and Systems: Report of the Committee*, (Australian Government Publishing Service, 1985).

5 In addition to which s 336 was new in point of substance, further to which see below.

6 *Industrial Relations Legislation Amendment Act 1992* (Cth).

7 *Industrial Relations Reform Act 1993* (Cth).

8 *Workplace Relations Act 1996* (Cth) pt XA, inserted by *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) sch 15(6).

9 *Workplace Relations Act 1996* (Cth) s 3(j).

10 *Workplace Relations Act 1996* (Cth) ss 298A(a)–(b).

11 *Workplace Relations Act 1996* (Cth) ss 298L(1)(a)–(b), as inserted by *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) sch 15 item 6.

A change of apparent practical importance in 1996 was to make contraventions of the provisions the subject of a civil pecuniary penalty only, rather than a criminal conviction, as previously.¹² As I shall recount presently, however, this change proved to be something of a pyrrhic victory for those who assumed that the new civil approach would bring with it procedural simplifications and smooth the road to securing positive findings of contraventions.

Although sweeping in other respects, the 2005 amendments¹³ do not require specific mention in the present context.

Which brings us to the *Act* itself, enacted in 2009. Rather than engage in a detailed narrative of the content of what has become a rather extensive package of provisions, I propose to identify some of the more significant features of them, and some of the issues that have occupied the energies of the judiciary in recent years.

The structure of divs 3 and 4 of pt 3-1 is simple enough. The prohibitions in those Divisions operate at three levels: first, a statement of the prohibitions themselves, in ss 340 and 346; secondly, corresponding definitions of what is a workplace right and what is industrial activity, in ss 341 and 347 respectively; and thirdly, a detailed listing — also effectively an interpretation provision — of the acts and omissions that constitute ‘adverse action’ in s 342. The linkage between the adverse action and the workplace right or industrial activity on which reliance is placed is the conjunction ‘because’ in each of ss 340 and 346. Thus s 340(1)(a) of the *Act* provides that

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

- (i) has a workplace right; or
- (ii) has, or has not, exercised a workplace right; or
- (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right

And s 346 of the *Act* provides that

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).

The first thing one immediately notices about these sections is their Janus-like character: they protect exercising, or not exercising, a workplace right, and engaging, or not engaging, in industrial activity, for example. Thus what I have

12 *Workplace Relations Act 1996* (Cth) s 298X.

13 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

described as the philosophy on which the 1996 amendments were based has remained in the DNA of the legislation. Indeed, sub-paras (b) and (c) of s 346, and s 347 which is therein referred to, take this drafting approach to its logical extreme. It is provided in s 347(b) that '[a] person *engages in industrial activity* if the person ... does, or does not ...' (emphasis in original) do various things, such as becoming 'involved in establishing an industrial association' and complying with the lawful request of such an association. Then sub-paras (c)–(g) of s 347 list the industrial activities which, if *not* engaged in, give rise to the protection in s 346(c), such as complying with an unlawful request made by an industrial association.

I do not propose to deal with every dimension of ss 341 and 347, but I shall note a couple that have produced some interesting outcomes, and which demonstrate the potential reach, and the limitations, of the adverse action provisions.

One of the workplace rights which an employee (but not anyone else) has under s 341(1)(c)(ii) is the ability 'to make a complaint or inquiry ... in relation to his or her employment'. There are two issues here: what is meant by the 'ability' to make a complaint or inquiry, and what content does the apparently innocuous phrase 'in relation to his or her employment' have?

As to the first, it has been said that, in a common law system, everything is lawful except what is unlawful. So far as I know, there is no law against making complaints, much less against making inquiries. On this view, every employee has the ability to make a complaint or inquiry. However, in what appears to be the only occasion on which the 'ability' point was specifically considered, the Court said

[T]he complainant must hold a genuine belief in the truth of the matters communicated as a grievance or accusation. In the absence of such a belief ... the complaint would not be a genuine grievance or finding of fault.

Further, the grievance or accusation must be communicated for a proper statutory purpose, which would, at least, entail giving the employer notice of the relevant matters or securing information, protection, redress or some other appropriate response. ...

[T]he requirement that the complaint be one that the employee 'is able to make' in relation to his or her employment suggests that there are complaints which the employee is not able to make in relation to his or her employment. The ability to make a complaint does not arise simply because the complainant is an employee of the employer. Rather, it must be underpinned by an entitlement or right. The source of such entitlement would include, even if it is not limited to, an instrument, such as a contract of employment, award or legislation.¹⁴

As to the second point, it was held in *Construction, Forestry, Mining and Energy Union v Pilbara Iron Company (Services) Pty Ltd [No 3]* that an

14 *Shea v TRUenergy Services Pty Ltd [No 6]* (2014) 314 ALR 346, 439–40 [623]–[625]. An appeal against this judgment was dismissed but the Full Court did not find it necessary to rule on the construction of this aspect of s 341(1)(c)(ii): *Shea v EnergyAustralia Services Pty Ltd* (2014) 242 IR 159.

indirect relationship between the subject of the complaint, for instance, and the complainant's employment will be sufficient to give rise to a workplace right.¹⁵ It is apparent from this judgment itself, and from others which have followed it, that the provision is not to be construed as requiring the actual subject-matter of the complaint or inquiry to be the complainant's own employment. For example, in the *Pilbara* case, each of the following was held to be a complaint in relation to the complainant's employment:

- a complaint about management's refusal to investigate a collision between two vehicles on the work site (not involving the complainant himself either as driver or as passenger) on the ground that the incident was not serious;¹⁶
- a complaint that another employee had been required to return to work after a 10-hour break, instead of the usual 12-hour break.¹⁷

This generous approach has been followed in later cases,¹⁸ but there have likewise been judgments that would be hard to defend if that approach were correct.¹⁹ The matter appears not to have been considered by a Full Court.

The protection given by ss 346(b) and 347(b)(iv) to someone who does not comply with a lawful request made by, or a requirement of, an industrial association has proved a productive opportunity for enforcement for the Australian Building and Construction Commissioner (and his predecessor). When an industrial association makes a demand on the employer of its members, that may be understood as a lawful request or requirement within the meaning of s 347(b)(iv). If the employer does not comply, and adverse action is taken by the association, its members or officers, then, subject to satisfaction of the other relevant statutory requirements, there will have been a contravention of s 346(b). The operation of sub-para (iv) of s 347(b) is not confined to the context of a person's participation, or non-participation, in the affairs of the association of which he or she is a member.²⁰

One aspect of the adverse action provisions which has not, so far as I can see, yet become fashionable, is that which relates to independent contractors. Three of the seven items in the table in s 342(1) deal with this subject, and appear to have the potential to reach into a number of areas that have, to date, been little explored. It would be adverse action, for example, for the principal to a contract to alter the position of the independent contractor to the latter's prejudice.²¹ Albeit that it is not immediately apparent what the legislature had in mind when it referred to the 'position' of the independent contractor, this provision appears to have the potential to render justiciable under pt 3-1 a range of contractual disputes which

15 [2012] FCA 697(29 June 2012) [64] ('*Pilbara*').

16 *Ibid* [68].

17 *Ibid* [70].

18 *Walsh v Greater Metropolitan Cemeteries Trust* (2014) 243 IR 468, 476 [41]–[42]; *Milardovic v Vemco Services Pty Ltd (admin apptd)* [2016] FCA 19 (29 January 2016) [68].

19 *Rowland v Alfred Health* [2014] FCA 2 (15 January 2014) [37]–[38]; *Regulski v Victoria* [2015] FCA 206 (13 March 2015) [146].

20 *Australian Building and Construction Commissioner v Australian Manufacturing Workers' Union* [2017] FCA 167 (1 March 2017) [179]–[194] ('*The Australian Paper Case*').

21 *Act* s 342(1) item 3(c).

otherwise have nothing to do with the objects or general scope of the *Act*, and in relation to which, as we shall see, the alleged perpetrator bears the onus of proof on important matters.

It would also be adverse action for the principal to a contract to refuse to engage the independent contractor.²² Read literally — and there appears to be no reason to proceed otherwise — a shortlisted unsuccessful tenderer would have a cause of action against the principal.²³ (Subject, of course, to demonstrating the existence of a workplace right, something which, given the common-rule coverage of modern awards, would rarely be problematic.) So would every employee of such a tenderer, and an association which was entitled to represent the industrial interests of the employee,²⁴ so long as the employee (in either case) was affected by his or her employer's failure to secure the tender (another bar which, in practice, would often not be difficult to cross).

Might it be rejoined that these instances are theoretical only, and are unlikely to arise under pt 3-1 because the reason for the adverse action would never be a workplace right or industrial activity? I am not so sure. If the workforce of the unsuccessful tenderer, for example, were members of a union with whom the direct employees of the principal were not on friendly terms, there might indeed be a pt 3-1 case lurking somewhere there.

Each of ss 340 and 346 provides that adverse action must not be taken 'because' of what I shall call the protected circumstance. It is this aspect of the provisions that has been much litigated in recent years. There is no difficulty with the word 'because' where there is a close alignment between the putative contravenor's reasons and the terms in which the protected circumstance is expressed in the *Act*. For example, if the person becomes a member of an industrial association and is thereupon dismissed by the employer for that reason, there will have been a contravention of s 346.

The difficulty arises in those situations in which the protected circumstance is broadly or generically expressed, as many of them are. Take s 347(b)(i), which makes it industrial activity for a person to 'become involved in establishing an industrial association'. The person may be an employee who has done something which would conventionally justify some kind of disciplinary sanction (ie some kind of adverse action) but which, unbeknownst to the employer, happened to constitute an involvement of the kind referred to in the sub-paragraph, such as using his or her access to the names and email addresses of other employees for the purpose of making contact with them in the establishment of the association. Again, in a similar situation the employer may be aware that the activity was related to the establishment of an association, but be unconcerned about that, being troubled only by the fact that the names and email addresses were accessed

22 *Act* s 342(1) item 4(a).

23 See *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd [No 2]* (2013) 232 IR 290, 325 [138]–[139] ('*McCorkell*'); reversed, but not on this point, by *Victoria v Construction, Forestry, Mining and Energy Union* (2013) 218 FCR 172.

24 As was the case in *McCorkell* (2013) 232 IR 290.

without authority. In either of these situations, would the presumptive disciplinary sanction have been imposed, or threatened, ‘because’ the employee became involved in establishing an industrial association?

Traditionally, the answer would have been, it depends on the terms of the particular prohibition. Harking back to s 5 of the *Conciliation and Arbitration Act 1904* (Cth) for a moment, it was an offence to dismiss an employee, for example, by reason of the circumstance that he or she

being an officer, delegate or member of an organization, 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 organization or its members, being an act or thing done within the limits of authority expressly conferred on him [or her] by the organization in accordance with the rules of the organization.²⁵

On one view — perhaps the more grammatically satisfying view — it would have been an offence to dismiss someone who was an officer of an organisation and who had done something which was within the limits of his or her authority under the rules because he or she had done that thing, whatever it happened to be, and whether or not the employer knew that the thing done was within that authority.

Under another aspect of the former s 5, however, it was an offence to dismiss an employee by reason of the circumstance that he or she was entitled to the benefit of an award.²⁶ Thus, someone who was dismissed for taking a break from work to which he was entitled under the relevant award failed in his s 5 prosecution because the employer proved that the manager who made the decision to dismiss was ignorant of the terms of the award.²⁷ It was not to the point that what the employee did, and for which he was dismissed, was to exercise a right which he had under the award.

It may be that the draftsman of ss 340(1)(a)(i) and (ii) of the *Act* considered that making explicit the distinction between having, and exercising, a workplace right, and capturing both of them under the prohibitions expressed in the section, would avoid outcomes such as this. Since the judgments of the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,²⁸ and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*,²⁹ however, this may be doubted. I take it that both cases are well-known to the present audience, but it is necessary here to dwell briefly on the particular provisions of the *Act* under which they arose.

In *Barclay*, an employee who was a union officer had circulated an email which implied the existence of a practice of fraudulently manipulating data prepared in the course of responding to a government audit. He was disciplined for that. He sued his employer under ss 347(b)(iii) and (v) of the *Act*, which made it industrial activity to participate in a lawful activity organised or promoted by an industrial

25 *Conciliation and Arbitration Act 1904* (Cth) s 5(1)(f).

26 *Ibid* s 5(1)(b).

27 *Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156.

28 (2012) 248 CLR 500 (*‘Barclay’*).

29 (2014) 253 CLR 243 (*‘BHP Coal’*).

association, or to represent or advance the views, claims or interests of an industrial association. Given that the employee, by sending the email, had done those things, the question was whether he had been disciplined because of it. The Court at first instance held not³⁰ and, after a reversal on appeal,³¹ the High Court restored the judgment of the trial judge.³²

In short, the point on which it did so was that the ‘because’ aspect of s 346 was to be determined by reference to the decision-maker’s actual state of mind.³³ Thus it was not conclusive that adverse action had been taken because the employee did something which happened to constitute industrial activity under s 347: the correct inquiry, rather, was whether the adverse action was taken because, for example, the employee represented or advanced the views, claims or interests of his union.

In *BHP Coal*, it was a reason why the employee had been dismissed that he had displayed an offensive sign to other employees on their way to work. He did that as part of his participation in a picket line organised by his union, which had been held, at trial, to be a lawful activity within the meaning of s 347(b)(iii)³⁴ (the judgment itself having been reversed on appeal). But it was not that circumstance which constituted the employer’s reason for the dismissal: it was the bare fact that the sign had been displayed to the other employees.³⁵ As it was put by Gageler J in that case:

The protection afforded by s 346(b) is not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity. It is protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity.³⁶

I took,³⁷ and I still take, the view that this represents the state of the law after *BHP Coal*.

These two High Court judgments have been very influential in a number of cases in which the objective facts giving rise to the adverse action fitted the terms of the statute but in which the thinking of the decision-makers did not. I shall mention two of them which reached the Full Court.

30 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

31 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212.

32 *Barclay* (2012) 248 CLR 500, 524, 543, 547–8.

33 *Barclay* (2012) 248 CLR 500, 517 [44]–[45], 542 [127], 546 [146].

34 *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [No 3]* (2012) 228 IR 195, 225–6 [85], 227 [90], 233 [108], [111].

35 That is something of an oversimplification of the employer’s reasons, but it will suffice for the purposes of the present discussion.

36 *BHP Coal* (2014) 253 CLR 243, 269 [92].

37 *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2015) 231 FCR 150, 160 [30] (*‘Endeavour Coal’*).

In *Endeavour Coal*,³⁸ a maintenance worker engaged at a mine on weekend shift (Friday to Sunday each week) had taken a total of 29½ days of personal leave over a period of about 32 months. In all but one instance, this leave was his entitlement under the relevant agreement. When he took the leave, he was, therefore, exercising a workplace right. But the mine management had a problem with that, and transferred the worker to the weekday shift, which attracted lower penalties than the weekend shift. This transfer was adverse action. Rejecting the case under s 340, the primary judge held that the reason for the transfer ‘was the lack of predictability in ... [the worker’s] attendance ... not the fact that he had previously exercised his rights to personal/carer’s leave’.³⁹ Upholding this reasoning, the Full Court rejected a submission made on the worker’s behalf that the case was to be distinguished from *Barclay* and *BHP Coal* on the basis that the very act of the worker which provided the reason for the adverse action was his exercise of the workplace right.⁴⁰ Applying *BHP Coal*, a majority of the Full Court found no error in the primary judge’s conclusion that it was not *the entitlement as such* which constituted that reason.⁴¹

In *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd*,⁴² a mine worker applied to take annual leave on two specific days. Upon that application being rejected, he told his manager that he was ‘going to be sick anyway’ and would obtain a medical certificate which the manager would find ‘very hard to challenge’.⁴³ The worker acted exactly as he had predicted: he absented himself from work on the two days in question, and provided a medical certificate which covered those days. Further, the worker, his wife and the doctor gave evidence that the worker had indeed been unwell on these days. That evidence was accepted.⁴⁴ The worker’s absence was, in the circumstances, his entitlement under the relevant agreement. But the worker was dismissed. The decision-maker gave evidence that he did not believe that the worker was unwell on the days in question and did not believe the medical certificate. That evidence was also accepted.⁴⁵ The primary judge found that, in the decision-maker’s thinking, the reason for the dismissal was not that the worker had exercised his entitlement to sick leave, but that he had been dishonest in the way he set up circumstances which would give rise to that entitlement, when the real reason that he desired to be absent from work on the days in question was unrelated to his state of health.⁴⁶

38 Ibid.

39 *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* (2013) 234 IR 190, 230 [177].

40 *Endeavour Coal* (2015) 231 FCR 150, 161 [35], 169 [77].

41 Ibid 161 [34]–[35], 165 [49], 173 [91], [93].

42 (2015) 238 FCR 273 (*Anglo Coal*).

43 Ibid 275 [5].

44 *Construction, Forestry, Mining and Energy Union v Anglo Coal (Dawson Services) Pty Ltd* [No 2] [2015] FCA 265 (26 March 2015) [78]–[81].

45 Ibid [121].

46 Ibid [138].

Anglo Coal also went to the Full Court but, unlike *Endeavour Coal*, the appeal as such did not directly involve what I would call the *Barclay* point.⁴⁷ However, in the way the appeal unfolded in the Full Court, that point came to be considered, and it was held, by a majority, that there was no error in the primary judge's conclusion.⁴⁸

There was a strong dissent in each of *Endeavour Coal* and *Anglo Coal*. Yet applications for special leave to appeal to the High Court were unsuccessful in both instances.⁴⁹ Until some even more challenging fact situations emerge, the *Barclay* line of jurisprudence now seems to be settled.

This has given rise to what may be a point of distinction between s 351 and traditional anti-discrimination provisions to be found, for example, in the *Sex Discrimination Act 1984* (Cth). Although not otherwise the subject of this paper, s 351 is an adverse action provision in pt 3-1 of the *Act*. It proscribes the taking of adverse action against an employee or prospective employee 'because' of the latter's race, colour, sex, etc. There is every reason to think that this provision will be interpreted consistently with *Barclay*, that is to say, as involving an inquiry into the decision-maker's actual thinking. The traditional legislation, by contrast, involves an objective inquiry, the contravenor's reasons (where they are known or may be inferred) being no more than an evidentiary ingredient in that inquiry.⁵⁰

It is tempting to regard the *Barclay* line of jurisprudence as inconsistent with *Bowling*, or with at least some of the remarks made by Mason J in that case. I would not yield to that temptation. At base, *Bowling* was a case about evidence. Approval for the dismissal of Mr Bowling had been given by two directors of the employer who were not called. As was pointed out in *Barclay* itself, it will, generally, 'be extremely difficult to displace the statutory presumption in s 361 if no direct testimony is given by the decision-maker'.⁵¹

Which brings me to s 361 itself. Again, I should commence with a little history. Section 5 of the *Conciliation and Arbitration Act 1904* (Cth) made it an offence to dismiss (etc) an employee 'by reason of the circumstances' that he or she was a member of an organisation (etc). It was provided in sub-s (4) as follows:

In any proceedings for an offence against this section, if all the relevant facts and circumstances, other than the reason or intent set out in the charge as being the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was not actuated by that reason or taken with that intent.

47 Relevantly to the adverse action point, the only grounds of appeal were purely evidentiary ones, seeking to challenge the conclusion at trial that the decision-maker was not in fact motivated by the circumstances that the worker exercised his entitlement to sick leave.

48 *Anglo Coal* (2015) 238 FCR 273, 282 [37], 302 [133]–[135].

49 Transcript of Proceedings, *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2015] HCATrans 331 (11 December 2015); Transcript of Proceedings, *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd* [2016] HCATrans 142 (17 June 2016).

50 *Milardovic v Vemco Services Pty Ltd (admin apptd)* [2016] FCA 19 (29 January 2016) [61].

51 248 CLR 500, 517 [45].

This meant, to take a simple example, that it first lay upon the dismissed employee to prove that he or she was a member of an organisation and had been dismissed, and it then lay upon the employer to prove that the dismissal had not been by reason of that membership.

Now, s 361(1) provides as follows:

If:

- (a) in an application in relation to a contravention of this Part, it is alleged that a person took ... action for a particular reason ... ; and
- (b) taking that action for that reason ... would constitute a contravention of this Part;

it is presumed [in proceedings arising from the application] that the action was ... taken for that reason or with that intent, unless the person proves otherwise.

It will be noted that this provision says nothing about all the relevant facts, other than the reason or intent of the person taking the adverse action, first having to be proved before the reverse onus applies. Read literally, the section seems to be saying that all that is required of the dismissed employee is the making of an allegation as to reason or intent. This would mean, for example, that the employee (or other relevant moving party) did not have to prove the existence of the underlying factual circumstance by reason of which it was alleged that the adverse action was taken, such as union membership.

Section 361 has not, however, been read that way. At least in relation to provisions such as ss 340(1)(a) and 346 that proscribe the taking of an adverse action ‘because’ of a workplace right or industrial activity, it remains a requirement of the moving party’s case to prove that he or she had or exercised the right, or engaged (etc) in the activity.⁵² The same cannot be said, at least categorically, of an allegation of a contravention of s 340(1)(b) of the *Act* — which proscribes a forward-looking motive as distinct from a rearward-looking reason⁵³ — but there is an argument that, even then, the existence of the workplace right must first be proved by the applicant as a base from which to cast upon the putative contravenor the onus of proving that it was not to prevent the exercise of the right that the adverse action was taken.

It frequently occurs that, in conjunction with an adverse action claim under pt 3-1 of the *Act*, the applicant will allege that someone other than the direct contravenor has indirectly contravened the relevant provision by the operation of s 550 of the *Act*, which provides as follows:

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
- (2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:

52 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46, 75–6 [119].

53 See *Fair Work Ombudsman v Australian Workers’ Union* [2017] FCA 528 (17 May 2017) [73].

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced the contravention, whether by threats or promises or otherwise; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) has conspired with others to effect the contravention.

(emphasis in original)

Here there are two issues which arise in relation to the application of the ‘because’ provisions of pt 3-1.

The first issue arises from the necessity of establishing that there has been a contravention by the direct contravenor. He or she may not even be a party to the proceeding. There is a view that s 361 is a procedural provision intended to relieve the applicant from the onus of proving the state of mind of the respondent, and that it does not operate in relation to the state of mind of someone who is not a party.⁵⁴ The second issue arises from the need, in establishing derivative liability under s 550, to prove that the alleged secondary contravenor had, at the time, ‘knowledge of the essential facts constituting the ... contravention’.⁵⁵ In proving the presence of that knowledge, s 361 ‘does not usually apply’.⁵⁶

The final matter I desire to address is a procedural one, but an important one nonetheless. Although adverse action proceedings under pt 3-1 of the *Act* are civil, they are penal and the analogue of what is called the privilege against self-incrimination applies. This means at least that an individual party to such a proceeding may not be compelled to provide discovery or to answer interrogatories if the discovery or the answer would expose him or her to penal liability. But does the privilege go further? Does it entitle the individual to withhold filing a defence, either at all or until some later stage? Does it immunise him or her from the now customary obligation to file an outline of submissions, or contentions, before the commencement of the trial? If the answer to either of these questions is in the affirmative, how is that to be aligned with the obligation to conduct litigation efficiently arising under ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth)?

Ten years ago, in *Australian Securities and Investments Commission v Mining Projects Group Ltd*,⁵⁷ it was held that an individual respondent to a civil penal proceeding was not obliged to provide further and better particulars of his or her defence. There, a defence had in fact been filed, but it was held that, in such a proceeding, there was no obligation to file a defence and, if the respondent chose to run a positive case it was open to him or her to wait until the applicant’s

54 *The Australian Paper Case* [2017] FCA 167 (1 March 2017) [203].

55 *Yorke v Lucas* (1985) 158 CLR 661, 670.

56 An observation to that effect was made by the Full Court in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2017] FCAFC 50 (23 March 2017) [59], but the point had not been argued and it was not necessary to decide it. Their Honours suggested that the point may still be open.

57 (2007) 164 FCR 32 (*‘Mining Projects’*).

evidentiary case was closed and then, if desired, file a defence or an amended defence.⁵⁸

The difficulty is that, in *Mining Projects*,⁵⁹ the Court specifically distinguished *Bridal Fashions Pty Ltd v Comptroller-General of Customs*.⁶⁰ In that case, the penal proceeding was taken under the *Customs Act 1901* (Cth), s 255 of which provided that ‘the averment of the plaintiff [in his or her] claim shall be prima facie evidence of the matter or matters averred’. Thus the practical effect of a defendant merely putting the plaintiff to his or her proof would be that the former would suffer an adverse judgment. In *Mining Projects*, the Court said:⁶¹

In a *Customs Act* case neither penalty privilege nor self-incrimination privilege is of any use to a defendant because, if either privilege is claimed and no positive case is run, the defendant will suffer an adverse judgment. For that reason, a positive plea could not be incriminating; it could only be exculpatory.

Although s 361 of the *Act* is an onus of proof provision, not merely an averment provision, there would equally seem to be no reason to allow an individual respondent to escape the conventional obligation to file a defence in relation to his or her positive case on the matter of reason or intent in an adverse action case under pt 3-1. This issue does not appear to have arisen, at least to the extent of disclosing a reported determination on the point.

But even apart from reverse onus, there are grounds to believe that making the adverse action prohibitions — and many others in the *Act* for that matter — civil, rather than criminal, contraventions, has not stripped cases involving the enforcement of these prohibitions of their procedural awkwardness. For a respondent to be allowed to remain mute as to the nature of his or her evidentiary case until after the conclusion of the applicant’s case is less than ideal. In this respect, the distinction between a purely negative case and a case which raises a positive defence is, in my opinion, more obvious to the theoretician than to the practitioner. Particularly where inferences must be drawn as to reason or intent, usually all the facts of the case will be relevant. Counsel for the respondent may, and generally will, desire to cross-examine the plaintiff’s witnesses on matters which provide support for his or her client’s defence, both positive and negative.

In my time on the Federal Court, I was exposed to a practical instance of the inconvenience to which I have referred. Those with a bent for curiosity will notice that the trial in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union*⁶² was conducted over three days in March, and two days in July 2015. This four-and-a-half-month interregnum arose in the following circumstances. The respondents had claimed the privilege against self-exposure to a penalty, and neither the individual respondent, nor the corporate

58 Ibid 37–8 [13].

59 Ibid 38–9 [14]–[16].

60 (1996) 17 WAR 499.

61 *Mining Projects* (2007) 164 FCR 32, 38 [15].

62 (2015) 254 IR 200.

respondent of which he was the active officer,⁶³ had made any positive allegations in his or its defence. Counsel for the respondents proceeded to cross-examine one of the applicant's witnesses about things which had been said by others, as is common where the matters in dispute arise out of conversations. He was met with an objection under s 44 of the *Evidence Act 1995* (Cth), which prohibits cross-examination about a previous representation alleged to have been made by a person other than the witness concerned. The exception, of course, is where evidence of the representation has already been admitted, or the court is satisfied that such evidence will be admitted.⁶⁴ In the absence of any positive allegation in the defence, the Court could not be so satisfied. Having considered their position, the respondents then applied to amend their defence, but the facts of the case, and the content of the intended cross-examination, were such as required an adjournment to give the applicant a proper opportunity to consider the new allegations or amended denials. It does not really matter how long that opportunity was required to be, since, as we all know, in a busy court, and where the case involves busy practitioners already locked into the proceeding, the need to adjourn for a fortnight readily becomes a need to adjourn for some months.

What is, in my opinion, rather odd about the direction things have taken in relation to the so-called privilege against self-exposure to a penalty is that it has become, in effect, a right to silence. Not only is the respondent concerned relieved of the obligation to expose himself or herself to a penalty, he or she is under no obligation to provide the conventional notice of exculpatory allegations that are proposed to be made, or evidence that is proposed to be led. The supposed benefits of departing from the traditional criminal procedure in relation to the adverse action prohibitions are, at least in my assessment, by no means self-evident.

63 The view being taken, based on *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union* [No 2] [2014] FCA 1032 (23 September 2014), that a corporate respondent cannot be compelled to file a defence of substance if the only source of its factual information is an individual who is also a respondent in the same proceeding and who has asserted the privilege.

64 *Evidence Act 1995* (Cth) s 44(2).