Union news

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Maurice Blackburn Lawyers

Since 1919

This edition:

General protections provisions of the *Fair Work Act 2009*

Two recent decisions have clarified aspects of the general protections provisions of the *Fair Work Act 2009 (Cth).*

Barclay v The Board of Bendigo Regional Institute of Technical and Further Education

Key points:

- the Full Court overturned the first instance decision of Justice Tracey, with Justice Lander dissenting
- majority held that the words 'because of' import an objective test; the subjective intention of the decision-maker is only one factor to be considered, and is not decisive
- it is not to the point to compare the treatment of other employees, such an inquiry masks the real question
- majority held that activities of union delegates are the activities of the Union, and not activities of the employees as employees.

The decision of the Full Court of the Federal Court clarified the operation of a number of key elements of section 340 of the Fair Work Act 2009 (Cth). Most significantly, the majority held that the test to be applied in determining why adverse action has been taken is an objective one, and that the subjective intention of the decision-maker is but one factor to be considered.

At first instance, the Board conceded that it had taken adverse action against the employee. However, it successfully rebutted the reverse onus by arguing that it took the adverse action for reasons that did not include the employee's activities as a union delegate. In accepting the Board's argument, Justice Tracey gave primacy to the subjective intention of the decision-maker.

On appeal, the majority, comprising Justices Bromberg and Gray, held that the objects of Part 3-1 of the Act make clear that the provisions are both 'facilitative and protective' and should be interpreted accordingly. For the majority, central issue for the Court to determine is why a claimant was treated the way he or she was; the search is for the 'real reason'. The majority said:

> *'The determination of those questions involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive.'*

In rejecting Justice Tracey's focus on the subjective intention of the decision-maker, the majority went on to say:

> *'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… 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.'*

The Court also held that the focus is on the claimant 'without regard to how others might be treated if they did not have the benefit of the protection afforded by the provisions' and went on to say that "[I]t is not to the point to say that any other employee who acted in the same way would have been subject to the same discipline". This finding obviates a great number of the difficulties that attend claims in the federal discrimination jurisdiction, and the elusive search for a 'comparator'.

In considering the industrial activities protections, the Court held that the protection afforded to officer-bearers extends to not merely holding that office, but the normal incidents of that office. Critically, where an employee is acting in his or her capacity as a union delegate, the employee's actions are those of the union, and not those of the employee as an employee. The Court said:

> *".... the complaint or claim is to be addressed to the Union, because the source of the complaint or claim is the conduct of the union. If employers were able to punish those of its employees who are union members or officers for the conduct of the union, the protection to those persons.... would be illusory and the purpose of the provision defeated."*

Where an employer takes adverse action in response to conduct taken by a union, the employer "cannot disassociate or divorce from that conduct its reason for the taking of the adverse action". In the case of Barclay 'the fact that Dr Harvey may have chosen to characterise the conduct of an officer as the conduct of an employee and therefore did not regard herself as taking action because Mr Barclay was an officer, or because of any of his industrial activities, does not alter the fact that her real reasons included these factors.'

The decision significantly strengthens the protection afforded by general protections provisions for employees generally, and employees engaged in industrial activity particularly. The case also reinforces the importance of building in workplace roles and responsibilities into collective agreements.

Australian Licensed Aircraft Engineers Association v QANTAS Airways Limited

In the second case, run by Maurice Blackburn Senior Associate Giri Sivaraman, Federal Magistrate Raphael upheld a claim by an ALAEA member who alleged that he had been subject to adverse action arising from an alteration of his position to his prejudice and coercion.

The employee was a licensed aircraft engineer who, along with his colleagues, routinely accepted overseas postings for short periods of time. On return from a posting, the employee had made an inquiry and complaint in respect of his pay for the period of the overseas posting. In response, the employer:

- suspended overseas postings for all Brisbane-based licensed aircraft engineers, including the employee;
- telephoned the employee and spoke to him in an intimidating fashion, witnessed by other employees.

The employee also claimed that the employer had verbally abused him, and denied him an opportunity for promotion.

It was not in contention that the employee had various workplace rights, including the rights to make an inquiry or complaint in respect of his pay, the right to participate in the disputes process under the enterprise agreement and the right to file the court proceedings. The focus on the claim was whether the particular conduct alleged constituted adverse action, and whether it was taken because the employee exercised one or more of his workplace rights.

FM Raphael held that the suspension of overseas postings constituted an injury to the employee in his employment on the basis that, before making his inquiry or complaint, the employee had the benefit of being able to apply for overseas postings. After making his inquiry or complaint, the employee lost the benefit, and hence had been injured in his employment.

However, the Federal Magistrate rejected the employee's claim that the hostile telephone call constituted 'verbal abuse'. Even if it had, the Federal Magistrate held that the verbal abuse did not constitute an injury in employment; it may, however, have altered the employee's position to his prejudice by 'reducing his status in relation to his colleagues' and upsetting him.

The Federal Magistrate touched on the difference between 'injury' and 'prejudicial alteration' and said:

> *'…lack of recent authority on the distinction between "injury" and "prejudicial alteration" is perhaps explained by the practice of pleading both categories of adverse action; for any action taken by an employer that constitutes an injury in employment will necessarily alter the position of the employee to his or her prejudice.'*

His Honour favoured a narrow approach to the meaning of 'injury', being 'the deprivation of one of the most immediate practical incident of employment'. Assuming that narrow approach prevails, the importance of pleading prejudicial alteration in the alternative cannot be overlooked.

In considering the coercion complaint, the Federal Magistrate adopted two-element test for coercion set out in *Finance Sector Union v Commonwealth Bank of Australia* and held that the employee needed to show pressure amounting to compulsion, and the illegitimacy of the pressure exerted. In upholding the employee's claim, His Honour found that the intimidating manner in which the employee was spoken to, coupled with the threat that, if the employee pursued his wage claim he would not be selected for any future overseas postings, were an 'illegitimate form of pressure… to prevent him from pursuing his claim'. Further, the employer's threat, and the 'intimidatory manner in which it was delivered indicate an intention to coerce'.

A penalty hearing has been scheduled.

Maurice Blackburn branches out in Western Victoria

Union members and organisers needing legal advice about personal injuries can now see Maurice Blackburn lawyers at new visiting office in Warrnambool, Victoria.

Each week the firm will be available to see clients in the Warrnambool, Colac and Portland regions. Clients can make appointments to see a lawyer at the visiting office located at Homeseeka, 40 Kepler Street, Warrnambool.

Principal lawyer Rachel Schutze acts for many injured workers and is based in Geelong:

"Maurice Blackburn is committed to providing an improved service to unions and their members in regional areas and understands the importance of assisting people in their own communities," she says.

"We understand that distance can be isolating and that it's hard to travel for hours to see a lawyer.

"The firm prides itself on achieving fair outcomes for injured people – we've been doing that for more than 90 years. Apart from our workers compensation claims, we also have specialist knowledge in other areas that help union members and their families, such as TAC claims, medical negligence, asbestos, superannuation, public liability and faulty products," said Rachel.

"If you need to fight the workers compensation or TAC system, don't fight it on your own."

Call (03) 5221 1152 or Freecall 1800 810 856 to make an appointment.

Rachel Shutze
Principal - Geelong office

Haneef lawyer receives justice award

The lawyer who led Dr Mohamed Haneef's compensation claim has been recognised for his efforts in the successful campaign.

Rod Hodgson, our Queensland Managing Principal, was the recipient of this year's Australian Lawyers Alliance Civil Justice Award in Queensland.

Rod accepted the award before 340 of his peers at the Alliance's state conference on Queensland's Gold Coast on Friday.

Dr Haneef was wrongly arrested on terrorism charges in 2007 and was awarded compensation by the federal government in 2010.

ALA Queensland president, Adam Tayler said in a statement:

"Mr Hodgson was chosen for this year's award because his passionate pursuit of justice, and his dedication to ensuring those most marginalised by circumstances such as personal injury and discrimination under the law, were better able to find redress through his efforts".

"As an advocate providing access to justice, Rod has also been involved in cases that benefit not only individuals but the community as a whole," he said.

The conference is being held on Friday and Saturday.

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Amendments to the *Trade Practices Act* take effect on 1 January 2011

The Competition and Consumer Act 2010 (Cth)

The *Trade Practices Act 1974* (**TPA**) has been renamed *The Competition and Consumer Act 2010* (Cth) (**the CCA**). The change took effect on and from 1 January 2011.

In addition to the change of name, a number of substantive changes have been made to the former TPA. The most significant changes in the employment context are the amendments to the provisions dealing with misleading and deceptive conduct and false and misleading representations.

The Australian Consumer Law – Schedule 2 of the Competition and Consumer Act

The key change is the consolidation in Schedule 2 of the CCA of various laws providing for the protection of consumers. The Australian Consumer Law (**ACL**) is the short title for Schedule 2 to the new CCA.

The ACL is intended to operate as a single national law for the protection of consumer rights. The ACL replaces various provisions of 20 pieces of state, territory and commonwealth legislation that previously dealt with consumer rights, including the majority of provisions from the various pieces of state-based fair trading legislation.

The ACL operates as a law of the Commonwealth and also of each State and Territory. The effect is that the law applies to the activities of all businesses in Australia – including sole traders, partnerships and other non-corporate entities, as well as corporations.

The ACL comprises five parts, as follows:

1. General provisions
2. General protections
3. Specific conduct
4. Offences, and
5. Enforcement and remedies.

Part 2 'General Protections' proscribes particular business conduct and includes a prohibition on misleading and deceptive conduct and unconscionable conduct in trade or commerce along with provisions making particular unfair contract terms void.

Part 3 proscribes specific conduct relating to trade or commerce, including false or misleading representations and

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Part 3 proscribes specific conduct relating to trade or commerce, including false or misleading representations and other unfair practices, along with protections for consumer transactions relating to good and services, including conditions and warranties.

Key changes to provisions affecting employment relationships

Various provisions of the former TPA have been used in the employment context to address unfair practices by employers. In particular, employees were able to utilize the provisions of the TPA to deal with misleading and deceptive conduct or false and misleading representations in the area of employment.

Consolidation of key employment provisions of the former TPA

In addition to consolidating state and territory laws, the ACL incorporates key parts of the former TPA. In the employment context, the most important are the consolidation of:

- Part IVA ('Unconscionable conduct') – encompassing sections 51AAB through 51ACAA, and
- Part V ('Consumer Protection') – encompassing sections 51AF through to 65A.

The key provisions of the former TPA that impact on employment and their equivalents in the ACL are:

Provision	TPA	ACL
Unconscionable conduct	51AB	20
Misleading or deceptive conduct	52	18
False or misleading representations	53	29
Misleading conduct in the area of employment	53B	31

Conduct by a person – not only a corporation

The previous sections 51AB, 52, 53 and 53B are substantially the same in effect. However, the provisions now apply to conduct by a natural person, as well as a corporation. This reflects the extended reach of the Act resulting from the operation of the ACL as a law of the states and territories as well as the Commonwealth.

In addition, the scope of section 53 has been broadened with respect to the matters that may not be the subject of a false or misleading representation.

Enforcement of the new ACL

Enforcement of the ACL is deal with in Part 4 (Offences) and Part 5 (Remedies) of Schedule 2. These are separate to the enforcement provisions applying to contraventions of the CCA.

The remedies available include:

- injunctions
- pecuniary penalties
- damages, and
- compensation.

Engaging in false or misleading representations, misleading conduct in relation to employment or unconscionable conduct is an offence. The maximum penalty for contravention of an offence provision of the ACL is $220,000 for an individual and $1,100,000 for a body corporate.

The prohibition on misleading or deceptive conduct (section 18 of the ACL) is not a pecuniary penalty provision.

The Act also provides for the making of non-punitive orders that are remedial in nature. For example, that a corporation or person undertake particular activities beneficial to the community or undertake training.

In addition, orders can be made requiring a corporation or person to publish material correcting or remedying false or misleading representations made.

Transitional provisions

There are complex transitional provisions. However, generally speaking, the former Trade Practices Act 1974 (Cth) continues apply to conduct that occurred prior to 1 January 2011. The new CCA applies to conduct occurring on and from 1 January 2011.

What hasn't changed – Part IV (Restrictive Trade Practices)

Part IV of the former TPA remains in the CCA. Part IV contains the provisions dealing with restrictive trade practices (including secondary boycotts) and the authorisation provisions (which allow unions to make application to engage in collective bargaining on behalf of (among others) independent contractors).

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House flooded? Know your insurance rights

The recent floods have impacted on hundreds of thousands of people. If you own a house that was flooded, or you are renting and your contents have been affected by the floods, it's important to know your legal rights.

What does my insurance policy cover?

All insurance policies are different. **Storm** or rain damage is covered in almost all **home and contents** insurance policies. This is damage caused by a storm, rain and wind, and local runoff from streets, gutters and stormwater drains.

Some home and contents insurance policies explicitly exclude **floods**. Each insurance company has its own definition for 'flood', but it generally means water flowing from rivers, creeks, dams, lakes or reservoirs that cause damage.

Some policies that excude flood damage, do nevertheless cover damage caused by flash flooding which is where the damage was caused to your property within 24 hours (or maybe up to 72 hours) of the downpour.

Some other types of insurance policies may cover losses arising from the floods such as **motor vehicle insurance, life insurance, income protection insurance, business interruption insurance etc.**

What should I do?

Submit a claim to your insurance company. Be as detailed as possible and take photos that show the state of your property and contents. **You don't have to prove whether the damage was caused by a storm or a flood, this is up to your insurer**. Make a copy of any claim you submit.

What happens next?

Insurance companies will be processing many claims for the floods, so your claim may take a little while, but insurers must fast track your claim if you are in urgent financial need. If you haven't heard from your insurer within three weeks of submitting your claim, you should complain in writing to the company. Hopefully your claim will be paid in full, however, if this doesn't happen, you have the right to appeal.

Need more information?

If your job has been affected by the floods or you are concerned about exposure to asbestos in the clean up, call 1800 810 812 or visit our website for more information.

Remember

It's important that you submit your claim and have an unsatisfactory outcome before you take these steps.

What are my legal rights?

If your insurance claim is rejected or you feel you have been treated unfairly, you can:

- appeal to your insurance company to reconsider its decision (each company will have its own appeals process, so check their website or call the company)
- take your claim to the Financial Ombudsman Service (1800 337 444)
- seek legal advice

Who provides legal advice?

You can talk to representatives from:

- **Legal Aid Queensland** (1300 651 188)
- **Legal Aid NSW** (1300 663 464)
- **Victorian Legal Aid** (03 9269 0120)
- **Insurance Law Service** (1300 663 464)
- **Maurice Blackburn** (1800 810 812)

Legal Aid and the Insurance Law Service provide free advice regarding your rights.

Maurice Blackburn has the largest plaintiff insurance practice in Australia and ran the leading flood insurance case. We offer free no obligation advice over the phone on insurance issues and will do your case no win, no fee (conditions apply).

Information correct at 19 January 2011.