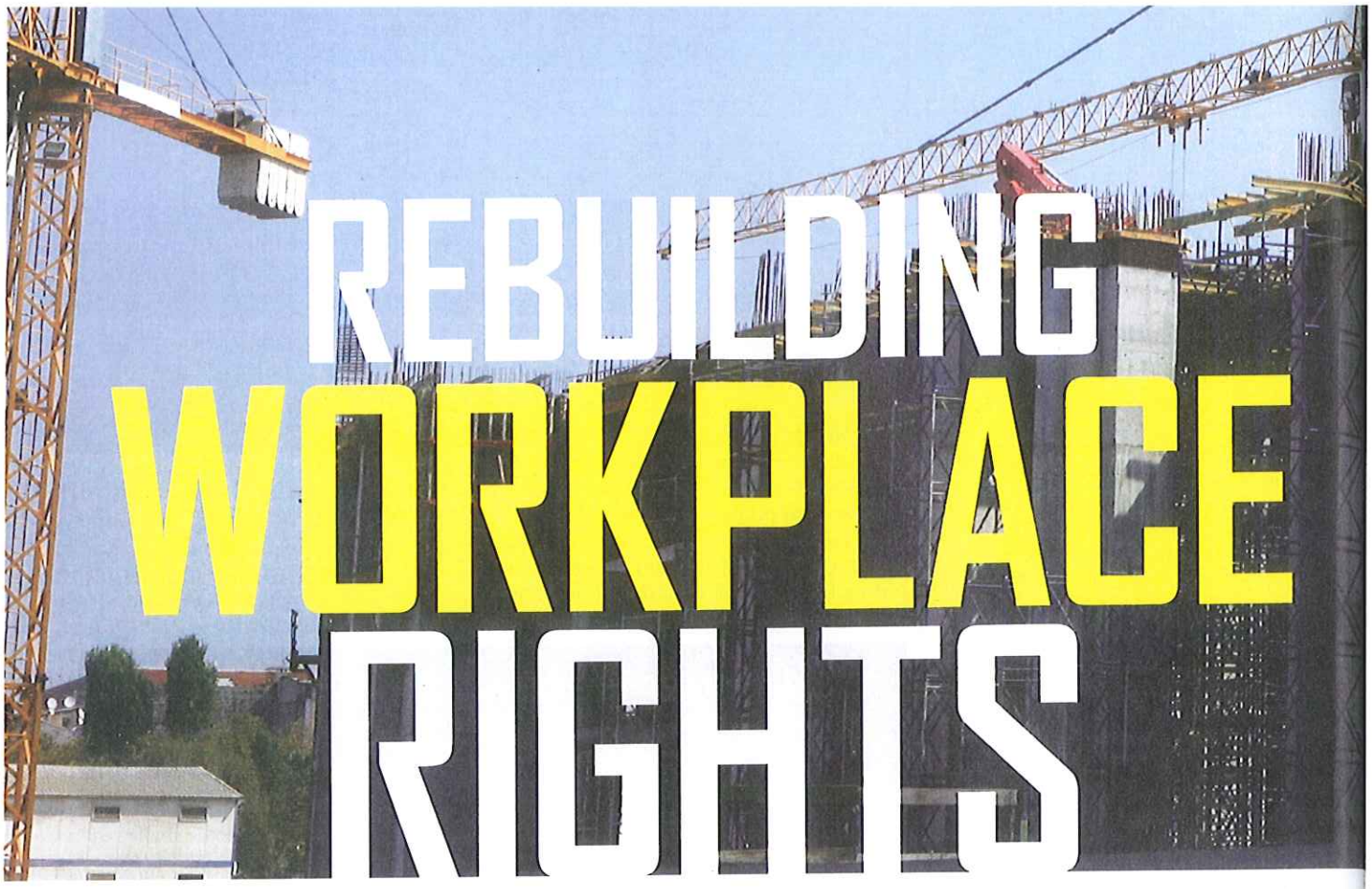

REBUILDING WORKPLACE RIGHTS

The broader protection of employees' workplace rights under the *Fair Work Act* 2009 will offer much more scope for injunctive action. **By Alex Manos**

As of 1 July 2009, Australia is subject to new laws regulating the workplace. The *Fair Work Act* 2009 (Cth) (the Act) has replaced the *Workplace Relations Act* 1996 (Cth) (*WR Act*) and is expected to bring a range of new rights and entitlements to the workplace, including sweeping reform to the laws relating to protections. These provisions stand to significantly widen the breadth and scope of general workplace protections and the types and the timing of applications brought.

The majority of the Act is based on the ALP's *Forward with Fairness Policy*, released in 2007. This policy was the platform for the November 2007 election but did not foreshadow in any meaningful way the implementation of these provisions.[1]

One of the defining features of the Act is its logical structure. Unlike its predecessor, which tended to have protections within subject specific rules, the protections in the Act are generally grouped into one section: Chapter 3, "Rights and responsibilities of employees, employers, organisations etc". This article examines the effect of Part 3-1, Division 3, titled "Workplace Rights",[2] which has not featured as a prominent topic of public discussion but which, nevertheless, is destined to leave its mark.

General protection

Section 340(1) of the Act provides a general protection in respect of workplace rights. At its simplest, it prohibits a person from taking adverse action against another person because that person has a workplace right. The Act provides detailed definitions of what constitutes an "adverse action" and when a person has a "workplace right". The protections apply in favour of employers, employees, prospective employees, independent contractors and industrial associations.

Adverse action

"Adverse action" is defined in s342, in a table setting out the circumstances in which a person's action amounts to one that is adverse. The definition is different depending on the nature of the relationship between the relevant persons. For example, an adverse action is taken by an employer against an employee if the employer:

(a) dismisses the employee;
(b) injures the employee in their employment;
(c) alters the position of the employee to the employee's prejudice; or
(d) discriminates between the employee and other employees of the employer.

In contrast, adverse action is taken by an employee against his or her employer if the employee:

(a) ceases work in the service of the employer; or

(b) takes industrial action against the employer.

In this way, the definition of "adverse action" is limited to those actions described in the table.

There is a body of case law around what it means to dismiss, injure, discriminate or prejudicially alter as a result of the freedom of association provisions in the *WR Act*. An injury in employment has been defined by the High Court of Australia as a term which "covers injury of any compensable kind", while a prejudicial alteration to an employee's position is even broader and has been defined 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".[3] These definitions will presumably continue to apply in the same way to the Act's general protections.

Actions which will clearly fall within the ambit of these definitions include suspension from employment on full pay, a transfer to an alternative location of employment, disciplinary action and a failure to pay wages to an employee.

Importantly, under the new laws an adverse action is taken if the person perpetrating the action threatens or organises to take any of those actions. In other words, the action does not need to have been effected: the section is contravened if the adverse action is threatened. Even more broadly, it does not even need to be communicated to the affected party and will fall within the parameters of the Act if it is merely being organised.

An action is not an adverse action, however, if it is authorised by or under an Act or law of the Commonwealth or of the states: s342(3). It also does not include an employer standing down a person employed under a contract of employment that provides for the employee to be stood down in the circumstances: s342(4)(b).

Workplace rights

A person affected by an adverse action must, in order to activate the protection afforded by the Act, be able to demonstrate that one of the reasons for the action was because of a workplace right that the person had exercised or proposed to (or not to) exercise, or that the adverse action was taken against that person to prevent the exercise of a workplace right.[4]

The causative connection between the adverse action and the workplace right must be made but – unlike with the *WR Act* – it need not be the sole or dominant reason: s360. It need only be *a* reason. This represents a significant lowering of the threshold required to succeed in a claim under this section.

Broadly, a person has a workplace right under s341(1) of the Act if they:

(a) have an entitlement, role or responsibility;
(b) are able to be involved in a process or proceeding; or
(c) are capable of making an inquiry or complaint about their employment.

The person's entitlement, role or responsibility must be specified in a workplace law (which includes the Act and any state legislation regulating employment relationships), a court order or a workplace instrument (e.g. enterprise agreement or award).

An employee will have many entitlements under workplace laws and/or industrial instruments. The rights to annual leave, redundancy payments and wages are all basic entitlements that may exist either under the Act or under a collective agreement or an industrial award.

Similarly, the right to be involved in a role or to be involved in a process or proceeding under a workplace law can arise in many situations. A workplace law is defined broadly to include the Act and any state-based legislation regulating employment relationships. It includes all occupational health and safety legislation.

Consider this example. An employee is nominated as a health and safety representative in the workplace under the *Occupational Health and Safety Act* 2004 (Vic). Following this appointment the employee does not receive a wage increase at the next performance review. The employee believes that the failure to secure the wage increase is because

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The Act prohibits an employer from exerting "undue influence or pressure" on an employee in relation to making certain decisions about their employment.

of the employee's OH&S representative role. If this claim is made out, a court could order the employer to pay compensation and a civil penalty.

A person has a workplace right if they are able to initiate, or participate in, a process or proceeding under a workplace law or workplace instrument. The Act provides a list of examples of what fits this definition, including a conference or hearing held by Fair Work Australia (FWA) (the successor to the Australian Industrial Relations Commission) (s341(2)(a)), making an enterprise agreement (s341(2)(e)) and agreeing to cash out paid annual leave (s341(2)(h)).

A person has a workplace right if the person is able to make a complaint or inquiry in relation to their employment or is able to make a complaint or inquiry to an enforcement body in the area of workplace relations. Under this definition, a complaint made by an employee to the Australian Competition and Consumer Commission (ACCC) under the mistaken belief that it could assist them to recover wages owing will fall within this definition even though the ACCC has no power to assist them. This is because the employee has made a complaint in relation to their employment.[5]

The definition of a workplace right is broad and far-reaching. The phrasing of the clause so that the protection becomes enlivened when a person only has access to a benefit or process is deliberate. It effectively removes the need for anyone to have activated the benefit, or to have commenced or already be involved in a process. It is sufficient, on this definition, if one is merely capable of acting on, or commencing or being involved in, a process. In practice, the phrasing of the section in this way will merely require a person to prove that the other person was aware that they had a workplace right and took adverse action because of it.

For example, an employee is terminated after six and a half years continuous service. At seven years continuous service the employee is entitled to long service leave on termination of employment under the *Long Service Leave Act* 1992 (Vic). This accruing entitlement meets the definition of a workplace right as it is a benefit that the employee is entitled to under a workplace law. The employee believes that their employment has been terminated (and hence they have suffered an adverse action) because of this workplace right. They could choose to bring a claim under the adverse action laws, and would not be required to demonstrate that they had requested long service leave from their employer or even that they intended to take it. It would be sufficient for the employee to demonstrate that it was an accruing entitlement.

Coercion, undue influence and misrepresentation

Part 3-1 of Chapter 3 of the Act contains other provisions that provide protection of a person's workplace rights.

Section 343 of the Act prohibits a person from organising or taking, or threatening to organise or take, any action against another person with an intent to coerce the other person[6] to exercise or not exercise, or to propose to exercise or not exercise, a workplace right.

If s343 is interpreted applying the same principles as for the restriction on coercion in agreement making under the *WR Act*, then proof of coercion will require two limbs to be satisfied. First, it will need to be shown that intentional pressure was exerted which, in a practical sense, negated choice. Second, the exertion of the pressure must have involved conduct that is unlawful, illegitimate or unconscionable.[7]

The Act also prohibits an employer from exerting "undue influence or pressure" on an employee in relation to making certain decisions about their employment (e.g. agreeing to a deduction from wages): s344.

The Act is contravened if a person knowingly or recklessly makes a false or misleading representation about the workplace rights of another person, or makes such a representation about how the exercise of a third person's workplace rights may affect the person: s345.

For example, it would be a contravention of this section for an employer to tell an employee that the employee is not entitled to carer's leave. This is because all employees have a minimum entitlement to carer's leave.[8]

Remedies

The provisions under the general protections in the Act are civil remedy provisions. They are therefore subject to the compliance and enforcement provisions in Chapter 4 of the Act, as well as the compliance division in Chapter 3, Part 3-1, Division 8.

An application complaining of a breach of the general protection provision involving a dismissal must, at first instance, be directed through FWA, which will hold a conference between the parties in an attempt to settle the dispute: s371. If FWA is unable to resolve the matter, then it will issue a certificate that allows the dispute to proceed to an eligible court. Applications for an interim injunction are exempted.

Where a certificate from FWA is required and has been issued, a person may, under s539, make an application to the Federal Court or Federal Magistrates Court to hear and determine the matter. The court may, if it is satisfied that a civil remedy provision has, or will be, contravened, hear the application and make any appropriate order.

One of the available remedies under s545(2) to an aggrieved party is injunctive relief. The court, when applying its discretion in respect of an interlocutory injunction, will consider whether there is a serious case to be tried, whether the balance of convenience favours the order sought and whether damages would be insufficient compensation.[9]

If the matter proceeds to a hearing, then a reverse onus of proof applies (s361) and the respondent must seek to persuade the court that on the balance of probabilities any action taken was not motivated by reasons that contravene the Act: s360.

This injunctive power, when viewed in combination with the broadly framed jurisdictional requirements, which only require an employer to have commenced organising or to have threatened to take an adverse action, may lead to employees seeking orders prior to a decision being implemented. It could be used to prevent the termination of employment even before termination has been communicated, or even to halt the implementation of a written warning prior to it being issued. It will be sufficient if an employee can demonstrate that the adverse action was being organised or had been threatened.

Depending on how this provision is interpreted by the courts it could, in injunction applications, prove to be a very low threshold.[10] This is because the balance of convenience in many cases will favour the retention of the employee in their employment.

Consider this example. An employer is organising to terminate part of its workforce on the grounds of redundancy. The affected employees believe that they are being targeted due to the generous overtime rates in their enterprise agreement. Termination of

employment is an adverse action and an overtime rate is a workplace right.

The affected employees could therefore apply to the court to seek injunction orders preventing the terminations. The court would need to weigh up the impact on the employees of allowing the termination to proceed, and the ability of an award of damages to adequately compensate the employees should their claim be proven, versus the impact on the employer of retaining the employees until the matter was determined at a final hearing. In many cases the balance of convenience will lie with the employees being retained.

It is also important that these provisions, unlike the unfair dismissal provisions, are not means tested and compensation is not capped. A director or CEO may therefore access these provisions.

Where a claim is made out, the court may order compensation, reinstatement of an employee to their employment (if terminated) and a pecuniary penalty. In the case of an individual, the penalty may be up to $6000 and for a body corporate, the pecuniary penalty may be up to $33,000 per contravention.[11] Presumably, the pecuniary penalty will ordinarily be ordered in favour of the party initiating the action.

Summary

The laws under the *WR Act*, on which these provisions are based, provide some guidance as to how these provisions will be applied. However their re-formulation so that they apply as general protections, in combination with the broad definition of a "workplace right", the reverse onus of proof and the lower causation threshold, will allow applications to be made in a far greater range of situations than seen before.

These new provisions provide opportunities for employees to seek protection during, and at the conclusion of, an employment relationship and for employers to seek compensation from unions that engage in unprotected industrial action. The imposition of financial penalties on those that breach the general protection provisions provides a strong incentive for all stakeholders to abide by the rules. ●

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1. The ALP's *Forward with Fairness Policy* (April 2007) stated it would give effect to important workplace rights including providing "protection against unfair treatment" (at p12).
2. There are a number of other divisions dealing with "General Protections" within Part 3-1 of Chapter 3 which are not considered in this article.
3. *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at [4].
4. Section 340(2) of the Act also prohibits action taken against a person because of a third person's workplace right.
5. See para 1370 of the Explanatory Memorandum to the Act.
6. Or a third person.
7. *Seven Network (Operations) Ltd v Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia & Ors* [2001] FCA 456 at [41].
8. Under both Part 7 of the *WR Act* and, as of 1 January 2010, under the *National Employment Standards*.
9. *Australian Broadcasting Corporation v O'Neill* (2006) 225 CLR 57, per Gleeson CJ and Crennan J at [19], and Gummow and Hayne JJ at [65] to [72].
10. See *Communications, Electrical, Electronic, Energy Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Limited* [2009] FCA 726 (6 July 2009) per Greenwood J for how the reverse onus of proof can affect applications for interim injunctions, even though the reverse onus is deemed by statute not to apply to interim injunction hearings.
11. 300 penalty units under s546(2). A penalty unit has the same meaning given by s4AA of the *Crimes Act* 1914 (Cth), namely $110.