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UNION VICTIMISATION, THE REVERSE ONUS  
AND THE CAUSAL LINK: THE DEVELOPMENT OF  
PRINCIPLES PRIOR TO THE FAIR WORK ACT

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I	Introduction.....	5
II	Developments in the Legislative Frameworks.....	6
A	Current Position: Fair Work Act 2009 (Cth).....	7
B	Historical Position: Conciliation and Arbitration Act 1904 (Cth).....	10
C	Historical Position: Industrial Relations Act 1988 (Cth).....	14
D	Historical Position: Workplace Relations Act 1996 (Cth).....	15
E	Expansion of Prohibited Actions and Prescribed Grounds.....	18
F	Shifting Causal Link and Reverse Onus.....	20
G	Shifting Purposes.....	21
H	Shifting Approaches to Multiple Reasons.....	26
III	Getting to the Reverse Onus.....	31
A	What Does the Employee Need to Prove?.....	32
	Obligation to prove that the employer took the action alleged.....	32
	Obligation to allege a particular prescribed ground.....	33
	Obligation to prove the existence of the prescribed ground.....	35
	Obligation to prove that the employer knew about the prescribed ground.....	37
	Obligation to provide some evidence that the prescribed ground was a reason.....	39
	Does the reverse onus shift the legal burden or merely the evidentiary burden? .....	42
B	Level of Evidence.....	47
IV	Reverse Onus Cases.....	50
A	Taking a Barclay Approach to Proof and Liability.....	52
	Decision-Maker’s Evidence Accepted.....	52

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Decision-Maker's Evidence Not Accepted.....	58
Need for Explanation of a 'Real Reason' to Rebut the Presumption.....	64
Subjective View .....	71
B The Broader Approach to Proof and Liability .....	74
The Halter and the Horse Analogy.....	75
Factor/Cause versus Reason.....	80
Objective View .....	89
V Conclusion .....	92

## I INTRODUCTION

The General Protections in the Fair Work Act 2009 (Cth) ('FW Act') which, broadly speaking, prohibit the taking of various forms of 'adverse action' 'because' of a prescribed ground, are some of the more controversial provisions in the FW Act. They draw together, and expand on, two distinct strands of previous legislation: the (older) union victimisation provisions and the (newer) unlawful termination rules. In both types of protections, there have been many questions about the meaning of the causal link and how it is proven. This paper focuses on the union victimisation provisions, rules that have a longer history and have received more judicial scrutiny than the unlawful termination protections.

The wording of the causal link in the union victimisation provisions has changed over the years. In 1904, the Conciliation and Arbitration Act 1904 (Cth) ('CA Act') prohibited employers from dismissing an employee 'by reason merely of the fact that' the employee was a union member or officer.<sup>1</sup> In 1914 the causal link became 'by reason of the circumstance'.<sup>2</sup> With the introduction of the Industrial Relations Act 1988 (Cth) ('IR Act'), the causal link became 'because', and this word continued to be used in the Workplace Relations Act 1996 (Cth) ('WR Act') and the present provisions of the FW Act.

In September 2012, the High Court handed down its decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('*Barclay*').<sup>3</sup> This was the first time the High Court had considered the adverse action provisions, including the causal link. In *Barclay* an employer successfully defeated an adverse action claim when the decision-maker gave evidence of the reasons for her decision (which did not include a prescribed reason), and her evidence was found to be credible by the trial judge. This was despite the existence of an objective connection between her reasons and the prescribed ground. Ultimately, the High Court took an approach to the issue of causation that could be described as being straightforward or direct. This approach can be summarised as follows. If the decision-maker gives evidence that they did not take adverse action 'because' of a prescribed ground, and that evidence is accepted, there will not be a breach. In this working paper, we describe this type of approach as the 'Barclay Approach'.

A similar approach was recommended in the earlier report of the Fair Work Act Review panel. The panel recommended that, if the High Court upheld the approach taken by the Full Federal Court majority (which, ultimately, it did not), the provisions should be

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<sup>1</sup> CA Act s 9(1).

<sup>2</sup> CA Act s 9(1), later renumbered s 5(1).

<sup>3</sup> (2012) 290 ALR 647.

amended 'so that the central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action'.<sup>4</sup>

This paper charts the history and development of the union victimisation protections up to the enactment of the FW Act, considering both the legislative and case developments from the very early provisions in 1904, up until the position immediately before the FW Act commenced. As the Explanatory Memorandum to the FW Act makes clear, key aspects of the adverse action provisions are directly based on earlier versions of the legislation, and are intended to be interpreted in accordance with the jurisprudence on those provisions.<sup>5</sup> Further, in *Barclay*, an historical analysis of the provisions and cases was a key component in the judgments of four of the five High Court judges.<sup>6</sup> Accordingly, an understanding of the earlier jurisprudence is crucial to interpreting the FW Act provisions and understanding the significance of *Barclay*. This paper explores that history in a fuller manner than has previously been undertaken.<sup>7</sup>

The first part of this paper profiles developments in the legislative framework, with a particular focus on the wording of the causal link and reverse onus, the stated purposes of the provisions, and the expansion of prescribed grounds. The paper then considers the case law. The cases examined are those from 1904 to immediately prior to the commencement of the FW Act.

## II DEVELOPMENTS IN THE LEGISLATIVE FRAMEWORKS

Part II of the paper profiles key aspects of the legislative frameworks as they have developed over the years. It begins with the FW Act, before turning to the history of legislative developments under the CA Act, IR Act and WR Act. From there Part II draws out four aspects of the developments since 1904: an expansion of prohibited actions and prescribed grounds; changes in the causal link and the reverse onus provision;

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<sup>4</sup> Ron McCallum, Michael Moore and John Edwards, 'Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation' (Report, Australian Government, 15 June 2012), 237. Interestingly, the Minister for Tertiary Education, Skills, Jobs and Workplace Relations intervened in *Barclay* in support of Mr Barclay and the union. This suggests the Government did not expect (or want) the provisions to be interpreted in the manner adopted by the High Court. Senior department officials have responded to criticism that the intervention was 'partisan', saying the intervention was in the public interest to clarify an important part of the legislation, and to argue against the adoption of a 'purely subjective test': 'DEEWR Defends Barclay Intervention', *Workplace Express* (online), 18 October 2012.

<sup>5</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth); see for example [1460], and [1458] which states: 'Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. The formulation of this clause embodies the language in existing section 792 which appears in Part 16 of the WR Act (Freedom of Association) and includes the related jurisprudence.'

<sup>6</sup> See, eg, (2012) 290 ALR 647, 658-61 (French CJ and Crennan J) and 664-9 (Gummow and Hayne JJ).

<sup>7</sup> For an earlier analysis on the WR Act provisions, see Chris Jessup, 'The Onus of Proof in Proceeding under Part XA of the Workplace Relations Act 1996' (2002) 15 *Australian Journal of Labour Law* 198.

changes in perceptions of legislative purposes; and, developments in relation to multiple reasons.

## A CURRENT POSITION: FAIR WORK ACT 2009 (CTH)

The FW Act prohibits a person from taking ‘adverse action’ against another person ‘because’ of various circumstances, grounds or attributes, subject to several exceptions.

### *What Is ‘Adverse Action’?*

The meaning of the term ‘adverse action’ depends on the relationship between the people involved. In respect of action taken by an employer against an employee, ‘adverse action’ means dismissing them, injuring them in their employment, altering their position to their prejudice, or discriminating ‘between’ them and other employees.<sup>8</sup> It also includes threatening or organising to engage in such behaviour.<sup>9</sup> Adverse action can be taken in situations outside an employment relationship, including by prospective employers against prospective employees, principals against independent contractors, and industrial associations against others.<sup>10</sup>

### *What Are the Prescribed Grounds?*

The FW Act prohibits adverse action on a wide range of grounds or attributes. The grounds are grouped into three main categories: ‘industrial activities’, ‘workplace rights’, and a list of discrimination-type attributes such as race and sex.

In relation to ‘industrial activities’, an employer must not take adverse action against an employee because the employee is or is not an officer or member of a union, or engages (or does not engage) in certain ‘industrial activities’ (including participating in lawful union activities and representing the views of a union).<sup>11</sup>

In relation to ‘workplace rights’, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes to exercise or not to exercise a workplace right,<sup>12</sup> or to prevent an employee from exercising a workplace right.<sup>13</sup> The term ‘workplace right’ is

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<sup>8</sup> FW Act s 342(1), item 1.

<sup>9</sup> FW Act s 342(2).

<sup>10</sup> FW Act s 342(1), items 2, 3 and 7.

<sup>11</sup> FW Act ss 346-7.

<sup>12</sup> FW Act s 340(1)(a).

<sup>13</sup> FW Act s 340(1)(b).

broadly defined and includes being entitled to the benefit of, or having a role or responsibility under, a workplace law or instrument.<sup>14</sup>

Finally, an employer must not take adverse action against an employee because of a list of discriminatory grounds: the employee'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'.<sup>15</sup>

The large number and range of prescribed grounds, as well as the various types of adverse action, means the reach of the adverse action provisions is potentially very wide.

### *What is the Causal Link?*

Adverse action is only prohibited if it is taken 'because' of a prescribed ground. This word 'because' defines the causal link between the ground and the adverse action that is necessary to create a breach. (One exception is s 340(1)(b), which does not use the word 'because' – it prohibits an employer taking adverse action against an employee 'to prevent the exercise of a workplace right'.) The causal link is crucial to understanding the reach of the adverse action provisions.

The FW Act includes some additional provisions which help to define this causal link, dealing with multiple reasons and a reverse onus of proof.

### *Multiple Reasons*

The FW Act deals with the possibility that an employer might have multiple reasons for taking adverse action against an employee. Section 360 provides that 'a person takes action for a particular reason if the reasons for the action include that reason'. The Explanatory Memorandum states:

Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. The formulation of this clause embodies the language in existing section 792 which appears in Part 16 of the WR Act (Freedom of Association) and includes the related jurisprudence. This phrase has been interpreted to mean that the reason must be an operative or immediate reason for the action (see *Maritime Union of Australia v CSL Australia Pty Limited* [2002] FCA 513; 113 IR 326 at [54]–[55]). The 'sole or dominant' reason test which applied to some protections in the WR Act does not apply in Part 3-1.<sup>16</sup>

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<sup>14</sup> FW Act s 341.

<sup>15</sup> FW Act s 351.

<sup>16</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1458].

### *Reverse Onus*

The FW Act includes a reverse onus in relation to the reasons for taking an action.<sup>17</sup> Broadly speaking, this means that although the employee must still establish by evidence that they possess a prescribed ground, and have suffered adverse action within the meaning of the legislation, once the employee alleges their employer took action for a particular reason, it is presumed that the employer's action was taken for that reason unless the employer proves otherwise. In short, the employee is relieved of the burden of proving the employer's reason for taking an action. Section 361 is set out in full below.

361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

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

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

The Explanatory Memorandum states:

Clause 361 reverses the onus of proof applicable to civil proceedings for a contravention of Part 3-1. It is intended to broadly cover section 809 of the WR Act.

Generally a civil action places the onus on the complainant to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent.

However, subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. This has been a long-standing feature of the freedom of association and unlawful termination protections and recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason.

Subclause 361(2) provides that the reverse onus will not apply to the granting of interim injunctions. This is consistent with section 809 of the WR Act, and is intended to address the problems that can arise from the interaction of the reverse onus with the 'balance of convenience' test that applies to interim injunctions.<sup>18</sup>

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<sup>17</sup> FW Act s 361.

<sup>18</sup> Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1459] – [1461].

These comments in the Explanatory Memorandum make it clear that the FW Act provisions are based on the earlier provisions in the WR Act. In turn, the WR Act rules were based on provisions in the IR Act and CA Act.

### *Exceptions*

Part 3-1 of the FW Act provides a number of exceptions. The first applies in relation to all three categories of 'industrial activities', 'workplace rights' and the list of grounds of race, sex etc, and to all forms of adverse action on those grounds. It is that the conduct of the employer will not amount to unlawful adverse action where that conduct was 'authorised by or under' the FW Act or other law of the Commonwealth, or a prescribed State or Territory law.<sup>19</sup> Three other exceptions apply solely in relation to the list of grounds 'race, colour, sex, sexual preference, age' and so on in s 351(1).<sup>20</sup>

The next section of this paper sets out the provisions as they existed under previous versions of the legislation, with a particular focus on the causal link, reverse onus, expansion of the types of prohibited conduct, expansion of the prescribed grounds and purposes of the provisions.

## B HISTORICAL POSITION: CONCILIATION AND ARBITRATION ACT 1904 (CTH)

The CA Act was enacted in 1904.<sup>21</sup> It had a number of objects, including to establish the Commonwealth Court of Conciliation and Arbitration (which was intended to prevent and settle industrial disputes), and (relevantly):

To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act.<sup>22</sup>

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<sup>19</sup> FW Act s 342(3) (and see sub-sect (4)).

<sup>20</sup> These three exceptions are where the adverse action was 'taken because of the inherent requirements of the particular position' (s 351(2)(b)); was taken on good faith religious grounds against a staff member in a religious institution (s 351(2)(c)); and was 'not unlawful under any anti-discrimination law in force in the place where the action is taken' (s 351(2)(a)).

<sup>21</sup> The CA Act was originally named the Commonwealth Conciliation and Arbitration Act 1904 (Cth), but in 1950 it was renamed the Conciliation and Arbitration Act 1904 (Cth) by s 3 of the Conciliation and Arbitration Act 1950 (Cth). See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 647 fn 1.

<sup>22</sup> CA Act s 2(vi).

Section 9(1) provided that an employer must not dismiss an employee ‘*by reason merely of the fact* that the employee is an officer or member of an organization or is entitled to the benefit of an industrial agreement or award’ (emphasis added).

This single sentence encapsulated the entire prohibition, and established:

- one prohibited action (dismissal);
- two prescribed grounds (being an officer or member of an organisation, or being entitled to the benefit of an agreement or award); and
- the causal connection (‘by reason merely of the fact’).

The reverse onus provision was as follows:

9(3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed whilst an officer or member of an organization or entitled as aforesaid, was dismissed for some reason other than those mentioned in this section.

In 1909, s 9 was substituted with a new section.<sup>23</sup> The new s 9(1) provided that an employer must not dismiss an employee ‘or injure him in his employment by reason merely of the fact that the employee is an officer or member of an organization, or of an association that has applied to be registered as an organization or is entitled to the benefit of an industrial agreement or award’.

These amendments added a new prohibited action (injury in employment), and expanded the prescribed grounds to include being an officer or member of an association that has applied to be registered as an organisation. The causal connection was not altered.

Subsection (3) of the new s 9 stated:

9(3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed or injured in his employment whilst an officer or member of an organization or such an association or whilst entitled as aforesaid, was dismissed or injured in his employment for some reason other than that mentioned in this section.

Section 9 was further amended in 1911 to add a new prohibited action – altering an employee’s position ‘to his prejudice’.<sup>24</sup> Section 9(3) as amended provided:

9(3) In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed or injured in his employment or prejudiced whilst an officer or member of an organization or such an association or whilst entitled as aforesaid, was dismissed or injured in his employment or prejudiced for some reason other than that mentioned in this section.

In 1914, s 9 was repealed and substituted.<sup>25</sup> The new s 9(1) prohibited an employer from dismissing an employee, injuring an employee ‘in his employment’, or altering ‘his

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<sup>23</sup> Commonwealth Conciliation and Arbitration Act 1909 (Cth) s 2.

<sup>24</sup> Commonwealth Conciliation and Arbitration Act 1911 (Cth) s 6(a).

<sup>25</sup> Commonwealth Conciliation and Arbitration Act (No 2) 1914 (Cth) s 2.

position to his prejudice, *by reason of the circumstance*’ (emphasis added) that the employee was an officer or member of a union, was entitled to the benefit of an industrial agreement or award, or had appeared as a witness, or given evidence, in a proceeding under the Act.<sup>26</sup>

Thus, the new s 9(1) added a new prescribed ground (that the employee had appeared as a witness or given evidence in a proceeding under the Act), and changed the required causal connection (from ‘by reason merely of the fact’ to ‘by reason of the circumstance’).

The new reverse onus provision provided:

9(4) In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant’s action, are proved, it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge.

The differences between this reverse onus provision and the previous version are quite subtle, but it appears that the previous version allowed the defendant to rebut the presumption by proving that the dismissal or prejudice was ‘for some reason other than’ a prescribed ground. In other words, it seems there was no requirement that the defendant show the prescribed ground was *not* a reason for the dismissal – it was enough if he or she could point to a non-prescribed ground that was *also* a reason for the dismissal. This reflected the fact that the causal link was only established if the dismissal or prejudice was ‘by reason merely of the fact’ of the prescribed ground – so there was only a breach if the prescribed ground was the *only* reason for the action. In contrast, the revised reverse onus provision required proof that the defendant ‘was not actuated by’ the alleged prescribed ground. This change makes sense when considered alongside the new causal link, which established a breach if the action was taken ‘by reason of the circumstance’ of a prescribed ground. It seems there was no longer a requirement that the prescribed ground be the *only* reason for the action, and hence it was no longer sufficient for the defendant to point to another non-prescribed reason for the action – instead the defendant had to show that she or he was ‘not actuated’ by the alleged prescribed reason.

The reasoning behind this change was explained very eloquently by the Attorney-General William Hughes in the following passage from his second reading speech for the 1914 Bill:

Clause 2 [of the amending Bill] deals with the position of an employe dismissed by his employer because he belongs to an organization. Under the Act as it stands, in order to secure a conviction it is necessary to prove that an employe has been dismissed merely because he is a unionist. It is a fact, and one of the most cheering evidences of the innate goodness of mankind, that convictions have been secured for this offence under the existing law. But for every one offender caught, ninety-nine go free. It is obvious that if a man wishes

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<sup>26</sup> The Explanatory Memorandum for the Commonwealth Conciliation and Arbitration Bill (No 2) 1914 (Cth) does not provide any discussion or commentary of the proposed changes. It simply shows the provisions with the repealed words struck through and the added words in bold.

to dismiss an employe because he is a unionist, he may easily do so. An employer may discharge a man because he is a unionist, and say that he has dismissed him because he does not like his appearance. We are amending the principal Act so that the onus will rest on the employer, and this is quite compatible with the policy of the Act.

Collective bargaining has become part of the warp and woof of our industrial fabric. We do not recognize individuals; we recognise only organizations. The whole system is based upon the principle of collective bargaining. The object of the Act, the work for which the Arbitration Court was established, is to settle industrial disputes between organizations and employers. These threaten the peace of the community. Disputes between isolated individual employ[e]es and their employers are negligible. Those "dwellers in the caves" who talk about the rights of the individual are invited to crawl into the daylight, and to see the new world, in which the individual workman, except in cases so rare as to be insignificant, does not really count at all. There are combinations of workmen and combinations of employers. These are the factors with which the Court has to deal. This Bill is to deal with conditions as they are, not as they were, or even as they might be. Therefore, in order that we may secure collective bargaining, and leave an organization perfectly free to embrace within its grasp every person engaged in the industry to which it relates, no man must be penalized because he belongs to an organization. The law says to a worker - "Before ye shall receive industrial salvation, it is necessary that ye shall enter the fold of a union" To penalize a man for doing that very thing the law desires to encourage is obviously wrong. And particularly so in this case, because the Federal Court cannot make a common rule. Under this law there is only one way in which a man can be industrially saved - that is, by becoming a unionist. In these circumstances, if we gave an employer power to penalize a man because he belonged to a union we should strike at the very taproot of the whole system with which the Statute was deliberately designed to deal. We propose to provide, therefore, that the onus of proving that a man has been dismissed for some reason other than being a unionist shall rest upon the employer. If an employer dismisses one of his men he must show that he did not dismiss him for being a unionist. Thereupon the onus of proof, as the lawyers in the House know, will fall upon the other party, and he will have to make out his case.<sup>27</sup>

In 1947, s 9 was renumbered to s 5.<sup>28</sup> Accordingly, the reverse onus provision became s 5(4).

5(4) In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved, it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge.<sup>29</sup>

In 1977,<sup>30</sup> s 5(4) was replaced with the following:<sup>31</sup>

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<sup>27</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 November 1914, 8 (William Hughes).

<sup>28</sup> Commonwealth Conciliation and Arbitration Act 1947 (Cth), s 26 and sch 2. Other amendments to s 9 included inserting the word 'delegate' after 'officer' (see s 25 and sch 1), creating a prohibited ground to protect an employee absent without leave for union purposes where an application for leave was unreasonably refused (s 7(a)), and inserting sub-s 5 which allowed the court to order that the employee be reinstated and reimbursed (s 7(b)).

<sup>29</sup> This quote is taken from the hard copy version of the original amending Act (Commonwealth Conciliation and Arbitration Act (No 2) 1914 (Cth)). The consolidated version of the CA Act as reprinted on 19 December 1973, available on [comlaw.gov.au](http://comlaw.gov.au), omits the comma after 'after proved'. Nothing appears to ride on this.

<sup>30</sup> Conciliation and Arbitration Amendment Act (No 3) 1977 (Cth). According to the Parliamentary Library's Index to Explanatory Memoranda (available at

5(4) 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.

By 1977, several provisions referred expressly to taking action with a specific 'intent'. This was a new way of formulating the causal link, instead of 'by reason of the circumstance'. For example, s 5(1A) prohibited an employer from threatening to dismiss, injure or prejudicially alter the position of an employee 'with the *intent* to dissuade or prevent the employee from becoming a union officer, delegate or member', or from giving evidence, or from doing certain acts to protect the industrial interests of the union.<sup>32</sup> It appears that the references to 'intent' in the new s 5(4) were intended to match up with this new causal link, while the references to 'reason' in the new s 5(4) were intended to match up with the existing causal link 'by reason of the circumstance'.

## C HISTORICAL POSITION: INDUSTRIAL RELATIONS ACT 1988 (Cth)

The IR Act was enacted in 1988, and replaced the CA Act. Section 334(1) of the IR Act prohibited an employer from dismissing an employee, injuring an employee in their employment, or prejudicially altering the position of an employee, '*because*' of a large number of prescribed grounds. The prescribed grounds included being a union officer, delegate or member,<sup>33</sup> refusing to join in industrial action,<sup>34</sup> participating in a secret ballot,<sup>35</sup> being entitled to the benefit of an award,<sup>36</sup> giving evidence in a proceeding under the IR Act,<sup>37</sup> or doing certain acts for the purpose of furthering or protecting the industrial interests of a union.<sup>38</sup>

Other provisions covered other types of prohibited actions both inside and outside the employment relationship. For example, s 334(2) prohibited an employer from refusing to employ a person, or discriminating against a person in the terms on which they are offered employment, because of certain prescribed grounds. Section 334(3) prohibited an employer from *threatening* to dismiss, injure or prejudicially alter the position of an employee because of certain prescribed grounds, or with the intent to coerce the employee to do certain things. Section 334(4) prohibited an employee from ceasing to work for an employer because of certain prescribed grounds. Some of the protections

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[http://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/Browse by Topic/law/explanmem](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/explanmem)), there was no Explanatory Memorandum for this Bill.

<sup>31</sup> Conciliation and Arbitration Amendment Act (No 3) 1977 (Cth) s 4(c).

<sup>32</sup> CA Act s 5(1A)(b) and (c).

<sup>33</sup> IR Act s 334(1)(a).

<sup>34</sup> IR Act s 334(1)(b).

<sup>35</sup> IR Act s 334(1)(d).

<sup>36</sup> IR Act s 334(1)(e).

<sup>37</sup> IR Act s 334(1)(f).

<sup>38</sup> IR Act s 334(1)(j).

were also extended to independent contractors.<sup>39</sup> Sections 334(5), 335 and 336 prohibited certain actions by unions.

Section 334(6) provided:

In a prosecution for an offence against subsection (1), (2), (3), (4) or (5), it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or part) by the reason, nor taken with the intent (whether alone or with another intent), specified in the charge.

As well as establishing the reverse onus, this section dealt with the possibility of multiple reasons for acting. It indicated that there would be a breach even if the prescribed ground is only part of the reason for the action (because the action must not be motivated 'in whole or part' by the prescribed reason). The reverse onus provisions in sections 335 and 336 (which relate to actions by unions) were very similar to s 334(6).<sup>40</sup>

In contrast, the reverse onus provision in s 334A(6) was different.<sup>41</sup> Section 334A prohibited an employer from taking certain action against an employee 'merely because the employee has engaged, or is proposing to engage' in certain types of industrial activity. Subsection (6) provided that it was 'a defence to the prosecution if the defendant proves that the action was not motivated *solely* by the reason, or taken with the *sole* intent, specified in the charge.'<sup>42</sup> Accordingly, there would only be a breach of s 334A(6) if the prescribed ground was the *only* reason for the action.

## D HISTORICAL POSITION: WORKPLACE RELATIONS ACT 1996 (Cth)

The Workplace Relations and Other Legislation Amendment Act 1996 (Cth) substantially rewrote the IR Act and renamed it the Workplace Relations Act 1996 (Cth) ('WR Act'). Section 298K(1) provided that an 'employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following', namely dismiss, injure or prejudicially alter the position of an employee, refuse to employ a prospective employee, or discriminate against a prospective employee in the terms or conditions of an offer of employment.<sup>43</sup> Section 298K(2) was a similar prohibition in relation to action taken by principals against independent contractors.

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<sup>39</sup> IR Act s 334(7A).

<sup>40</sup> Sections 335(3) and 336(3) are identical, and provide (emphasis added to show the main difference with s 334(6)): 'In a prosecution for an offence against this section, it is not necessary for the prosecution to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but, *where a reason or intent is specified in the charge*, it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or in part) by the reason, not taken with the intent (whether alone or with another intent), specified in the charge.'

<sup>41</sup> Section 334A was inserted by the Industrial Relations Reform Act 1993 (Cth) s 80.

<sup>42</sup> Emphasis added.

<sup>43</sup> WR Act s 298K(1).

The term 'prohibited reason' was defined in s 298L, which provided that '[c]onduct referred to in subsection 298K(1) or (2) is for a prohibited reason if it is carried out *because* the employee, independent contractor or other person concerned'<sup>44</sup> has one of the prescribed characteristics. The prescribed characteristics were listed in s 298L(1)(a) to (o), and included being a union member, delegate or official, not being a union member, refusing to join in industrial action, being entitled to the benefit of an industrial instrument, and participating in a proceeding under an industrial law.

Other sections related to actions by unions,<sup>45</sup> employees, or independent contractors.<sup>46</sup>

By and large, the relevant causal link was 'because' (see, for example, s 298L(1) quoted above).<sup>47</sup> However, some of the provisions used other phrases such as 'with intent to coerce',<sup>48</sup> 'with intent to dissuade',<sup>49</sup> and 'for the reason that, or for reasons that include the reason that'.<sup>50</sup>

It should be noted that the primary provision in s 298K(1) (relating to action by an employer), and many of the other provisions, deal directly with the possibility of multiple reasons. Section 298K(1) prevented an employer from taking certain action 'for a prohibited reason, or for reasons that include a prohibited reason'. Accordingly, the prohibited reason was not required to be the *only* reason for action.

The reverse onus provision appeared in s 298V of the WR Act. It provided:

298V Proof not required of the reason for, or the intention of, conduct

If:

- (a) in an application under this Division relating to a person's or an industrial association's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
- (b) for the person or industrial association to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association proves otherwise.

The Explanatory Memorandum states:

Proposed section 298V, in relation to proceedings in this Division, reverses the onus of proof applicable to civil proceedings. Normally, in a civil action, the onus falls on the complainant to establish, on the balance of probabilities, that the conduct complained of was carried out for a particular reason or particular intent in contravention of the relevant provision or provisions.

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<sup>44</sup> WR Act s 298L(1) (emphasis added).

<sup>45</sup> WR Act ss 298P – 298SBA.

<sup>46</sup> WR Act s 298N.

<sup>47</sup> See also WR Act ss 298P (1), 298R(b)-(d), 298S(2)(a), and 298S(4).

<sup>48</sup> WR Act ss 298P(2), 298Q(1)(a), 298R(a), and 298S(2)(b) and (c).

<sup>49</sup> WR Act s 298Q(1)(b).

<sup>50</sup> WR Act s 298Q(2).

The consequence of section 289V [sic] is that, once a complainant has alleged that the conduct carried out, or threatened to be carried out, in relation to him or her is motivated by a reason or intent that would contravene the relevant provision(s) in Part XA, the person or industrial association will have to establish, on the balance of probabilities, that the conduct was not carried out for the unlawful reason or intent. This reflects existing provisions in the equivalent offence provisions of the ER Act [sic – IR Act] which are to be repealed and replaced by Part XA. They are included because of the difficulty for an applicant establishing the proscribed motive in these kinds of cases.<sup>51</sup>

The relevant Bills Digest states:

Proposed section 298V shifts the burden of proof from persons making a complaint alleging discrimination to those seeking to defend themselves against such a complaint. Complainants must, however, allege a reason for the prohibited conduct.<sup>52</sup>

In 2006, the WR Act was substantially amended by the introduction of the Workplace Relations Amendment (WorkChoices) Act 2005 (Cth). Section 792(1) of the amended WR Act prohibited an employer from taking certain action against an employee or potential employee ‘for a prohibited reason, or for reasons that include a prohibited reason’. Conduct was taken for a ‘prohibited reason’ if it was carried out ‘because’ of certain prescribed grounds (s 793).

The reverse onus provision appeared in s 809:

809 Proof not required of the reason for, or the intention of, conduct

(1) If:

(a) in an application under section 807 relating to a person’s conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and

(b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.

(2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 838 for interim injunctions.

The Explanatory Memorandum states (note that s 809 was originally numbered s 270 in the amending Bill):

Subsection 270(1) would reverse the onus of proof applicable to civil proceedings for a contravention of a civil remedy provision in proposed Part XA. It is based upon pre-reform section 298V of the WR Act.

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<sup>51</sup> Explanatory Memorandum, Workplace Relations and Other Legislation Amendment Bill 1996 (Cth) [16.39] – [16.40].

<sup>52</sup> Department of the Parliamentary Library (Cth), *Bills Digest*, No 96 of 1995-96, 44.

Typically, in a civil action, the onus would fall on the complainant to establish, on the balance of probabilities that the conduct complained of was carried out for a particular reason or with a particular intent, in contravention of the relevant provision.

However, subsection 270(1) would provide that, once a complainant has alleged that a person's actual or threatened conduct is motivated by a reason or intent that would contravene the relevant provision(s) of proposed Part XA, the person would have to establish, on the balance of probabilities, that the conduct was not carried out unlawfully.

The reverse onus would not apply to the granting of interim injunctions. This differs from pre-reform section 298V of the WR Act, and is intended to address the problems that can arise from the interaction of the reverse onus with the 'balance of convenience' test that applies to interim injunctions.<sup>53</sup>

## E EXPANSION OF PROHIBITED ACTIONS AND PRESCRIBED GROUNDS

Over time, the number of 'actions' and 'grounds' specified in the provisions has increased dramatically.

In 1904, the prohibition covered only one prohibited action (dismissal), and two prescribed grounds (being an officer or member of an organisation, or being entitled to the benefit of an agreement or award). Five years later, the 1909 amendments added a new prohibited action (injuring an employee in their employment), and expanded the prescribed grounds to include being an officer or member of an association that has applied to be registered as an organisation. In 1911, altering an employee's position to his or her prejudice was prohibited, and in 1914 a new prescribed ground was added (where the employee has appeared as a witness, or given evidence, in a proceeding under the Act).

This trend of introducing new prohibited actions and prescribed grounds continued. Indeed, immediately before the FW Act came into effect, the legislation defined five prohibited actions taken by an employer against an employee or prospective employee,<sup>54</sup> and specified 16 prescribed grounds.<sup>55</sup> The prescribed grounds included:

- being, or not being, a union officer, delegate or member;<sup>56</sup>
- making an application for a secret ballot;<sup>57</sup>
- making an inquiry or complaint to certain persons or bodies;<sup>58</sup> and

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<sup>53</sup> Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005 (Cth) [2613] – [2616].

<sup>54</sup> WR Act s 792(1). Namely: (a) dismiss an employee; (b) injure an employee in his or her employment; (c) alter the position of an employee to the employee's prejudice; (d) refuse to employ a person as an employee; (e) discriminate against a person in the terms or conditions on which the employer offers to employ the other person as an employee.

<sup>55</sup> WR Act s 793(1).

<sup>56</sup> WR Act s 793(1)(a) and (b).

<sup>57</sup> WR Act s 793(g).

<sup>58</sup> WR Act s 793(1)(j).

- being absent from work without leave for the purpose of carrying out duties or exercising rights as a union officer, if an application for leave had been unreasonably refused.<sup>59</sup>

In some cases, the introduction of a new prescribed ground was the direct result of parliamentary reactions to judicial decisions.

For example, in the 1917 High Court decision *Pearce v W D Peacock & Co Ltd*,<sup>60</sup> the union issued a log of claims seeking better employment conditions at the business. Only one employee at the business was a union member, and the employer asked him to sign a paper stating that he was satisfied with his wages and conditions. If he had signed the document the employer could not have been made a party to the award (under the then-current legislation). The employee refused to sign, and the employer dismissed him. The employee claimed that the reason for his dismissal was his union membership. The employer stated that he dismissed the employee because 'I would not keep a man in my employ who was dissatisfied',<sup>61</sup> and that the employee's union membership did not influence him. The Magistrate accepted the employer's evidence and found there was no breach of the provision, and an appeal to the High Court was dismissed. Soon after,<sup>62</sup> the legislation was amended to insert a new prescribed ground: employers were prohibited from dismissing (or taking certain other action against) an employee by reason of the circumstance that the employee, 'being a member of an organization which is seeking better industrial conditions, is dissatisfied with his conditions.'<sup>63</sup> The second reading speech to the amending Bill makes it clear that this was a direct response to this case.<sup>64</sup>

In the 2001 case *National Union of Workers v Qenos Pty Ltd*,<sup>65</sup> Weinberg J reflected on the fact that s 9 of the CA Act prohibited an employer from dismissing an employee by reason merely of the fact that the employee was a union officer or member of an organisation, or was entitled to the benefit of an industrial agreement or award. This was similar to s 298L(1)(a) of the pre-WorkChoices WR Act concerned being a union officer, delegate or member. His Honour continued:

The Act contained no provisions equivalent to s 298L(1)(b)-(n) [the list of other prescribed grounds in the pre-WorkChoices WR Act]. That suggests that s 9, as originally drafted, was intended to encompass at least some of the matters subsequently introduced by s 298L(1)(b)-(n). It may be that these additional prohibited reasons were added as a matter of emphasis or clarification rather than because of any perceived restriction or limitation on the scope of the forerunner to s 298L(1)(a).<sup>66</sup>

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<sup>59</sup> WR Act s 793(1)(n).

<sup>60</sup> (1917) 23 CLR 199.

<sup>61</sup> (1917) 23 CLR 199, 202.

<sup>62</sup> Act 31 of 1920.

<sup>63</sup> Commonwealth Conciliation and Arbitration Act 1920 (Cth) s 5, inserting a new s 9(1)(d) in the CA Act.

<sup>64</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 18 August 1920, 3594 (Littleton Groom).

<sup>65</sup> (2001) 108 FCR 90.

<sup>66</sup> *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90, 119.

In fact, in another 2001 case Marshall J went further – his Honour referred to this statement and indicated that he would ‘delete the reference to “may be” in the above quote and positively assert what is somewhat tentatively suggested therein.’<sup>67</sup> This suggests that, over time, Parliament has found it necessary to spell out, in ever increasing detail, the types of circumstances that deserve protection – perhaps as a response to a relatively narrow approach to the causal link established by the courts.

## F SHIFTING CAUSAL LINK AND REVERSE ONUS

Over the years, the legislature has used a variety of phrases to define the causal link. The table below summarises the words used over time.

	Causal link: a person must not take prohibited action [...] of a prescribed reason	Reverse onus provision
CA Act (1904, 1909, 1911)	‘by reason merely of the fact’	‘it shall lie upon the employer to show that any employee, proved to have been dismissed [or injured or had his position prejudicially altered] whilst an officer or member of an organization or entitled as aforesaid, was dismissed [or injured or had his position prejudicially altered] <i>for some reason other than those</i> <sup>68</sup> mentioned in this section.’
CA Act (1914, 1947)	‘by reason of the circumstance’	‘if all the facts and circumstances constituting the offence, other than the reason for the defendant’s action, are proved, it shall lie upon the defendant to prove that he was <i>not actuated</i> by the reason alleged in the charge.’
CA Act (1977)	‘by reason of the circumstance[s]’	‘if all the relevant facts and circumstances, other than the <i>reason or intent</i> 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 <i>not actuated by that reason or taken with that intent</i> .’
IR Act	‘because’	‘it is not necessary for the prosecutor to prove the defendant’s reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was <i>not motivated</i> (whether in whole or part) <i>by the reason, nor taken with the intent</i> (whether alone or with another intent), specified in the charge.’
WR Act (pre-	‘because’ <sup>69</sup>	‘it is presumed ... that the conduct was, or is being, carried

<sup>67</sup> *Elliot v Kodak Australasia Pty Ltd* (2001) 108 IR 23, 28.

<sup>68</sup> The 1909 and 1911 versions use the word ‘that’ rather than ‘those’.

<sup>69</sup> Section 298K of the pre-WorkChoices WR Act states that an employer must not ‘for a prohibited reason’ do certain things. Section 298L states that conduct is ‘for a prohibited reason if it is carried out *because* the employee, independent contractor or other person concerned [is a union member, etc]’ (emphasis added). Similarly, in relation to the post-WorkChoices Act, s 793 states that conduct is ‘for a prohibited

	Causal link: a person must not take prohibited action [...] of a prescribed reason	Reverse onus provision
and post-WorkChoices)		out for that reason or with that intent, unless the person or industrial association <sup>70</sup> proves otherwise.’
FW Act	‘because’	‘it is presumed ... that the action was ... taken for that reason or with that intent, unless the person proves otherwise.’

The causal link will be discussed in detail later in this paper. However, it is useful to note at this stage that in the *Barclay* litigation, Mr Barclay argued that the introduction of the word ‘because’ instead of ‘by reason of’ was significant. He argued that the use of the word ‘because’ meant the decision-maker’s subjective reasons for taking the action were irrelevant and the test was purely objective.<sup>71</sup> At first instance, Tracey J rejected this argument. His Honour noted several cases decided since the introduction of the word ‘because’ where courts had ‘used the phrase “by reason of” and the word “because” interchangeably’.<sup>72</sup> This finding (that the introduction of the word ‘because’ instead of ‘by reason of’ was stylistic rather than substantive) was upheld in the Full Federal Court<sup>73</sup> and the High Court.<sup>74</sup>

## G SHIFTING PURPOSES

Over time, the courts’ perception of the purpose of the reverse onus provision has remained relatively constant. The courts view the reverse onus provision as reflecting the fact that it will be very difficult for an applicant (often an employee) to prove the reason for the respondent’s action. This was particularly the case under the CA Act and the IR Act when breach of these provisions was a criminal offence and accordingly, without the reverse onus provision, the employee would have been required to prove the reason for the respondent’s action to a standard ‘beyond reasonable doubt’.

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reason if it is carried out *because* the employee, independent contractor or other person concerned [is a union member, etc]’ (emphasis added).

<sup>70</sup> The words ‘or industrial association’ do not appear in the post-WorkChoices version of the reverse onus provisions (s 809).

<sup>71</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 258 (Tracey J).

<sup>72</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 258 (Tracey J).

<sup>73</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 220 (Gray and Bromberg JJ), and 254 (Lander J).

<sup>74</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, 657 (French CJ and Crennan J).

For example, in the 1975 case of *Bowling v General Motors-Holdens Pty Ltd*,<sup>75</sup> Smithers and Evatt JJ said the reverse onus provision ‘proceeds upon the basis that the real reason for a dismissal may well be locked up in the employer’s breast and impossible, or nearly impossible, of demonstration through ordinary forensic processes.’<sup>76</sup> Similarly, in a 1976 case, *Heidt v Chrysler Australia Ltd*,<sup>77</sup> Northrop J noted that ‘[t]he circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly with the knowledge of the employer. It is for this reason that s 5(4) is of such importance’.<sup>78</sup> This observation has been quoted with approval on many occasions,<sup>79</sup> and the phrase was also used in an Explanatory Memorandum to a bill amending the IR Act.<sup>80</sup>

However, considering the union victimisation provisions more broadly (aside from the reverse onus provision) it does seem that courts’ perception of the purposes of the provisions has shifted over time (as, indeed, have the stated legislative objects). Originally, the provisions focused on encouraging the formation and protection of unions. For example, the objects of the CA Act included:

To facilitate and encourage the organization of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and of employees to be declared organizations for the purposes of this Act.<sup>81</sup>

This aim ‘[t]o facilitate and encourage’ unions was achieved, in part, by offering some protection to employees who became members or officers of unions – but it seems that originally, this protection of individuals was not the main purpose of the provisions, and was merely a practical way to protect and support unions. In *Jones v Thiess Bros Pty Ltd* Keely J quoted with approval from *Bowling v General Motors-Holdens Pty Ltd*<sup>82</sup> that:

Clearly the purposes of the Act will be frustrated unless employees are able to act as union representatives ... and negotiate with the representatives of employers without fear that on that account they will suffer in their employment. The immediate object of Parliament in enacting s 5 can clearly be seen to be to remove fear of adverse action by an employer against an employee taking union office, and performing the functions of that office.<sup>83</sup>

In the 1976 case *General Motors Holden Pty Ltd v Bowling*,<sup>84</sup> Mason J considered that the provisions:

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<sup>75</sup> (1975) 8 ALR 197.

<sup>76</sup> (1975) 8 ALR 197, 204; quoted in *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 186.

<sup>77</sup> (1976) 26 FLR 257.

<sup>78</sup> (1976) 26 FLR 257, 267.

<sup>79</sup> See, eg, *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326, 336; *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 193; *Police Federation of Australia v Nixon* (2008) 168 FCR 340, 359.

<sup>80</sup> Supplementary Explanatory Memorandum, Industrial Relations Reform Bill 1993 (Cth) 64.

<sup>81</sup> CA Act s 2(vi).

<sup>82</sup> (1975) 8 ALR 197, 210.

<sup>83</sup> (1977) 15 ALR 501, 518.

<sup>84</sup> (1976) 12 ALR 605.

are, broadly speaking, designed to protect an officer, delegate or member of an organization against discrimination by his employer. They have a legislative history which extends back to the turn of the century when the trade union was a more fragile institution than it is today and when it stood in need of a large measure of protection from employers.<sup>85</sup>

More recently in 1986, in *Lewis Construction Co Pty Ltd v Martin*, the Full Court of the Federal Court found that the provisions aim to protect both the person dismissed and the relevant union (not merely the union as the employer had argued). The Court expressed the following view:

The purpose of protection of organisations has been seen to be linked with the protection of their members. Indeed, the retention in s 5(1) of the low maximum penalty (a fine of \$400), coupled with the existence of the reinstatement power in s 5(5), tends to suggest that the emphasis lies on the protection of the person dismissed, as much as upon the protection of the organisation. If the intention were merely to protect organisations, this could no doubt be accomplished by heavy penalties, without the existence of a power to reinstate.<sup>86</sup>

The IR Act continued this tradition, with one of its objects being ‘to encourage the organisation of representative bodies of employers and employees and their registration under this Act.’<sup>87</sup>

In one case on the IR Act, the Court stated that the provisions:

are intended to prohibit conduct which has, as a purpose, causing injury to an employee because the employee engaged in a specified activity. The sections identify activity that Parliament views as activity a person should be able to engage in as an employee ... without penalty in the workplace though in some respects their operation is wider. The provisions are intended to be protective of the rights of employees in that context.<sup>88</sup>

However, as time passed, the purposes of the provisions shifted away from protecting and facilitating unions (and protecting their delegates or members), towards protecting the right of individual employees to choose to join, or not to join, a union. In 1996 this purpose was expressly set out in the legislation – the objects of the relevant part of the WR Act included ‘to ensure that employers, employees and independent contractors are free to join industrial associations of their choice or not to join industrial associations.’<sup>89</sup> Further, by this time the legislation protected not only the rights of employees, but also the rights of employers, as the provisions applied equally to employers.<sup>90</sup>

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<sup>85</sup> (1976) 12 ALR 605, 616. This phrase was quoted in *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90, 99 (Weinberg J); *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232, 245 (Wilcox J).

<sup>86</sup> (1986) 70 ALR 135, 142.

<sup>87</sup> IR Act s 3(f); see also the objects in s 3(g)-(k) which relate directly to unions.

<sup>88</sup> *Kelly v Construction, Forestry, Mining and Energy Union (No 3)* (1995) 63 IR 119, 130.

<sup>89</sup> WR Act s 298A(a); see also post-WorkChoices WR Act s 778(a) which provided that one of the objects of the relevant part was ‘to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations’.

<sup>90</sup> See, for example, *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 68 (Nicholson J rejected the argument that the purpose was ‘clearly to protect employees and independent contractors’, finding that it ‘applies equally to employers’).

In 2000, two decisions of the Federal Court reached slightly different conclusions as to whether the purpose of the then-current legislation (the pre-WorkChoices WR Act), was the same as the purpose of previous versions of the provisions. In *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd*,<sup>91</sup> Merkel J said the object of the provisions, 'as well as their statutory predecessors, has not been in doubt.'<sup>92</sup> His Honour considered the objects were to 'remove fear of adverse action by an employer against an employee taking union office and performing the functions of that office'<sup>93</sup> and to 'ensure the threat of dismissal or discriminatory treatment cannot be used by an employer to destroy or frustrate an employee's right to join an industrial association and to take an active role in that association to promote industrial interests of both the employee and the association'.<sup>94</sup>

In contrast, in *Australian Workers' Union v BHP Iron-Ore Pty Ltd*,<sup>95</sup> Kenny J considered the union's argument that the original purpose of the provisions under the CA Act (to 'protect the existence and functioning of organisations'<sup>96</sup>) had not been changed by the introduction of the WR Act. However, her Honour noted the changes in the objects provisions and, in particular, the additional objects set out in s 298A which 'serve to emphasise that the Part is directed to ensuring that employees enjoy the freedom to join or not to join a union as they see fit and, if they join, that they can join the union of their choice.'<sup>97</sup>

In *Unsworth v Tristar Steering and Suspension Australia Ltd*,<sup>98</sup> in the context of the post-WorkChoices WR Act, Gyles J considered the objects of Part 16 (set out in s 778) and the objects of the Act more broadly (set out in s 3).<sup>99</sup> His Honour noted that these objects 'are quite different from those which pertained for most of the history of industrial relations in Australia post Federation.'<sup>100</sup> His Honour quoted from Mason J's judgment in *General Motors Holden Pty Ltd v Bowling*<sup>101</sup> (which referred to the aims of protecting union members, delegates and officers from discrimination by employers), and said the legislation 'as it stood in 2006 did not contain any vestige of special protection for trade unions or [their] members compared with employers, organisations of employers or, more particularly, those who do not belong to a trade union'.<sup>102</sup>

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<sup>91</sup> (2000) 175 ALR 173.

<sup>92</sup> (2000) 175 ALR 173, 187.

<sup>93</sup> (2000) 175 ALR 173, 187, citing *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197, 210.

<sup>94</sup> (2000) 175 ALR 173, 187, quoting *Davids Distribution Pty Ltd v National Union of Worker* (1999) 91 FCR 463, 500.

<sup>95</sup> (2000) 106 FCR 482

<sup>96</sup> (2000) 106 FCR 482, 496.

<sup>97</sup> (2000) 106 FCR 482, 497-8. See also *Construction, Forestry, Mining & Energy Union v BHP Steel (AIS) Pty Ltd* [2000] FCA 1008 (27 July 2000) [48].

<sup>98</sup> (2008) 175 IR 320. Note that some aspects of this decision have been questioned: *Dowling v Fairfax Media* (2008) 172 FCR 96, 119 (Jagot J).

<sup>99</sup> (2008) 175 IR 320, 326-8.

<sup>100</sup> (2008) 175 IR 320, 332.

<sup>101</sup> (1976) 12 ALR 605, 616.

<sup>102</sup> (2008) 175 IR 320, 332.

There has also been some judicial consideration of the interaction between the Australian legislation and the right to freedom of association at international law. In a 2003 decision, North J of the Federal Court considered the scope of s 298L(1)(a) of the pre-WorkChoices WR Act (which related to union membership), and held that this section 'should be construed conformably with Australia's international obligations'.<sup>103</sup> In a 2008 decision,<sup>104</sup> Jagot J of the Federal Court rejected an argument that Part 16 of the post-WorkChoices WR Act was limited by an additional requirement that conduct in question relate to 'freedom of association' (such as the right to join, or not to join, or associate with, a union). Her Honour noted a number of textual considerations that supported the rejection of this argument,<sup>105</sup> and also noted that this approach to construction 'is not inconsistent with and does not undermine the objects of Pt 16 or the giving of effect to Australia's international obligations'.<sup>106</sup>

Another matter which arises in considering the purpose of the provisions is whether they should be construed broadly on the basis that they are *beneficial* provisions. In the 2001 decision of *Elliott v Kodak Australasia Pty Ltd*,<sup>107</sup> Marshall J noted that, unlike the provisions under the IR Act and the CA Act, the WR Act provisions do not create criminal offences. His Honour considered that 'Part XA of the WR Act is beneficial legislation which must be interpreted broadly and not in a restrictive, narrow or technical way.'<sup>108</sup> In the same year, Weinberg J noted that:

The objects of Pt XA are remedial in nature. One such object is to protect the rights of individuals who are members or officers of industrial associations from discrimination and victimisation. Similar provisions in other legislation have been treated as remedial and construed beneficially... Where a remedial law also has a penal aspect, such that the two principles of construction conflict, it has been held that the principle of strict construction should yield to the principle of beneficial construction...<sup>109</sup>

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<sup>103</sup> *Australasian Meat Industry Employees' Union v Beldra Pty Ltd* (2003) 126 IR 165, 221. His Honour went on to state that these international obligations extend 'to protecting union members from discrimination based on the actions taken by a union as an incident of the membership of the person of the union': 221.

<sup>104</sup> *Dowling v Fairfax Media Publications Pty Ltd* (2008) 172 FCR 96. This case overturned an earlier decision that the proceedings be struck out because there was no reasonable prospect of success. A later decision on the substance of the complaint (*Dowling v Fairfax Media Publications Pty Ltd* (2009) 182 IR 28) did not disturb Jagot J's 2008 decision.

<sup>105</sup> (2008) 172 FCR 96, 117-118. These considerations included that although there is some overlap between s 793 and s 659 (unlawful dismissal), this 'is not necessarily perverse' (at 118). Her Honour noted that there are different remedies, procedures and cost consequences between the two sets of provisions, and '[t]he provisions with respect to proof are different (compare s 664 with s 809)' (at 118).

<sup>106</sup> (2008) 172 FCR 96, 119, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

<sup>107</sup> (2001) 108 IR 23. An appeal from this decision was allowed on other grounds: *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251.

<sup>108</sup> (2001) 108 IR 23, 30.

<sup>109</sup> *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90, 99-100 (citations omitted).

Finally, it is interesting to note that several courts have expressed the view that the purpose of the legislation is not to provide immunity to union officers and delegates.<sup>110</sup> In the 1957 case *Atkins v Kirkstall-Repco Pty Ltd*,<sup>111</sup> the Commonwealth Industrial Court explained:

This case is an example of how difficult it can be, particularly in the light of sub-s. (4) of s. 5 of the Act, for an employer to dismiss an employee, however unsatisfactory his conduct as such may have been, if the employee has also been an active union delegate. But the purpose of the legislation is clearly not to give a union delegate any immunity from dismissal except that he cannot be dismissed because he is a delegate. In *Pearce v W.D. Peacock and Co. Ltd* Barton A.C.J., who formed one of the majority of the High Court in that case, said:- "An employee who is dissatisfied with his work and wages may or may not be a unionist. When the dissatisfaction exists it would be absurd to say that a dismissal on that account is justified when he is not a unionist, but is a contravention of the section when he is a unionist ...".<sup>112</sup>

In a 2003 case, Gyles J commented:

This case again illustrates the practical difficulties confronting both employer and employee where the employee is an active union delegate and where there are, or have been, contentious industrial issues in which the delegate has been involved in acting contrary to what management sees as the best interests of the employer. The difficulties are compounded because an active delegate is unlikely to be a shrinking violet. On the one hand, victimisation of union officials is not to be tolerated. On the other hand, a union official is given no immunity from normal constraints of behavior, nor any licence to act in a manner which would not be tolerated in another employee.<sup>113</sup>

## H SHIFTING APPROACHES TO MULTIPLE REASONS

Another matter that has evolved over time is the way the legislation deals with the possibility of multiple reasons for taking an action. In the early versions of the CA Act (1904 to 1914), the legislation prohibited actions taken 'by reason merely of the fact' that the employee was a union member (or had another characteristic). As discussed above, the use of the word 'merely' would seem to imply that a breach would only occur where the prohibited reason was the *only* reason for the action.

In the 1914 amendments to the CA Act, the word 'merely' was discarded, and the action was prohibited if it was taken 'by reason of the circumstance' that the employee was a

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<sup>110</sup> See, eg, *Hyde v Chrysler (Australia) Ltd* (1977) 30 FLR 318, 332; *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 113.

<sup>111</sup> (1957) 3 FLR 439.

<sup>112</sup> (1957) 3 FLR 439, 445. Notably, cases have determined that action taken against a group of employees, only some of whom have a prescribed characteristic such as union membership, can be a breach with respect to those employees with the characteristic: *Community and Public Sector Union v Commonwealth* (2006) 157 IR 470, 479; *Community and Public Sector Union v Commonwealth* (2007) 163 FCR 481, 496. These cases involved employers refusing to grant leave on the Work Choices national day of protest.

<sup>113</sup> *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Australian Health and Nutrition Association Ltd* (2003) 147 IR 380, 381.

union member (or had another prescribed characteristic). To avoid conviction, a respondent was required to prove that it 'was not actuated' by the reason alleged. In *Joiner v Muir*,<sup>114</sup> the Court found that the employee's union membership did 'actuate' the employer's decision to dismiss her with pay in lieu of notice, and found that 'the existence of additional actuating circumstances does not mean that a breach of the Act has not occurred.'<sup>115</sup>

In 1970, Joske J considered that the prescribed ground had to be the 'operative or pre-eminent reason'.<sup>116</sup> His Honour said:

To the interpretation of the section one can adapt the language of Lord Simon L.C. to this effect:

The question to be answered is what is the real reason or the real purpose of the employers? The test is not what is the natural result to the informants of the employers' action, nor what is the resulting injury which they realise or should realise will follow, but what was in truth the object in their minds when they acted as they did. The analysis of human impulses leads into the quagmire of mixed motives, and there may be more than a single purpose or object. It is enough to say that if there is more than one purpose actuating the employers liability must depend on ascertaining the predominant purpose.<sup>117</sup>

Later cases considering the phrase 'by reason of the circumstance' held that, in order for a breach to be found, the prohibited reason had to be a 'substantial and operative' reason, but need not be a predominant reason or the only substantial and operative reason.<sup>118</sup> The phrase 'substantial and operative' stems from a 1975 decision of the Australian Industrial Court in *Roberts v General Motors-Holden's Employees' Canteen Society Inc.*<sup>119</sup> In that case, the Court looked to the High Court's interpretation<sup>120</sup> of the phrase 'for the reason that' in legislation dealing with resale price maintenance (in particular, 'withholding the supply of goods "for the reason that" it was likely that the goods would be sold thereafter at discount prices'<sup>121</sup>) and adopted the phrase 'substantial and operative reason' in relation to the test of 'by reason of the circumstance'. The Court said:

Whether a particular action taken by a person may be said to be so taken by reason of some particular circumstance, appears to depend on whether it may be said that the circumstance was a substantial and operative factor influencing him to take such action.<sup>122</sup>

This formulation ('substantial and operative') was endorsed by the High Court in the 1976 decision *General Motors Holden Pty Ltd v Bowling*.<sup>123</sup> Justice Mason held the lower

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<sup>114</sup> (1967) 15 FLR 340.

<sup>115</sup> (1967) 15 FLR 340, 355.

<sup>116</sup> *Causer v Austral Bronze Crane Copper Pty Ltd* (1970) 133 CAR 902, 907.

<sup>117</sup> *Causer v Austral Bronze Crane Copper Pty Ltd* (1970) 133 CAR 902, 907, referring to *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 444-5.

<sup>118</sup> See, eg, *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981): 'It does not have to be the only substantial and operative factor.'

<sup>119</sup> (1975) 25 FLR 415.

<sup>120</sup> *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617.

<sup>121</sup> (1975) 25 FLR 415, 424.

<sup>122</sup> (1975) 25 FLR 415, 424.

court was correct in finding that ‘an employer is actuated by a particular reason or circumstance, if that reason or circumstance was “a substantial and operative factor” influencing him to take that action,’<sup>124</sup> and that it was also correct in rejecting the notion of the ‘sole or predominant reason actuating the employer’.<sup>125</sup>

Courts continued to use the formulation ‘substantial and operative’ for some time.<sup>126</sup> In *Heidt v Chrysler Australia Ltd*, Northrop J said:

...it is not necessary for the informant to establish that the reason alleged was the only or sole reason actuating the employer; the reason alleged need not be the predominant reason: “... it is enough if it is an operative reason, that is to say, a substantial reason in the totality of the reasons...”<sup>127</sup>

In a 1982 case, Justice Smithers confirmed that the employer has been ‘actuated’ by ‘a reason or circumstance if that reason or circumstance was a substantial and operative factor influencing him to take that action’. Further, ‘an employer may be said to have been actuated by a particular reason if it was a substantial and operative factor influencing him to take that action, although that reason was but one of a number of reasons which so influenced him’.<sup>128</sup>

In one case, it was held that ‘[t]he employer is not obliged to show that the existence of the factor was totally disregarded ... but the evidence must establish, on the balance of probabilities, that the prohibited factor was not “a substantial and operative factor”’.<sup>129</sup>

In the 1986 case of *Lewis Construction Co Pty Ltd v Martin*,<sup>130</sup> the Full Bench of the Federal Court found that the essential question for determination was whether the prescribed ground (union membership) was a ‘substantial and operative factor’ in the decision to dismiss. The employer had dismissed all members of a particular union. The employer argued (and the trial judge found)<sup>131</sup> that the employer believed the dismissal of all union members ‘was the only course open to it as a means of countering a campaign ... then being conducted by’ the union.<sup>132</sup> On appeal, the employer argued that

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<sup>123</sup> (1976) 12 ALR 605, 616.

<sup>124</sup> (1976) 12 ALR 605, 616.

<sup>125</sup> (1976) 12 ALR 605, 616.

<sup>126</sup> See, eg, *Cuevas v Freeman Motors Ltd* (1975) 8 ALR 321, 322; *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 267; *Jones v Thiess Bros Pty Ltd* (1977) 15 ALR 501, 504; *Wood v City of Melbourne Corporation* (1979) 26 ALR 430, 438; *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 107; *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981); *Linehan v Northwest Exports Pty Ltd* (1981) 57 FLR 49, 62; *Voigtsberger v Council of the Shire of Pine Rivers (No 2)* (1981) 58 FLR 239, 254; *Sandilands v Australian Newsprint Mills Ltd* (1982) 3 IR 386, 386; *Stapleton v African Lion Safari Pty Ltd* (Unreported, Federal Court of Australia, Ellicott J, 7 April 1982); *Webb v Nationwide News Pty Ltd* (1985) 10 IR 252, 254; *Lewis Construction Co Pty Ltd v Martin* (1986) 70 ALR 135, 139; *Gibbs v Palmerston Town Council* (Unreported, Federal Court, Gray J, 21 December 1987); *Australasian Meat Industry Employees’ Union v Sunland Enterprises Pty* (1988) 24 IR 467, 477.

<sup>127</sup> (1976) 26 FLR 257, 266.

<sup>128</sup> *Sandilands v Australian Newsprint Mills Ltd* (1982) 3 IR 386, 386.

<sup>129</sup> *Webb v Nationwide News Pty Ltd* (1985) 10 IR 252, 254.

<sup>130</sup> (1986) 70 ALR 135.

<sup>131</sup> (1986) 70 ALR 135, 138.

<sup>132</sup> (1986) 70 ALR 135, 137.

this was the ‘real’ reason for the dismissal, and accordingly the employee’s union membership was not a ‘reason’ for the dismissal, it was merely the criterion for selection for dismissal. The Full Bench found that ‘this court is bound to hold ... that an offence was committed if [the employee’s] membership of the [union] was a “substantial and operative factor” in the decision to dismiss him’.<sup>133</sup> The Court held ‘there is no inconsistency between the presence of a perceived need to dismiss [union] members in order to counteract a [union] campaign as a reason for dismissal, and the existence of other reasons for that dismissal. The search for the “real” reason for a dismissal is not one sanctioned by the authorities.’<sup>134</sup> The employer had failed to lead any evidence to support the proposition that union membership was not a substantial and operative factor in the decision to dismiss, and the Court held it had not satisfied the reverse onus.

When the IR Act was introduced, the new provisions expressly dealt with the possibility of multiple reasons or intents. The reverse onus provision in s 334(6) provided a defence if the defendant proved ‘the action was not motivated (*whether in whole or in part*) by the reason, nor taken with the intent (*whether alone or with another intent*) specified in the charge’ (emphasis added). These words indicate that there would be a breach even if the prescribed ground was only part of the reason for the action. The reverse onus provisions in sections 335 and 336 (which related to actions by unions) were very similar to s 334(6).<sup>135</sup> In contrast, the reverse onus provision in s 334A(6) was different. Section 334A prohibited an employer from taking certain action against an employee ‘merely because the employee has engaged, or is proposing to engage’ in certain types of industrial activity. Subsection (6) provided that it was ‘a defence to the prosecution if the defendant proves that the action was not motivated *solely* by the reason, or taken with the *sole* intent, specified in the charge.’<sup>136</sup> Accordingly, there would only be a breach of s 334A(6) if the prescribed ground was the *only* reason for the action.

In *Kelly v Construction, Forestry, Mining and Energy Union (No 3)*,<sup>137</sup> Moore J referred to the notion of the ‘substantial and operative’ factor under the CA Act, but said that under the IR Act ‘there is a relevant difference in the language’<sup>138</sup> – it refers to ‘whether in whole or in part’. Accordingly, his Honour stated ‘[g]iven the differences in language,

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<sup>133</sup> (1986) 70 ALR 135, 137 citing *General Motors-Holdens Pty Ltd v Bowling* (1976) 12 ALR 605.

<sup>134</sup> (1986) 70 ALR 135, 138.

<sup>135</sup> Sections 335(3) and 336(3) are identical, and provide (emphasis added to show the main difference with s 334(6)):

In a prosecution for an offence against this section, it is not necessary for the prosecution to prove the defendant’s reason for the action charged nor the intent with which the defendant took the action charged, but, *where a reason or intent is specified in the charge*, it is a defence to the prosecution if the defendant proves that the action was not motivated (whether in whole or in part) by the reason, not taken with the intent (whether alone or with another intent), specified in the charge.

<sup>136</sup> Emphasis added.

<sup>137</sup> (1995) 63 IR 119.

<sup>138</sup> (1995) 63 IR 119, 129.

some caution, in my opinion, has to be exercised in applying, for present purposes, decisions concerning the operation of s 5(4) [of the CA Act].<sup>139</sup> Notably other cases on the IR Act refer to the phrase ‘whether in whole or in part’ but do not consider it closely.<sup>140</sup>

The WR Act also expressly dealt with the possibility of multiple reasons. For example, s 298K(1) of the pre-WorkChoices WR Act prevented an employer from taking certain action ‘for a prohibited reason, or for reasons that include a prohibited reason’. The same phrase was used in the post-WorkChoices WR Act.<sup>141</sup> Accordingly, the prohibited reason was not required to be the *only* reason for action. However, there were some exceptions to this general approach. For example, under the post-WorkChoices WR Act, if an employer took prohibited conduct against an employee or prospective employee because they were entitled to the benefit of an industrial instrument,<sup>142</sup> there was no breach of the legislation ‘unless the entitlement [was] the sole or dominant reason’ for the conduct.<sup>143</sup>

An early case under the WR Act followed the judicial approach under the CA Act and held that the prohibited ground had to be a ‘substantial and operative’ reason for the action.<sup>144</sup> However, a year later this approach had changed, and courts began to decide that the prohibited ground did not have to be a ‘substantial and operative’ reason.<sup>145</sup> For example, in 1999, Nicholson J of the Federal Court rejected an argument that he was obliged to follow the cases which used the phrase ‘substantial and operative’ reason. His Honour held:

[t]he words ‘or for reasons that include a prohibited reason’ in s 298K(1) effect a change to the law and permit a reason to be an operative reason provided it is one of the reasons for the conduct. It would not therefore have to be the ‘substantial’ reason. It would have, of course, to be ‘operative’ – that is it would have to be a reason.<sup>146</sup>

Later, Branson J of the Federal Court also referred to the legislative phrase ‘for reasons

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<sup>139</sup> (1995) 63 IR 119, 130; although his Honour went on to note the ‘observations of Northrop J apparently to the contrary in *Lawrence v Hobart Coaches Pty Ltd*’ (1994) 57 IR 218 at 219.

<sup>140</sup> See, eg, *Pryde v Coles Myer Limited* (1990) 33 IR 469, 472 (Keely J); *Lawrence v Hobart Coaches Pty Ltd* (1994) 57 IR 218, 220, 224 (Northrop J); *Kelly v Construction, Forestry, Mining and Energy Union (No 3)* (1995) 63 IR 119, 126, 128 (Moore J).

<sup>141</sup> Section 792(1).

<sup>142</sup> Or an order of an industrial body or the Australian Fair Pay and Conditions Standard.

<sup>143</sup> Section 792(4). This section was applied in *Unsworth v Tristar Steering and Suspension Australia Ltd* (2008) 175 IR 320, 338.

<sup>144</sup> *Howarth v Frigrite Kingfisher Pty Ltd* [1998] FCA 612 (29 May 1998).

<sup>145</sup> See, eg, the use of the term ‘operative reason’ in *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* (2002) 120 FCR 107, 122-3; *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 190; *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, 483-4; *Australian Workers’ Union v John Holland Pty Ltd* (2001) 103 IR 205, 218; *Transport Workers Union of Australia v BP Australia Ltd* (2001) 187 ALR 697, 706.

<sup>146</sup> *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 69. This formulation was referred to in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232, 261 (Merkel J).

that include a prohibited reason' and said '[t]he employer's reasons will include a prohibited reason within the meaning of this subsection if the prohibited reason is one of the operative reasons for the conduct whether or not it was the substantial reason for the conduct.'<sup>147</sup> Later in the judgment, her Honour held that the reason must be an 'operative or immediate reason' for the conduct.<sup>148</sup> This phrase was quoted in the FW Act's Explanatory Memorandum.<sup>149</sup>

Similarly, a case decided under the post-WorkChoices WR Act found that the reason does not need to be 'substantial and operative' – it will be operative provided it is *one* of the reasons for the conduct.<sup>150</sup>

### III GETTING TO THE REVERSE ONUS

An employee (or other applicant) is generally required to prove certain facts before the reverse onus provision comes into play. To give a simple example, if an employee alleges that she was dismissed because she was a union member, the employee would be required to prove that she was dismissed (the action taken by the employer), and that she was a union member (the prescribed ground), before the onus would shift to the employer in relation to the reason for the dismissal. This general position depends on the wording of the particular legislation, and over the years courts have explored a number of dimensions to the question of what the employee needs to prove, relating to the obligation on the employee to:

- prove that the employer took the action alleged;
- allege a particular prescribed ground;
- prove the existence of the prescribed ground;
- prove that the employer was aware of the prescribed ground; and
- provide some evidence that the prescribed ground was a reason.

These matters are explored in turn in Part IIIA, entitled 'What Does the Employee Need to Prove?' In addition, the question of whether the reverse onus shifts the legal burden or merely the evidentiary burden is examined in the final section of the material exploring what the employee must prove.

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<sup>147</sup> *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326, 337. Contrast with Northrop J's decision in *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 266 where his Honour quoted from an earlier case *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 635 (Barwick CJ): 'it is enough if it is an operative reason, that is to say, a substantial reason in the totality of reasons...'

<sup>148</sup> (2002) 113 IR 326, 342.

<sup>149</sup> Explanatory Memorandum, Fair Work Bill 2008 (Cth) [1458].

<sup>150</sup> *Construction, Forestry, Mining and Energy Union v CE Marshall & Sons Pty Ltd* (2007) 160 IR 223, 228, referring to *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34.

Part IIIB explores the case decisions over the years examining the level of evidence required, from an initial standard of 'beyond reasonable doubt', to the 'balance of probabilities' and s 140 of the Evidence Act 1995 (Cth).

## A WHAT DOES THE EMPLOYEE NEED TO PROVE?

### *Obligation to prove that the employer took the action alleged*

It is clear that the applicant is required to prove that the respondent took the action alleged, before the reverse onus comes into play. In one Federal Court decision, two casual employees claimed they had been dismissed because they were union members. They were unsuccessful, because they failed to prove that they had been dismissed – the Court found the circumstances were consistent with engagement on a daily basis, and accordingly they had failed to show there was an employment contract in existence on the morning in question.<sup>151</sup>

In another example, in a case of the Industrial Relations Court of Australia, Moore J considered an allegation that an employer had refused to employ certain individuals because they were union delegates.<sup>152</sup> It was the prosecutor's obligation to show the company had refused to employ the individuals. However, the prosecutor did not provide any evidence to establish that there were vacant positions available at the time. The prosecutor argued that the reverse onus provision applied so as to require the employer to prove its reasons for not offering employment (that is, it was up to the employer to prove that there were no vacant positions, and that this was why it refused to employ the individuals).<sup>153</sup> Justice Moore did not accept this argument. His Honour found the onus only applied once the 'refusal to employ' had been established, and then only applied to the company's reasons for refusing to employ.<sup>154</sup> Justice Moore considered the meaning of the phrase 'refuse to employ' in some detail, and ultimately concluded that it only applied if there was a position or vacancy at the relevant time. As the prosecutor had not proven this, the employer did not have a case to answer.<sup>155</sup>

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<sup>151</sup> *Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd* (1988) 24 IR 467, 473. See also *Linehan v Northwest Exports Pty Ltd* (1981) 57 FLR 49, 661 (Ellicott J held that the employee was employed by the day and accordingly was not satisfied beyond reasonable doubt that the employer dismissed or threatened to dismiss him); *Transport Workers' Union of Australia v De Vito* (2000) 140 IR 33, 40-1 (Ryan J held the employment contract was not terminated at the initiative of the employer); *Buckingham v KSN Engineering Pty Ltd* (2008) 177 IR 427, 450 (Lucev FM found pleadings failed to properly allege the relevant conduct, and this deficiency could not be saved by the reverse onus).

<sup>152</sup> *Fraser v Fletcher Construction Australia Ltd* (1996) 70 IR 117.

<sup>153</sup> (1996) 70 IR 117, 118.

<sup>154</sup> (1996) 70 IR 117, 118.

<sup>155</sup> (1996) 70 IR 117, 118-9. Justice Wilcox reached a similar conclusion about the meaning of 'refuse to employ' in *Construction, Forestry, Mining & Energy Union v BHP Steel (AIS) Pty Ltd* [2000] FCA 1008 (27 July 2000). For another example of a case where the applicant was unsuccessful because of a failure to

Some cases seem to conflate the issues of the action taken and the reverse onus. In a 2008 decision, it was alleged that a union official threatened to take industrial action if a particular contractor (who was involved in an industrial proceeding) was used on a job. Federal Magistrate Cameron found that the words the union official used did not constitute a threat of industrial action. Federal Magistrate Cameron said: 'As I am satisfied that the words ... do not meet the criteria ... as constituting a threat of industrial action, I find that the respondents have discharged their onus under s 809 of the Act and that that conversation does not amount to a breach'.<sup>156</sup> Unlike the two cases discussed earlier in this section (which found that the reverse onus was not enlivened because the applicant had failed to prove the alleged action was taken), Cameron FM's reasoning suggests that the applicant's failure to prove the alleged action meant the respondents had satisfied their onus.<sup>157</sup>

### *Obligation to allege a particular prescribed ground*

Another issue is whether the applicant is required to specifically identify the alleged prescribed ground (for example, union membership, or participating in proceedings under an industrial law, or being entitled to the benefit of an award), or whether it is simply enough to allege that the respondent took the action for a prescribed ground. Some versions of the reverse onus provision expressly required that the charge specify the alleged reason or intent. For example, the reverse onus provision in the 1914 version of the CA Act stated 'if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved, it shall lie upon the defendant to prove that he was not actuated *by the reason alleged in the charge*'.<sup>158</sup> In contrast, the earlier 1911 version of the CA Act did not expressly require the alleged reason to be identified by the applicant. It simply provided:

In any proceeding for any contravention of this section, it shall lie upon the employer to show that any employee, proved to have been dismissed or injured in his employment or prejudiced whilst an officer or member of an organization or such an association or whilst entitled as aforesaid, was dismissed or injured in his employment or prejudiced for some reason other than that mentioned in this section.<sup>159</sup>

The pre-WorkChoices WR Act (s 298V) provided that the reverse onus applied if, '*in an application* under this Division relating to a person's ... conduct, it is alleged that the

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prove the employer took the conduct alleged, see *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90.

<sup>156</sup> *Alfred v Primmer (No 2)* (2008) 177 IR 82, 113.

<sup>157</sup> Some cases indicate that the employer's conduct itself must have an intentional aspect to it: *Australian Workers' Union v BHP Iron Ore Pty Ltd* (2000) 96 IR 422; *BHP Iron Ore Pty Ltd v Australian Workers' Union* (2000) 102 FCR 97, 108-109, 112; *Australian Workers' Union v BHP Iron-Ore Pty Ltd* (2000) 106 FCR 482, 499.

<sup>158</sup> Section 9(4) (emphasis added).

<sup>159</sup> Section 9(3).

conduct was ... carried out for a *particular* reason or with a particular intent'.<sup>160</sup> In a 2000 case under this legislation, an employer argued that s 298V did not come into operation because the document initiating the proceeding did not specifically allege any particular reason for the dismissal.<sup>161</sup> However, the Court held that the words 'an application' in s 298V refers to the proceeding itself, rather than the document that initiates the proceeding, and that s 298V operates when, 'in the course of a proceeding in which contravention of Pt XA is alleged, there is an allegation that conduct was carried out for a particular reason.'<sup>162</sup>

In another 2000 case,<sup>163</sup> Einfeld J rejected an argument that the applicant could not rely on s 298V because it had failed to refer to the section in the statement of claim. His Honour said 'the relevant paragraphs of the amended statement of claim adequately allege that conduct was done for a particular reason, after which the [applicant] is entitled to rely on the s 298V presumption.'<sup>164</sup>

A 2001 Full Federal Court decision<sup>165</sup> briefly considered the obligation of a claimant to allege the conduct was carried out for a particular reason before being able to rely on the reverse onus. The case concerned a threat by a union official to close down a site if certain individuals did not join the union. One issue on appeal was whether the union *intended* to coerce the individuals to join the union (which could amount to a breach of s 298S(2)), and whether the claimant could rely on the reverse onus provision to establish that intention. Ultimately, the Full Federal Court found that the trial judge's finding (that the union did have the intent to coerce) had not relied on the reverse onus provision, but rather was an inference drawn from the evidence.<sup>166</sup> Despite this, the Court went on to say:

it may not have been open to the respondent both on the state of the pleadings and in light of the course of the trial, to invoke the presumption of s 298V. While the amended statement of claim baldly asserted that [the union official's] conduct constituted "a threat of industrial action" ... and that it was "in breach of: ... (iv) s 298S(2)(c) of the Act" ... it did not, for s 298V(a) purposes expressly "allege that the conduct was ... carried out for a particular reason or with a particular intent". That allegation, we understand, was only made explicitly in written submissions after the evidence had been taken. It should have been made clearly and unequivocally much earlier in the proceeding.<sup>167</sup>

In a 2008 decision regarding the post-WorkChoices WR Act, Wilson FM considered whether it was sufficient for the employee to simply allege that their dismissal was for a prescribed reason (without specifying a particular prescribed reason), and held that

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<sup>160</sup> Section 298V (emphasis added).

<sup>161</sup> *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* (2000) 100 IR 383, 390.

<sup>162</sup> (2000) 100 IR 383, 391.

<sup>163</sup> *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, 480-81.

<sup>164</sup> (2000) 100 FCR 454, 481.

<sup>165</sup> *Australian Building Construction Employees and Builders' Labourers' Federation v Employment Advocate* (2001) 114 FCR 22.

<sup>166</sup> (2001) 114 FCR 22, 33-4.

<sup>167</sup> (2001) 114 FCR 22, 34.

'[c]ommon sense dictates that, at the least, the applicant must identify those reasons ... that are alleged to have formed the contravening conduct.'<sup>168</sup>

Accordingly, in general it seems that the applicant has been required to identify the particular prescribed ground, although the stage at which it was required to be identified varied depending on the particular legislation.

#### *Obligation to prove the existence of the prescribed ground*

Once the applicant has identified the alleged prescribed ground, are they required to do more and prove that the prescribed ground exists (for example, prove that the employee was in fact a union member or did in fact participate in proceedings)?

In *Bahonko v Sterjov*, Jessup J referred to s 5(4) of the CA Act and observed:

Under that provision, it lay upon the prosecutor to prove the existence of the factual circumstance alleged to provide the basis of the defendant's reasons for dismissal. For example, if it were alleged that an employee had been dismissed because of his or her union membership, it was for the prosecutor to prove the employee was a union member; by s 5(4) it then lay upon the defendant to prove that that circumstance was not the reason why the employee had been dismissed.<sup>169</sup>

For example, in a 1949 case,<sup>170</sup> an employee claimed that he was dismissed by reason of the circumstance that he was a union delegate or member. However, the Court found the employee had failed to prove his membership or delegate status. Accordingly, the reverse onus did not come into effect, and the employer was not 'called upon to make any explanation of its action.'<sup>171</sup> In a 1980 case under the CA Act, an employee claimed that he was dismissed 'by reason of the circumstance' that he was entitled to the benefit of an award. However, the employee's claim was unsuccessful because he failed to prove that he was in fact entitled to the benefit of an award.<sup>172</sup> The reverse onus was not enlivened. And in a third case, an employee argued that he was dismissed because, as a member of a union seeking better industrial conditions, he was dissatisfied with his conditions. However, this argument was unsuccessful because he 'failed to prove that the organization was seeking better industrial conditions',<sup>173</sup> primarily because the

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<sup>168</sup> *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 97.

<sup>169</sup> (2007) 167 IR 43, 75.

<sup>170</sup> *Wright v Scriball Pty Ltd* (1949) 65 CAR 344.

<sup>171</sup> (1949) 65 CAR 344, 345-6 (Foster J). Chief Justice Kelly and Dunphy J reached the same conclusion.

<sup>172</sup> *Leontiades v F T Manfield Pty Ltd* (1980) 43 FLR 193. The employee was not a union member, and was not involved in the industrial dispute which resulted in the award. Justice Keely found that where an award 'imposes a duty on an employer to pay no less than the minimum wages to non-members of a union, the duty on the employer is not owed to the non-members because they are not parties to the dispute settled by the award' (at 196). The employer owed a duty to *the union* in respect of him, but did not owe a duty to him. Accordingly, the employee was not 'entitled to the benefit of' the award within the meaning of s 5(1)(b) of the CA Act, and the reverse onus was not enlivened. See also *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981).

<sup>173</sup> *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 270.

issue in question (manning levels on a particular station) was not covered in the existing award and the union was not making any claim in relation to it.

Jessup argues that s 298V of the pre-WorkChoices WR Act was different to s 5(4) of the CA Act because:

[i]t says nothing about what the applicant does or does not have to prove, but, assuming the relevant allegation to have been made, sets up a presumption that the respondent's conduct was done for the reason or intent alleged, unless proved otherwise. On one view, the applicant is under no obligation to prove the existence of facts which would provide a basis for the presumed reason. For instance, an applicant would not have to prove (or even allege) that an employee was a union member: it would be necessary only for the applicant to allege that the dismissal of the employee was done because he or she was a union member, leaving it to the respondent to disprove that allegation, one possible way of doing so being to prove that the employee was never a union member.<sup>174</sup>

However (as Jessup notes), Branson J reached a different conclusion in a 1999 case, finding that the applicant was required to prove the existence of the prescribed ground under the pre-WorkChoices WR Act.<sup>175</sup> In that case, a number of employees were disciplined for being absent without leave. Some of the employees were absent to attend proceedings in the Australian Industrial Relations Commission. They argued they had been disciplined for a prohibited reason, namely that they had 'participated in a proceeding under an industrial law'.<sup>176</sup> This argument failed. Justice Branson found they were not participants in the proceeding, as they were merely observing and were not instructing or giving evidence.<sup>177</sup> Her Honour said the reverse onus provision (s 298V):

does not, in my view, allow the applicant to circumvent that finding. Rather it is to be construed as an aid to proof of the intent or reason of the respondent which motivated, or formed part of the motivation for, the respondent's conduct. It may fairly be presumed that the section is intended to alleviate the difficulties of proof by one party of the state of mind or motivation of another.<sup>178</sup>

In a 2008 Federal Court decision under the post-WorkChoices WR Act,<sup>179</sup> Moore J found that the reverse onus provision 'does not obviate the need for the applicant to prove the existence of objective facts which are said to provide a basis for the respondent's conduct.'<sup>180</sup> Accordingly:

it is not sufficient for the applicant to simply allege that he was a member and delegate of an industrial organisation. Rather, on the assumption that the applicant is able to prove the fact of membership or delegateship of an industrial organisation, the burden is cast on the respondent

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<sup>174</sup> Chris Jessup, 'The Onus of Proof in Proceeding under Part XA of the Workplace Relations Act 1996' (2002) 15 *Australian Journal of Labour Law* 198, 203.

<sup>175</sup> *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations* (1999) 140 IR 131.

<sup>176</sup> Section 298L(1)(j) of the pre-WorkChoices WR Act.

<sup>177</sup> (1999) 140 IR 131, 153.

<sup>178</sup> (1999) 140 IR 131, 167.

<sup>179</sup> *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306.

<sup>180</sup> (2008) 177 IR 306, 321.

to prove that his membership or delegateship of an industrial organisation did not form part of the reason for the termination of his employment.<sup>181</sup>

Similarly, in another 2008 case, Federal Magistrate Wilson concluded that ‘the applicant must prove the preliminary facts necessary to enliven the need for a respondent to embark upon attempting to discharge its evidential onus of proof’.<sup>182</sup> And in a 2009 case, Moore J told an employee ‘that it was incumbent upon him to at least lead evidence at the trial to show that the basal facts which might engage s 809 of the WR Act could be established on his evidence.’<sup>183</sup>

On a slightly different point, in a 2008 case,<sup>184</sup> Jagot J considered a situation where an employer *mistakenly* believed that a prescribed ground *did* exist.

[A]n employer may dismiss an employee on the mistaken belief that the employee proposed to participate in proceedings under an industrial law when there were no such proceedings or no such proposal. In that case, s 793(1)(k) could not apply because the facts specified in it do not exist... The same reasoning would apply to each of the other forms of prohibited reasons and proscribed conduct ...<sup>185</sup>

This reasoning suggests that if an employer dismisses an employee because the employer believes, for example, that the employee is a union member, but this belief is incorrect, there is no breach because the facts specified in the provision do not exist.<sup>186</sup> Perhaps another way of looking at this situation is that the employee has failed to prove that the prescribed ground exists, and accordingly the reverse onus is not enlivened.<sup>187</sup>

#### *Obligation to prove that the employer knew about the prescribed ground*

In some cases, employees have been required to prove not only the *existence* of a prescribed ground, but also that the employer *knew* about it. For example, in the 1982

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<sup>181</sup> (2008) 177 IR 306, 322.

<sup>182</sup> *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 100.

<sup>183</sup> *Dowling v Fairfax Media Publications Pty Ltd* (2009) 182 IR 28, 33. An appeal against the decision of Moore J was dismissed: *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28.

<sup>184</sup> *Dowling v Fairfax Media Publications Pty Ltd* (2008) 172 FCR 96.

<sup>185</sup> (2008) 172 FCR 96, 124.

<sup>186</sup> See also *Employment Advocate v Williamson* (2001) 111 FCR 20, 29 (Gray J); *Wright v Scriball Pty Ltd* (1949) 65 CAR 344, 346 (Foster J).

<sup>187</sup> On the other hand, if an employee starts proceedings ‘on the mistaken belief that they had standing to do so’, and as a result the employee is dismissed, the fact that the proceedings are later struck out does not ‘prevent the application of s 793(1)(k) because, irrespective of the employee’s mistake, the employee participated in a proceeding under an industrial law’. Similarly, if the employee proposes to participate in proceedings but is mistaken about their standing to do so, ‘this does not necessarily mean that the person has not proposed to participate in proceedings of the relevant type’: (2008) 172 FCR 96, 124. For another case dealing with a similar point, see *Alfred v Primmer (No 2)* (2008) 177 IR 82, which considered whether there could be a breach if there was ‘no basis at law’ for the prescribed reason (at 105). The alleged prescribed reason was participating in proceedings under an industrial law. The argument was that the relevant proceedings had been issued with a body which did not have jurisdiction to hear the matter, and therefore the proceedings were a ‘nullity’ (at 106). However, ultimately Cameron FM held that the fact the body did not have jurisdiction to determine the dispute did not prevent such a case from being a ‘proceeding’ (at 111), and therefore did not have to decide the broader point.

case *Sutherland v Hills Industries Ltd*, the employee conceded that on the evidence the employer had not been shown to have been aware that the employee was a delegate, and therefore, could not have taken that fact into account when dismissing him.<sup>188</sup> This appears to amount to a concession that the employee bears the onus of proving that the employer was aware of the existence of the prescribed reason or attribute. Similarly, in a 2008 case, an employee claimed that he was dismissed for prescribed reasons including that he intended to make a claim relating to an overtime entitlement. The employee was required to prove that the employer *knew* that he intended to make a claim, before the reverse onus was enlivened.<sup>189</sup>

In another 2008 case, the employer argued the employees had to prove that it knew the employees were union members before the onus came into effect. Justice North ultimately did not have to decide this point, but for the purposes of the case assumed it was correct.<sup>190</sup> His Honour found the employer knew that two of the employees were union members, but did not know the third was a union member. That was enough to rebut the presumption with respect to the third employee.<sup>191</sup>

However, other cases have reached the opposite conclusion, finding that there was no obligation on the employee to prove the employer knew about the prescribed ground. A good example is provided by a 1999 decision of the Full Federal Court,<sup>192</sup> in which the Court considered whether an employer had rebutted the presumption in s 298V. The employer argued that 'it was not sufficient that [the union] establish facts said to give rise to the proscribed reason, "[i]t must go further and establish that the employer knew those facts to be the position, prior to any effect being given to s 298V".'<sup>193</sup> This argument was not accepted, and the appeal was dismissed.<sup>194</sup>

In a 2005 case, Branson J considered a situation where a principal and contractor were negotiating for a tender.<sup>195</sup> When the principal found out that the contractor had a non-union enterprise bargaining agreement, it declined to sign the contract. The principal

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<sup>188</sup> (1982) 2 IR 287, 288.

<sup>189</sup> *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 115.

<sup>190</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* (2008) 176 IR 377, 390.

<sup>191</sup> (2008) 176 IR 377, 400.

<sup>192</sup> *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463.

<sup>193</sup> (1999) 91 FCR 463, 502, citing *Joiner v Muir* (1967) 15 FLR 340.

<sup>194</sup> Justice Burchett dissented. His Honour said: 'It is said there are gaps in the [employer's] direct evidence which leave the presumption under s 298V unanswered; but the answer need not be by direct evidence – if the circumstances rebut the presumption so strongly that no serious question remains, that must suffice': (1999) 91 FCR 463, 504. In his Honour's view, the reason for the dismissals was the strike and picketing, and there was nothing at all to suggest that it related to the state of mind of the employees (that is, that they were 'dissatisfied' with their conditions). In these circumstances, his Honour considered that it was not appropriate 'to ground a decision on the presumption': 507.

<sup>195</sup> *Hadgkiss (acting as delegate of the Employment Advocate) v Barclay Mowlem Construction Ltd* (2005) 214 ALR 463.

argued there was no evidence that the contractor had non-union employees, 'or that if it did, that that fact was known to' the principal.<sup>196</sup> However, Branson J considered:

[t]his submission appears to overlook the statutory presumption contained in s 298V. As the [contractor] has alleged that the relevant conduct of the [principal] was carried out because one or more of [the contractor's] employees were not, or did not propose to become, members of an industrial association, and it would constitute a contravention of Pt XA of the Act for the [principal] to carry out the conduct for that reason, it is to be presumed in this proceeding that the conduct was carried out for that reason unless the respondent proves otherwise. The respondent did not prove otherwise.<sup>197</sup>

Justice Branson also noted that '[t]his is not a case in which the evidence as a whole positively establishes that all of [the contractor's] employees were members of an industrial association and that there could be no basis for the prohibited reason'.<sup>198</sup> This comment may even suggest that the contractor was not strictly required to prove the facts giving rise to the alleged prescribed reason (that the contractor employed non-union employees).

In *Willis v Chew*,<sup>199</sup> a 1981 Federal Court decision, a 'critical question' was whether the employer knew the employee was a union member before he dismissed her.<sup>200</sup> She had only joined the union on the morning of her dismissal. Justice Ellicott was 'satisfied ... that the [employer] did not know she was a member and, this being so, [was] also satisfied that he did not dismiss her by reason of the circumstance that she was a member of a union.'<sup>201</sup> This reasoning appears to suggest that his Honour considered that the employer's lack of knowledge of the prescribed ground was a matter to be raised by the *employer* in rebutting the reverse onus, rather than an initial matter to be proved by the *employee*.

#### *Obligation to provide some evidence that the prescribed ground was a reason*

A couple of decisions appear to go one step further. These cases suggest that, after alleging a specific prescribed ground, proving the prescribed ground exists, and proving that the respondent was aware of the existence of the prescribed ground, the applicant also has to provide some evidence that the prescribed ground actually *was* a reason for the action (or at least that the stated innocent reason was *not* a reason) before the reverse onus is enlivened. Some cases alluded to this possibility but did not ultimately decide whether there was a requirement on the applicant to provide this evidence.

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<sup>196</sup> (2005) 214 ALR 463, 475.

<sup>197</sup> (2005) 214 ALR 463, 475.

<sup>198</sup> (2005) 214 ALR 463, 475-6.

<sup>199</sup> *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981).

<sup>200</sup> (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981) at 6.

<sup>201</sup> (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981) at 7.

An early judgment that took this approach was that of Dunphy J in the 1953 case *Turner v Victorian Railways Commissioners*.<sup>202</sup> His Honour did not agree that the onus was enlivened automatically once the employee had proved that he was dismissed and that he was union member. His Honour said:

If proof of the said elements [that is, the fact of dismissal and the existence of a prescribed ground] is all that is necessary absurdity can result. For instance, a unionist who is dismissed for stealing, and who has, in fact, been convicted of stealing as a servant, can bring proceedings in this Court, simply prove the elements, and then call on the defendant to prove that the dismissal was not on account of union membership.

In my opinion, the section cannot be construed in such literal terms. If a reason for dismissal is extracted from the informant ... then the onus does not shift automatically, but such reason must be at least depreciated by the informant himself before the defendant can be called upon.<sup>203</sup>

His Honour found that, since the employee himself had provided evidence that the reason for dismissal was absenteeism (orally and by producing the notice of dismissal), and since 'he gave no proof of any other reason for dismissal, the onus of proof did not shift' to the employer and the employer 'was not required to call any evidence at all.'<sup>204</sup> Justices Kirby and Morgan also found against the employee, but did so on the basis of the evidence provided by the employer.

In *General Motors Holden Pty Ltd v Bowling*,<sup>205</sup> the lower court had found the employer failed to discharge the onus because it had not called two directors who had been involved in the decision to dismiss.<sup>206</sup> However, in the High Court, Barwick CJ (in dissent) found that in this case the reverse onus was effectively not activated, because there was 'no shred of evidence ... which would justify the conclusion that a reason for the employee's dismissal was the fact that he held the office of shop steward'.<sup>207</sup> This was because the employee's actions which concerned the employer (for example, a public statement regarding sabotage at the workplace) were not connected to the office or duties of a shop steward – they were his personal industrial activities. His Honour said:

If, on the evidence, there is no basis for concluding that that circumstance might be or have been a reason for the dismissal, there is no room for requiring the employer to negative the proposition that that circumstance was such a reason.<sup>208</sup>

However, Barwick CJ gave a dissenting judgment. Justice Mason (who was in the majority) said:

Section 5(4) imposed the onus on the appellant of establishing affirmatively that it was not actuated by the reason alleged in the charge. The consequence was that the respondent, in order

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<sup>202</sup> (1953) 78 CAR 59.

<sup>203</sup> (1953) 78 CAR 59, 61.

<sup>204</sup> (1953) 78 CAR 59, 61.

<sup>205</sup> (1976) 12 ALR 605.

<sup>206</sup> (1976) 12 ALR 605, 610.

<sup>207</sup> (1976) 12 ALR 605, 610.

<sup>208</sup> (1976) 12 ALR 605, 611. See also the dissenting judgment of Burchett J in *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, 504, 507.

to succeed, was not bound to adduce evidence that the appellant was actuated by that reason, a matter peculiarly within the knowledge of the appellant. The respondent was entitled to succeed if the evidence was consistent with the hypothesis that the appellant was so actuated and that hypothesis was not displaced by the appellant. 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.<sup>209</sup>

In *Hyde v Chrysler (Australia) Ltd*,<sup>210</sup> Northrop J accepted the evidence of the employer's witnesses 'denying that the informant was dismissed by reason of the circumstances alleged in the information' (that the employee was a union delegate) and found '[t]hat denial is consistent with all the facts as found'.<sup>211</sup> His Honour continued:

The evidence given on behalf of the company is accepted and therefore it is not necessary to consider whether the evidence, apart from the evidence of the denial and the evidence of the reason for dismissal of the informant, is consistent with the hypothesis that the company was actuated by the circumstances alleged in the information. The shifting onus imposed by s.5 (4) of the Act has been discharged. Accordingly the information must be dismissed.<sup>212</sup>

In a 2006 case, Buchanan J said '[e]ven though there is scant material available to the applicants, if they bore the onus, to suggest that union membership as such played any part in their dismissal, there is some',<sup>213</sup> thereby avoiding the need to decide whether the applicants were required to provide evidence that the prescribed ground was a reason.

In another 2006 case,<sup>214</sup> Greenwood J held there was no obligation on an employee to provide evidence of a prohibited reason. Rather, there need only be evidence of the conduct and *allegation* of a prohibited reason (and even if there *was* a requirement for evidence supporting a hypothesis of prohibited reason, in this case that had been met). His Honour said:

There is no doubt the applicant has the onus of establishing the causes of action on the balance of probabilities but s 298V effects a discharge of that onus once the relevant conduct is proven and the allegation of a prohibited reason made.<sup>215</sup>

While *Bowling* suggested there needs to be some evidence that the reason was 'possibly a reason' before the onus provision applies, Greenwood J noted that in that context the reason had to be a 'substantial and operative reason', whereas under the WR Act the reason only need be *a reason*, and there is no need for a requirement that there be

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<sup>209</sup> (1976) 12 ALR 605, 617.

<sup>210</sup> (1977) 30 FLR 318.

<sup>211</sup> (1977) 30 FLR 318, 322.

<sup>212</sup> (1977) 30 FLR 318, 322.

<sup>213</sup> *Seymour v Saint-Gobain Abrasives Pty Ltd* (2006) 161 IR 9, 28 (emphasis added).

<sup>214</sup> *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111.

<sup>215</sup> (2006) 154 IR 111, 194-5.

evidence before the reverse onus applies.<sup>216</sup> Justice Greenwood held that there was no requirement for the applicants to establish facts giving rise to a hypothesis of a prescribed reason for the conduct. And even if they did have that obligation, their evidence was sufficient to meet that requirement.<sup>217</sup>

*Does the reverse onus shift the legal burden or merely the evidentiary burden?*

One issue that arises in relation to the reverse onus is whether it reverses a 'legal burden' or an 'evidentiary burden'.<sup>218</sup> A reversed 'evidentiary burden' shifts the burden of introducing evidence to the respondent,<sup>219</sup> but leaves with the applicant the ultimate legal burden of proving that the conduct was for a prescribed reason. A reversed 'legal burden' means the respondent would 'lose on [the] issue in cases of doubt',<sup>220</sup> and accordingly would mean that the respondent bears the ultimate burden of proving that the conduct was not for a prescribed reason.<sup>221</sup> In most cases examined for this paper this distinction is not a significant issue and is not discussed, but it is addressed in a few cases – and some suggest that the answer differs depending on the particular legislative provision in question.<sup>222</sup>

In the 1975 case of *Roberts v General Motors-Holden's Employees' Canteen Society Inc*,<sup>223</sup> the Australian Industrial Court commented that an employer's action 'may be said to have been actuated by a particular reason or circumstance if that reason or circumstance was a substantial and operative factor influencing him to take that action.'<sup>224</sup> The Court continued:

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<sup>216</sup> (2006) 154 IR 111, 195-6.

<sup>217</sup> (2006) 154 IR 111, 204.

<sup>218</sup> These categories were described in the High Court decision *Purkess v Crittenden* (1965) 114 CLR 164, 167-8 (Barwick CJ, Kitto and Taylor JJ), 170 (Windeyer J).

<sup>219</sup> J D Heydon states: 'An evidential burden is not a burden of disproof. Rather the evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation.' J D Heydon, LexisNexis Australia, *Cross on Evidence* (at Service 153) [7015] (citations omitted).

<sup>220</sup> Peter Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths, 2<sup>nd</sup> ed, 1998) 60.

<sup>221</sup> J D Heydon states: 'The legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) either by a preponderance of the evidence or beyond reasonable doubt, as the case may be.' J D Heydon, LexisNexis Australia, *Cross on Evidence* (at Service 153) [7010].

<sup>222</sup> It should be noted that it may not be strictly correct to describe a burden of proof as 'shifting' (see, eg J D Heydon, LexisNexis Australia, *Cross on Evidence* (at Service 153) [7200]), but in this paper we use this language to indicate that the employer or respondent bears the relevant burden (rather than the employee or applicant as would otherwise be the case).

<sup>223</sup> (1975) 25 FLR 415.

<sup>224</sup> (1975) 25 FLR 415, 424-5.

It is in this sense that, to support its plea of not guilty, the burden is cast upon the defendant to prove to the satisfaction of the court, as on a balance of probabilities, that in dismissing the informant it was not actuated by either of the circumstances described in ... the charge.<sup>225</sup>

This comment seems to suggest the Court considered the reverse onus in the CA Act a reversal of both the legal burden and the evidentiary burden.

In the 1976 case of *Heidt v Chrysler Australia Ltd*, Northrop J noted:

the informant bears the normal onus of proof of establishing the guilt of the defendant beyond reasonable doubt. The “burden of proof” in this sense is stable but the burden of introducing evidence at any particular time may shift from time to time ... The circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly with the knowledge of the employer. It is for this reason that s 5(4) is of such importance – it has the effect of shifting the onus of proof to the employer with the result that the employer is obliged to prove a negative if he is to avoid being found guilty of the offence charged if all the other facts and circumstances constituting the offence are proved. The onus so cast upon the employer is to prove a negative on a preponderance of probabilities...<sup>226</sup>

His Honour compared s 5(4) of the CA Act with ‘averment’<sup>227</sup> provisions in other Acts, such as s 30R(1) of the Crimes Act 1914 (Cth), which provided that ‘the averments of the prosecutor contained in the information or indictment shall be prima facie evidence of the matter or matters averred.’<sup>228</sup> His Honour referred to a High Court case<sup>229</sup> in which Dixon J made the following comments about s 30R(1):

this provision, which occurs in a carefully drawn section, does not place upon the accused the onus of disproving the facts upon which his guilt depends but, while leaving the prosecutor the onus, initial and final, of establishing the ingredients of the offence beyond reasonable doubt, provides, in effect, that the allegations of the prosecutor shall be sufficient in law to discharge that onus.<sup>230</sup>

This analysis of Dixon J suggests that s 30R(1) imposed an evidentiary burden on the accused, but the legal burden remained with the prosecutor. Justice Northrop contrasted this position with s 5(4) which ‘cast an onus of disproving facts’. Accordingly,

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<sup>225</sup> (1975) 25 FLR 415, 425.

<sup>226</sup> (1976) 26 FLR 257, 267 (citations omitted).

<sup>227</sup> An ‘averment’ is ‘[a]n allegation of law or fact contained in a statement of a charge which the prosecution maintains is true and intends to prove. An averment includes a statement or allegation made in an indictment, presentment, or information. In some jurisdictions, there is a provision that an averment is prima facie evidence of the facts averred’: Peter Nygh and Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (Butterworths, 2<sup>nd</sup> ed, 1998) 40-1.

<sup>228</sup> (1976) 26 FLR 257, 267.

<sup>229</sup> *R v Hush; Ex parte Devanny* (1932) 48 CLR 487.

<sup>230</sup> (1932) 48 CLR 487, 507-8, quoted at *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 267-8. In relation to this statement by Dixon J, J D Heydon comments: ‘It is submitted that the above remarks are generally applicable to averment provisions in other Commonwealth legislation, and that such provisions have the effect only of casting an evidential burden on the accused. In such a case the averment and the evidence must be considered by the tribunal in order to determine whether the prosecution case has been made out beyond reasonable doubt. Where, because the evidence casts doubt upon the averments or otherwise, the whole of the material fails to discharge the criminal burden on the prosecutor, the defendant must be acquitted.’ J D Heydon, LexisNexis Australia, *Cross on Evidence* (at Service 153) [7105] (citations omitted).

it seems that Northrop J in *Heidt* considered that s 5(4) moved *both* the legal burden and the evidentiary burden to the defendant.

An unusual case was the 1988 Federal Court decision of Keely J in *Curran v Cornwall's (Wholesale) Meat Co Pty Ltd ('Curran')*.<sup>231</sup> In this case, the employer did not call any evidence. Usually, a respondent's failure to call evidence (and in particular, to call evidence from the decision-maker) leads to a presumption that the evidence would be unfavourable to them – or at least to a finding that the respondent had failed to satisfy the reverse onus.<sup>232</sup> Although not calling any evidence, in *Curran* the employer was successful. Justice Keely referred to Mason J's decision in *Bowling* and said that his Honour's statement:

as to the evidence being “consistent with the hypothesis”, was not intended to convey that a defendant company, which has not called evidence as to the reasons for a dismissal, must be convicted where, on the evidence before the court, there is “a slender possibility” that the employee was dismissed by reason of the circumstance that he was a delegate.<sup>233</sup>

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<sup>231</sup> (1988) 25 IR 394.

<sup>232</sup> See, for example, *General Motors Holden Pty Ltd v Bowling* (1976) 12 ALR 605, 619 where Mason J commented: '[t]he unexplained failure of the appellant to call the two Melbourne directors [the decision-makers] then becomes significant. It left uncontroverted the possibility that the respondent's position as a shop steward was an influential, perhaps even a decisive, consideration in their minds.' See also the earlier decision of Smithers and Evatt JJ in *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197 (Woodward J dissented on this point, finding that it should not be assumed that the evidence of the directors would have damaged the employer's case: at 227); *Voigtsberger v Council of the Shire of Pine Rivers (No 2)* (1981) 58 FLR 239, 258 (only two of six councillors who made the decision to dismiss were called as witnesses); *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, 499 (employer failed to prove the identity of the person who made the decision, or adduce evidence from that person as to their reasons – accordingly, there was no evidence to rebut the presumption in s 298V. Justice Burchett dissented); *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* (2000) 100 IR 383 (representative of the employer gave evidence that the employee's union status was not a reason for the dismissal, but there was no evidence that this representative was the decision-maker or that there were no other decision-makers); *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232, 279; *Mcllwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111 (employer elected not to call evidence. Greenwood J held in these circumstances the principle in *Jones v Dunkel* ((1959) 101 CLR 298) could apply, but ultimately his Honour did not find it necessary to rely on that principle); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* (2008) 176 IR 377, 387 (employer claimed that employee was dismissed because he was unsuitable as a quality inspector, but employee claimed his immediate supervisor had praised his work. The employer did not call the immediate supervisor to give evidence, and North J drew a *Jones v Dunkel* inference that his evidence would not have assisted the employer); *Police Federation of Australia v Nixon* (2008) 168 FCR 340, 366 (applicant argued the ultimate decision was that of the Commissioner of Police, and her failure to give evidence was critical to the case. This was ultimately accepted as one of the factors supporting the finding that there was a serious question to be tried); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Blue Star Pacific Pty Ltd* (2009) 184 IR 333, 345 (application for an interlocutory relief. Employer did not provide any evidence as to identity or reasons of the decision-maker, although provided general evidence about the financial position of the business and a downturn in work and employment rates. Greenwood J was prepared to draw an adverse inference from failure to provide evidence from decision-maker). Contrast with *Kelly v Construction, Forestry, Mining and Energy Union (No 3)* (1995) 63 IR 119, 127 (union failed to call union officer who took the action, but Court refused to draw an adverse inference from that fact because the union explained its failure to call the officer – officer had repeatedly failed to provide a written statement when requested).

<sup>233</sup> (1988) 25 IR 394.

Justice Keely considered the *employee's* evidence and noted that, unlike in *Bowling*, the employee in this case was not a troublemaker and merely acted as a 'go-between' from the employees to management, and that on one occasion he had even convinced the employees to continue working when they had decided to go home. The Court also noted that all employees on the mutton chain (on which the employee worked), except one, were dismissed at the same time. The Court dismissed the information, being satisfied on the balance of probabilities that the employer did not dismiss the employee for a prescribed reason. This case might suggest that the reverse onus is a mere evidentiary onus, but the employee still bears the legal onus.

In another case, the employer dismissed a large number of employees who had participated in a picket line. The union argued the dismissal was for the reason that the employees, being members of a union seeking better industrial conditions, were dissatisfied with their conditions. The employer did not directly deny that the reason for the dismissal was that the employees were union members seeking better industrial conditions – in fact, it did not even prove the identity of the person who made the decision, or call evidence from that person.<sup>234</sup> (The Court noted that the affidavits were compiled over almost four months, and with the assistance of experienced counsel and solicitors.<sup>235</sup>) Accordingly, there was 'no evidence rebutting the presumption provided by s 298V'.<sup>236</sup> In relation to s 298V, the Court said:

an allegation ... of conduct for a prohibited reason is sufficient for it to be presumed that the conduct was engaged in for that reason unless the employer proves to the contrary. Section 298V does not relieve the applicant... from proving on the balance of probabilities each of the ingredients of the contravention. It enables the allegation to stand as sufficient proof of the fact unless the employer proves otherwise.<sup>237</sup>

This comment suggests that the WR Act provision relates to the evidentiary burden. Burchett J dissented in this case. His Honour said: 'It is said there are gaps in the [employer's] direct evidence which leave the presumption under s 298V unanswered; but the answer need not be by direct evidence – if the circumstances rebut the presumption so strongly that no serious question remains, that must suffice'.<sup>238</sup> In his Honour's view, the reason for the dismissals was the strike and picketing, and there was nothing at all to suggest that it related to the state of mind of the employees (that is, that they were 'dissatisfied' with their conditions). In these circumstances, his Honour considered that it was not appropriate 'to ground a decision on the presumption'.<sup>239</sup> Again, this reasoning may suggest his Honour considered the reverse onus relates to the evidentiary burden, not the legal burden.

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<sup>234</sup> *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463, 499.

<sup>235</sup> (1999) 91 FCR 463, 499.

<sup>236</sup> (1999) 91 FCR 463, 499.

<sup>237</sup> (1999) 91 FCR 463, 501 (citation omitted). This passage was quoted in *McCann v Mt Isa Mines* [2003] FCA 1031 (19 September 2003) [27]; *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 192; *Dowling v Fairfax Media Publications Pty Ltd* (2008) 172 FCR 96, 114.

<sup>238</sup> (1999) 91 FCR 463, 504.

<sup>239</sup> (1999) 91 FCR 463, 507.

In a 1998 case under the WR Act, the Court ordered the employer to present its case first, saying that it had ‘an immediate evidentiary onus of proof’.<sup>240</sup>

In the 1998 High Court case *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*, Gaudron J said:

The only issue is whether [the action] was engaged in for a “prohibited reason” or for reasons including a “prohibited reason”. Section 298V of the Act operates to create a presumption that it was. And it also operates to place the onus on those who contend otherwise to show that it was not.<sup>241</sup>

In a 2000 case on the pre-WorkChoices WR Act, Heerey J appeared to support the view that the reverse onus relates to the evidentiary burden:

The dominating feature in this matter, to my mind, is s 298V, which in effect reverses the onus in proceedings under Division 6 of Part XA. The plain words of that section indicate to me that it is an allegation which is sufficient to put an onus on the respondents. It is not necessary for an applicant to raise evidence in support of that allegation. In other words, the section is an averment provision, familiar in other areas of the law. An allegation is made and the law says that it is then up to a respondent to raise evidence to rebut the allegation.<sup>242</sup>

In another 2000 case, Einfeld J held:

Section 298V effectively provides that where it is alleged that conduct was carried out for a particular reason, that allegation is able to stand as sufficient proof that the conduct was carried out for the reason alleged unless and until the person who has engaged in that conduct proves otherwise.<sup>243</sup>

In *Commonwealth Bank of Australia v Finance Sector Union of Australia*,<sup>244</sup> a 2007 Full Federal Court decision, the employer ‘made no real attempt to rebut the presumption for which s 298V provides’,<sup>245</sup> and so the reverse onus and causal link was not a major issue.<sup>246</sup> Despite this, it is worth noting the following comments of Branson J:

...the primary judge was plainly correct in concluding that [the employer] had not rebutted the s 298V presumption. That presumption is not rebutted merely because the circumstances in which the relevant conduct is carried out are consistent with the conduct not being carried out for a prohibited reason; the presumption is rebutted only where there is sufficient evidence to allow a positive finding to be made that none of the operative reasons for the conduct was a prohibited reason ... His Honour was not in a position to make such a positive finding because no evidence was adduced from [the decision-maker] who alone, as [the employer] admitted, made the [relevant] decision.<sup>247</sup>

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<sup>240</sup> *Howarth v Frigrite Kingfisher Pty Ltd* [1998] FCA 612 (29 May 1998).

<sup>241</sup> (1998) 195 CLR 1, 60.

<sup>242</sup> *Australian Nursing Federation v Croft Health Care Vic Pty Ltd* [2000] FCA 93 (9 February 2000), [2].

<sup>243</sup> *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, 480-81.

<sup>244</sup> (2007) 157 FCR 329.

<sup>245</sup> (2007) 157 FCR 329, 348.

<sup>246</sup> The employer argued that the trial judge erred in finding that it had altered the position of the employees to their prejudice.

<sup>247</sup> (2007) 157 FCR 329, 348-9.

In a 2008 Federal Magistrates Court decision, Federal Magistrate Wilson considered the reverse onus provision, and said:

In my view ... the applicant bears the *legal* onus of proving his or her case to the requisite civil standard ... the respondent bears the *evidential* onus of proving a negative, regarding the reason or reasons for termination of employment. That is, in the absence of the employer proving that the reason for termination of employment was not for a proscribed reason ... it is not necessary for the employee to prove such facts; they are presumed in his favour.<sup>248</sup>

In a 2008 case, Ryan J was required to consider in some detail the meaning of the reverse onus in s 809 of the post-WorkChoices WR Act.<sup>249</sup> This was an interlocutory application for injunctive relief, and s 809(2) provided that the reverse onus 'does not apply in relation to the granting of an interim injunction'. His Honour found that there are two ways to view the reverse onus, and they lead to different outcomes when interpreting s 809(2). To summarise, his Honour considered the first possible interpretation is that s 809 only moves the evidentiary burden, not the legal burden. If the respondent provides some evidence, the court is then required to decide whether the applicant has discharged the ultimate burden of proving that the conduct was for a prohibited reason.<sup>250</sup> The second possible interpretation is that the reverse onus shifts both the evidentiary and legal burdens.<sup>251</sup> Justice Ryan noted that in *Heidt v Chrysler Australia Ltd*,<sup>252</sup> Northrop J regarded s 5(4) of the CA Act 'as being of that character'.<sup>253</sup> Although it is not immediately clear which interpretation Ryan J preferred, it seems his Honour preferred the second interpretation.

In 2009, in separate cases, Federal Magistrates Smith and Lucev described the reverse onus in s 809 of the post-WorkChoices WR Act as an 'evidentiary onus'.<sup>254</sup>

## B LEVEL OF EVIDENCE

The CA Act and IR Act created offences which required the prosecutor to prove the elements of the offence to a standard 'beyond reasonable doubt'. For example, the prosecutor was required to prove matters such as the fact of dismissal, and the fact of

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<sup>248</sup> *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 97 (emphasis added). This passage was quoted in *LHMU v Cuddles Management* (2009) 183 IR 89, 109.

<sup>249</sup> *Police Federation of Australia v Nixon* (2008) 168 FCR 340.

<sup>250</sup> (2008) 168 FCR 340, 359. His Honour referred to the judgment of Dixon J in *R v Hush*; *Ex parte Devanny* (1932) 48 CLR 487, which in turn was relied on by Wilcox and Cooper JJ in *Dauids Distribution Pty Ltd v National Union of Worker* (1999) 91 FCR 463, as supporting this view.

<sup>251</sup> (2008) 168 FCR 340, 359.

<sup>252</sup> (1976) 26 FLR 257.

<sup>253</sup> (2008) 168 FCR 340, 359.

<sup>254</sup> *Community and Public Sector Union v Commonwealth* (2009) 184 IR 317, 319 (Smith FM); *Liquor, Hospitality and Miscellaneous Union v Cuddles Management Pty Ltd* (2009) 183 IR 89, 120 (Lucev FM).

union membership, 'beyond reasonable doubt'.<sup>255</sup> However, for the purposes of the reverse onus provision, the employer (or other accused) was only required to prove that they did not act for a prescribed reason on the 'balance of probabilities'.<sup>256</sup> For example, Gray J of the Federal Court said (in relation to the CA Act):

In a case such as this, the prosecutor carries the onus of proving *beyond reasonable doubt* the basic elements of the alleged offence, including the existence of each proscribed circumstance by reason of which it is alleged that the defendant acted. By reason of s 5(4) of the Act, the defendant carries the onus of proving on the *balance of probabilities* that it was not actuated by any of the proscribed circumstances alleged.<sup>257</sup>

Under the WR Act, a contravention of the union victimisation provisions was not an offence.<sup>258</sup> Accordingly, the civil onus of proof was applicable to all aspects of the allegation, including (for example) the fact of dismissal<sup>259</sup> and the reverse onus.<sup>260</sup>

However, in some cases a stricter standard of proof was required, because the applicant was seeking civil remedies 'in the form of pecuniary penalties'.<sup>261</sup> In *Heidt v Chrysler Australia Ltd*, Northrop J described the onus on the employer as an onus 'to prove a negative on the preponderance of probabilities'.<sup>262</sup> In some cases, the standard of proof was considered to be the *Briginshaw* standard,<sup>263</sup> which is, to some extent, reflected in s

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<sup>255</sup> See, eg, *Cuevas v Freeman Motors Ltd* (1975) 8 ALR 321, 322.

<sup>256</sup> See, eg, *Cuevas v Freeman Motors Ltd* (1975) 8 ALR 321, 327; *Australasian Meat Industry Employees' Union v Sunland Enterprises Pty* (1988) 24 IR 467, 470; *Atkins v Kirkstall-Repro Pty Ltd* (1957) 3 FLR 439, 440; *Joiner v Muir* (1967) 15 FLR 340, 356; *Roberts v General Motors-Holden's Employees' Canteen Society Inc* (1975) 25 FLR 415, 425; *Jones v Thiess Bros Pty Ltd* (1977) 15 ALR 501, 504; *Leontiades v FT Manfield Pty Ltd* (1980) 43 FLR 193, 199; *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 107; *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981); *Sutherland v Hills Industries Ltd* (1982) 2 IR 287, 293; *Stapleton v African Lion Safari Pty Ltd* (Unreported, Federal Court of Australia, Ellicott J, 7 April 1982); *Webb v Nationwide News Pty Ltd* (1985) 10 IR 252, 254; *Gibbs v Palmerston Town Council* (Unreported, Federal Court, Gray J, 21 December 1987). IR Act: *Pryde v Coles Myer Ltd* (1990) 33 IR 469; *Lawrence v Hobart Coaches Pty Ltd* (1994) 57 IR 218, 220; *Kelly v Construction, Forestry, Mining and Energy Union (No 3)* (1995) 63 IR 119, 126.

<sup>257</sup> *Gibbs v Palmerston Town Council* (Unreported, Federal Court, Gray J, 21 December 1987) (emphasis added).

<sup>258</sup> See pre-WorkChoices WR Act s 298X; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 68.

<sup>259</sup> See, eg, *Community and Public Sector Union v Victoria* (2000) 99 IR 233, 237; *Australian Workers Union v Johnson Matthey (Aust) Ltd* (2000) 96 IR 476, 488; *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 194-5.

<sup>260</sup> See, eg, *Howarth v Frigrite Kingfisher Pty Ltd* [1998] FCA 612 (29 May 1998); *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 68; *Elliott v Kodak Australasia Pty Ltd* [2002] FCA 154 (26 February 2002); *Transport Workers Union of Australia v BP Australia Ltd* (2001) 187 ALR 697, 706; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2005) 147 IR 315. WR Act s 809: *Seymour v Saint-Gobain Abrasives Pty Ltd* (2006) 161 IR 9, 14, 28.

<sup>261</sup> *Alfred v Primmer (No 2)* (2008) 177 IR 82, 113.

<sup>262</sup> (1976) 26 FLR 257, 267.

<sup>263</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336, where Dixon J held that proof of a fact on the balance of probabilities requires that the tribunal 'feel an actual persuasion of its occurrence or existence': at 361, and at 362, that

reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the

140 of the Evidence Act 1995 (Cth). In summary, s 140 provides that the case must be proved on the balance of probabilities, and in deciding whether the court is satisfied on the balance of probabilities, the court must take into account the nature of the cause of action or defence, the nature of the subject-matter of the proceeding, and the gravity of the matters alleged. For example, in *Employment Advocate v National Union of Workers*, the applicant argued that the purpose of the law is protective rather than penal, and therefore should be construed beneficially. However, Einfeld J considered that 'in dealing with these types of civil offences some standard of proof above mere satisfaction on the probabilities is appropriate',<sup>264</sup> and went on to note that in any event the Court was bound by s 140 of the Evidence Act 1995 (Cth).

In the 2007 case *Construction, Forestry, Mining and Energy Union v CE Marshall & Sons Pty Ltd*,<sup>265</sup> Collier J noted that the rules of evidence for civil matters are set out in s 140 of the Evidence Act 1995 (Cth). The employer argued that the burden of proof to be applied was akin to the *Briginshaw* test. Her Honour held that this issue

may be addressed by recognising that the civil standard of proof – that is the balance of probabilities – is applicable as required by s 140(1) of the *Evidence Act*, however, in applying the civil standard it is appropriate to take into account the issues prescribed in s 140(2) [the nature of the cause of action, subject-matter, and the gravity of the matters alleged].<sup>266</sup>

The 2006 case of *Mcllwain v Ramsey Food Packaging Pty Ltd*<sup>267</sup> raised two other interesting evidentiary issues. First, the facts relevant to the alleged prescribed reason for the dismissal began years earlier (that is, the evidence was not confined to the period immediately before the dismissals).<sup>268</sup> Second, Greenwood J accepted that evidence which relates to the employer's tendency to act in a particular way, or have a particular state of mind, could be admissible evidence in this case.<sup>269</sup>

A further evidentiary issue is the extent to which later events can be relevant when determining whether the reverse onus was satisfied. This issue was raised in a 1980

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consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. See, eg, *Alfred v Primmer (No 2)* (2008) 177 IR 82, 113; *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197, 201; *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 192 (without determining whether he was required to apply the *Briginshaw* standard, Merkel J 'approached the determination of the factual issues in dispute on the basis that my finding in favour of the applicant on the issue of liability has been arrived at after the "careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction" that the decision at which I have arrived is a correct and just conclusion' (quoting *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 350)); *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, 464; *Community and Public Sector Union v Commonwealth* [2007] FCA 1861 (4 December 2007) [52].

<sup>264</sup> (2000) 100 FCR 454, 464. This passage was quoted in *Community and Public Sector Union v Commonwealth* [2007] FCA 1861 (4 December 2007) [52].

<sup>265</sup> (2007) 160 IR 223.

<sup>266</sup> (2007) 160 IR 223, 230.

<sup>267</sup> (2006) 154 IR 111.

<sup>268</sup> (2006) 154 IR 111, 121, 170.

<sup>269</sup> (2006) 154 IR 111, 121, 213-7 (having regard to the 'tendency rule' in s 97 of the Evidence Act 1995 (Cth)).

case,<sup>270</sup> where the employer argued that the reason for the employee's dismissal was a downturn in work (rather than the alleged prescribed reason), and pointed to the fact that after the employee's dismissal, other employees also left the company. Justice Keely noted that the employer had to satisfy the court 'that it was not actuated by the reason alleged and that reason, of course, is the one in existence at the time of the dismissal.'<sup>271</sup> His Honour emphasised the need to be careful when considering later events, but accepted that in this case they were relevant to the question of whether the evidence of the decision-maker should be believed. Ultimately, Keely J was satisfied on the balance of probabilities that the employer was not actuated by a prohibited reason.<sup>272</sup>

#### IV REVERSE ONUS CASES

One of the very early cases considering the reverse onus provision under the CA Act was the High Court decision in *Pearce v WD Peacock & Co Ltd ('Pearce')*.<sup>273</sup> This case is useful as it illustrates two different approaches to the analysis of the causal link and reverse onus.

In *Pearce*, an employee claimed that the reason for his dismissal was his union membership. The union had issued a log of claims, and the employer asked him to sign a document stating that he was satisfied with his wages and conditions. (As the employee was the only union member at the business, if he had signed the document there would have been no dispute between the employer and the union and, under the then-current legislation, the employer could not have been made a party to the award.) When the employee refused to sign the document, he was dismissed.

The employer gave evidence that the employee's union status did not influence the decision to dismiss him – rather, he dismissed the employee because the employee was dissatisfied with his wages and 'I would not keep a man in my employ who was dissatisfied'.<sup>274</sup> The Magistrate had no reason to doubt the employer's testimony, and accordingly found the employer had not breached the section.

The majority of the High Court found that there was evidence to support the Magistrate's finding, and no ground to overturn it. Acting Chief Justice Barton found that the Magistrate had the benefit of hearing the witnesses and observing the cross-examination, and there was no sufficient basis to overturn his findings, although his Honour also noted that:

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<sup>270</sup> *Leontiades v F T Manfield Pty Ltd* (1980) 43 FLR 193.

<sup>271</sup> (1980) 43 FLR 193, 199.

<sup>272</sup> (1980) 43 FLR 193, 199.

<sup>273</sup> (1917) 23 CLR 199.

<sup>274</sup> (1917) 23 CLR 199, 202.

[t]he question was solely as to the reason for the dismissal. No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to little or no regard, though in the present case they seem to have been admitted without objection.<sup>275</sup>

Similarly, Gavan Duffy and Rich JJ found that there was no reason to overturn the Magistrate's finding as to the credibility of the witnesses, and accepting the employer's evidence meant that the employer had satisfied the onus.

The majority's approach is similar to that taken by the High Court in *Barclay* (and for the purposes of this paper, and for convenience only, we label this approach the 'Barclay Approach' – the first of the two categories we use in this paper). Put simply, this approach is that if the decision-maker gives evidence that they did not take adverse action 'because' of a prescribed ground, and that evidence is accepted, there will not be a breach.<sup>276</sup>

In *Pearce*, Isaacs J dissented. His Honour noted the purposes of the Act to facilitate and encourage the organisation of unions. In his Honour's view, the employee's dissatisfaction was 'bound up' with his union membership, and if the employer could not say 'one is independent of the other', the employer could not rely on the excuse that the dismissal was because the employee was dissatisfied. Justice Isaacs said '[s]uch an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached'.<sup>277</sup> His Honour referred to other evidence given by the employer which suggested that union membership was a factor – that 'there was a "horse" attached to the "halter", and that he knew it'.<sup>278</sup>

On its face, Isaacs J's decision is consistent with the Barclay Approach taken by the majority – his Honour simply disagreed with the Magistrate's finding about the employer's evidence, because other parts of the employer's own evidence contradicted it. However, the 'horse and the halter' analogy also suggests a broader, and perhaps more nuanced and complex, approach to the issue of the causal link which looks beyond the employer's stated reasons for acting. Justice Isaacs' decision is an example of the second strand of cases discussed in this paper. For the purposes of this paper, and again simply for convenience only, we label this second approach the 'Broader Approach'.

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<sup>275</sup> (1917) 23 CLR 199, 203.

<sup>276</sup> *Barclay* (2012) 290 ALR 647, [44]-[45] (French CJ and Crennan J), [71], [121], [127] (Gummow and Hayne JJ), [140], [145] (Heydon J). See further, Kathleen Love, Beth Gaze and Anna Chapman, "'But Why?' 'Just Because!': The Causal Link between Adverse Action and Prescribed Grounds under the Fair Work Act", refereed conference paper, 27th Association of Industrial Relations Academics Australia and New Zealand (AIRAANZ) Annual Conference, 6-8 February 2013, Fremantle; Beth Gaze and Anna Chapman, 'Bringing the Human Right to Non-Discrimination into Workplace Law: Towards Substantive Equality at Work in Australia?' (2013) *International Journal of Comparative Labour Law and Industrial Relations* (forthcoming).

<sup>277</sup> (1917) 23 CLR 199, 207.

<sup>278</sup> (1917) 23 CLR 199, 208.

The rest of this paper uses these two categories (the Barclay Approach and the Broader Approach) as convenient labels for grouping the cases on the reverse onus prior to the 2009 FW Act. However, it is important to recognise that we use these categories for convenience only. They are not precisely defined, and there is no clear line between them. Indeed, they are more in the character of themes or methods, than categories as such. Moreover, cases can often display elements of both approaches. Nevertheless, we consider these two categories are useful tools for examining the cases, and the paper examines each in turn.

## A TAKING A BARCLAY APPROACH TO PROOF AND LIABILITY

Many cases over the years can be characterised as having taken a Barclay Approach to determining whether the action was because of a prescribed reason. In other words, these cases rest largely on the decision-maker's evidence as to their reasons for the action, and whether that evidence is accepted.<sup>279</sup> In some cases the evidence of the decision-maker is accepted. In other cases it is not. These are examined in turn. In addition, in some cases employers seek to establish a non-prescribed reason as the 'real' reason for their action. This last theme is also examined under this heading of 'Taking a Barclay Approach', as are the cases that adopt a subjective view of the issue.

### *Decision-Maker's Evidence Accepted*

This section provides examples of cases that use the Barclay Approach, where the decision-maker's evidence is ultimately accepted (and accordingly there is found to be no breach of the legislation).

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<sup>279</sup> See, eg, *Stapleton v African Lion Safari Pty Ltd* (Unreported, Federal Court of Australia, Ellicott J, 7 April 1982). In this case the representative of the employer was well known for his dislike of unions, and the dismissal took place soon after another union member was dismissed and commenced proceedings against the employer. The employee claimed 'that in this atmosphere it should be presumed over any denial by the [employer's] witnesses that [the employee's] union membership and dissatisfaction with his conditions were a substantial and operative factor in his dismissal.' However, the Court accepted the employer's denials of any prescribed reason and the employer's stated reason for the dismissal (the need to reduce staff numbers and employee's previous performance issues). The Court was satisfied on the balance of probabilities that the reasons for dismissal did not include a prescribed reason. See also, *Lawrence v Hobart Coaches Pty Ltd* (1994) 57 IR 218 where the decision-maker gave evidence that dismissal was for refusing to work weekend overtime after being given a warning, and not because the employee was a union delegate, and the Court accepted that evidence after considering the surrounding circumstances and the employee's evidence. Also, *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Australian Health and Nutrition Association Ltd* (2003) 147 IR 380 where an active union member was dismissed for harassing and intimidating behaviour in the workplace. All of the people involved in the decision-making gave evidence that his union membership and activities were not related to the decision to dismiss – in fact, the dismissal was 'in spite of' his union status because the decision-makers were aware it would likely provoke the union. The Court considered the evidence of the decision-makers against 'the whole matrix of relevant facts', although did not find it necessary to make findings on several matters such as the 'rights or wrongs' of the dismissal or whether there were deficiencies in the investigation. The Court was satisfied that the employer had met the onus.

A good example is provided in the 1957 case of *Atkins v Kirkstall-Repro Pty Ltd*.<sup>280</sup> The employee, a union delegate, was dismissed. The decision-maker 'swore that it was for absenteeism, and that [the employee's] position as a delegate of the union formed no part in the reason for the dismissal.'<sup>281</sup> The Court said '[t]he ultimate question for decision in this case is whether that evidence should be accepted'.<sup>282</sup> The Court considered that strictly speaking it was unnecessary for the employer to prove the reason for dismissal, but 'when it advances a reason of dismissal, the reasonableness of its conduct may be of importance in weighing the truth of the evidence which its officers give as to what actuated the dismissal.'<sup>283</sup> The Court noted that the employee had been involved in negotiations between the employer and the union, and the employer's offer had been rejected by the union (mainly, the employer believed, as a result of the employee) shortly before the dismissal.<sup>284</sup> Despite this context, the Court accepted the evidence of the manager and found that the employer had discharged its onus under s 5(4).<sup>285</sup>

In *Heidt v Chrysler Australia Ltd*,<sup>286</sup> the Australian Industrial Court accepted the employer's evidence after finding that it was supported by all the other evidence.<sup>287</sup> In that case, the employee was one of five operators on a particular station, and the employer decided that only four operators were needed at that station. The fifth was to be moved to another area. The employee was directed to work as one of the four operators, but refused and was dismissed. He claimed that he was dismissed because he was a union member, because he was entitled to the benefit of an award, and because he was dissatisfied with his conditions. Notably, there was an agreement between the union and the employer that the employer would require all new employees to become and remain members of the union (subject to limited exceptions). Justice Northrop found:

The mere proof of a reason for dismissal, other than the reason alleged in the charge, does not necessarily negate the reason alleged in the charge. A mere denial of the reason alleged in the charge may not be sufficient to satisfy the onus cast upon the defendant. All the facts and

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<sup>280</sup> (1957) 3 FLR 439.

<sup>281</sup> (1957) 3 FLR 439, 442.

<sup>282</sup> (1957) 3 FLR 439, 442.

<sup>283</sup> (1957) 3 FLR 439, 441.

<sup>284</sup> (1957) 3 FLR 439, 444.

<sup>285</sup> See also *Turner v Victorian Railways Commissioners* (1953) 78 CAR 59, where Kirby J noted that 'it does not lie upon the defendants to prove either from evidence led by the informant or by the defendants, or by both, that they have dismissed the informant for some particular reason or as to the validity of that reason, but merely that they were not actuated by the reasons alleged in the charges': at 60. However, the defendants had given evidence that the reason for the dismissal was unauthorised absence and a failure to explain such absence. Justice Kirby accepted this evidence, finding that the dismissal had no connection with the employee's union membership, office, activities or any dissatisfaction with working conditions: at 61.

<sup>286</sup> (1976) 26 FLR 257.

<sup>287</sup> (1976) 26 FLR 257, 271.

circumstances leading up to the dismissal must be considered, including any reason expressed at the time of the dismissal, as well as any denial of the reason alleged in the charge.<sup>288</sup>

His Honour accepted the employer's evidence that the employee was dismissed 'by reason of his refusal to perform his duty and for no other reason. All the evidence, including the evidence of the informant, of the facts and circumstances leading up to the dismissal and immediately thereafter, support the evidence of [the employer] in this respect.'<sup>289</sup>

And in 2001, Weinberg J rejected a union's allegations that the employer's intention to conduct a 'spill and fill' process constituted a threat of dismissal, injured the employees in their employment, or altered their position to their prejudice, for a prescribed reason (union membership – the employees had refused to approve an enterprise bargaining agreement).<sup>290</sup> His Honour found that the action taken did not constitute a threat of dismissal, injury to the employees, or prejudicial alteration of their position.<sup>291</sup> Nevertheless, his Honour went on to consider whether any such action was taken for a prescribed reason. His Honour considered the evidence of the two decision-makers, noted that they were 'extensively cross-examined ... in a forceful manner',<sup>292</sup> and ultimately accepted their evidence.<sup>293</sup> His Honour said:

It is understandable that the ... employees might view with a degree of cynicism the protestations of management that those employees are not being targeted by the proposed spill and fill. That cynicism is undoubtedly heightened by the unfortunate conjunction of events whereby the decision to conduct the spill and fill was taken within weeks of the commencement of the protected action. However, ... the fact that there is some connection between an employer's act and the employee's union membership or activities does not mean that the employer did the act because the employee was a union member or because of the employee's activities. Whether an employer was motivated by a prohibited reason or reasons which included a prohibited reason is a question of fact, often involving questions of judgment. The fact that a particular act precedes another does not necessarily mean that it causes that other to occur.<sup>294</sup>

His Honour continued:

There is in any event a difference between welcoming an outcome which is reasonably foreseeable as a by-product of a particular course of action, and being motivated, in whole or in part, by a desire to achieve that outcome. The former state of mind is not sufficient to establish that the conduct in question was carried out for a prohibited reason. The latter is sufficient for that purpose.<sup>295</sup>

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<sup>288</sup> (1976) 26 FLR 257, 268.

<sup>289</sup> (1976) 26 FLR 257, 271. See also *Hyde v Chrysler (Australia) Ltd* (1977) 30 FLR 318. Although this case has a similar name, it concerned a different employee and a different situation. Justice Northrop again accepted the evidence of the employer's witnesses 'denying that the informant was dismissed by reason of the circumstances alleged in the information' and found '[t]hat denial is consistent with all the facts as found': at 332.

<sup>290</sup> *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90.

<sup>291</sup> (2001) 108 FCR 90, 118-19.

<sup>292</sup> (2001) 108 FCR 90, 120.

<sup>293</sup> (2001) 108 FCR 90, 120.

<sup>294</sup> (2001) 108 FCR 90, 120 (citations omitted).

<sup>295</sup> (2001) 108 FCR 90, 121.

In the 2009 decision *Harrison v P & T Tube Mills Pty Ltd*,<sup>296</sup> an employee (a union delegate) was dismissed after he refused to remove a union sticker from his neck. This was in the context of conflict in the workplace between employees for and against the union, leading to a ban on all stickers.<sup>297</sup> The decision-maker denied that the employee's union status had been a reason for the dismissal, and the primary judge accepted this evidence.<sup>298</sup> The decision-maker said the reason for the dismissal was the employee's 'wilful disobedience'.<sup>299</sup> The primary judge found that the employer had succeeded in rebutting the presumption in s 809. On appeal, the Full Court of the Federal Court noted that a central consideration of the primary judge 'was whether the direction to [the employee] to remove the sticker from his neck had been reasonable and lawful.'<sup>300</sup> The Full Court considered an argument that the direction had *not* been lawful or reasonable, and said:

Even if the direction had not been reasonable or lawful, if the termination had been by reason of non-compliance with that direction, it does not follow that it was for a prohibited reason. However no occasion arises to examine the consequences of the direction's [sic] having been unreasonable or unlawful because the primary Judge considered, correctly, that it had been both reasonable and lawful.<sup>301</sup>

The Court distinguished this case from *Australian Tramway Employees' Association v Brisbane Tramways Company Ltd*,<sup>302</sup> where it was found that the 'employer's direction not to wear badges of any kind, other than those supplied by the employer, was part of a policy of the employer to suppress unionism. On the facts, that is not this case.'<sup>303</sup> The Court said that the decision-maker gave evidence that the reason for the dismissal was the misconduct, and that he had not been influenced by the employee's union status. 'His evidence was accepted and nothing has been shown on appeal to impugn that acceptance. It follows that [the employer] discharged the onus of proving that the dismissal had not been for a prohibited reason'.<sup>304</sup>

Another issue with which courts have grappled is whether, in assessing the respondent's evidence, regard should be had to the *applicant's* evidence. In a series of decisions regarding the retrenchment of a union delegate, the Federal Court considered whether it was appropriate to take into account evidence called on behalf of the *employee* when assessing the credibility of the *employer's* evidence, and ultimately held that it was appropriate to do so. At first instance,<sup>305</sup> Marshall J accepted the employer's evidence that a redundancy decision was not based on the employee's union status, and

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<sup>296</sup> (2009) 188 IR 270.

<sup>297</sup> (2009) 188 IR 270, 272.

<sup>298</sup> (2009) 188 IR 270, 274.

<sup>299</sup> (2009) 188 IR 270, 274.

<sup>300</sup> (2009) 188 IR 270, 271.

<sup>301</sup> (2009) 188 IR 270, 275.

<sup>302</sup> (1912) 6 CAR 35.

<sup>303</sup> (2009) 188 IR 270, 276.

<sup>304</sup> (2009) 188 IR 270, 276. See also n 557 and n 558 below and surrounding text.

<sup>305</sup> *Elliot v Kodak Australasia Pty Ltd* (2001) 108 IR 23.

therefore found that the employer had discharged the onus. His Honour held the employee's evidence was not relevant to whether the employer had discharged the onus. Such evidence would only have been relevant if the employer's evidence was improbable, in which case it would have been appropriate to consider the employee's evidence to 'highlight that improbability.'<sup>306</sup> On appeal, the Full Federal Court found Marshall J erred in not considering the employee's evidence as part of an assessment of the veracity of the employer's evidence.<sup>307</sup>

Similarly, in a 2004 Federal Court case,<sup>308</sup> an employer failed in its objection to the applicant providing evidence going to the employer's reasons for its decision. The employer applied to have a large number of the applicant's affidavits taken off the court file on the basis that they were oppressive. One of the reasons given was that 'the evidence regarding the reasons of the employer is premature by reason of [the reverse onus in] s 298V'.<sup>309</sup> Justice Kiefel rejected this argument, saying:

I do not accept that s 298V has the effect that the applicant is somehow prevented from putting evidence forward at this point, or that he is obliged to place reliance only upon the statutory presumption. It seems to me at least arguable that its own evidence as to the employer's reasons may not only establish whether an offence is made out but may also be additionally relevant to penalty.<sup>310</sup>

In some cases, the courts looked very closely at the surrounding circumstances in determining whether to accept the decision-maker's evidence. For example, in the 1985 case *Webb v Nationwide News Pty Ltd*,<sup>311</sup> Wilcox J of the Federal Court considered a claim by an active union member who was dismissed in the context of widespread retrenchment (about one quarter of the journalistic staff of *The Australian* were made redundant). The chairman of the business instructed a news editor to prepare a list of 40 journalists for retrenchment, and the Court found it likely these instructions specifically referred to selecting people who were disruptive.<sup>312</sup> The news editor prepared the list of 40 people, and the employee was about sixth or seventh in order of those who should go. His reasons for including the employee were that he was highly paid, not very productive, wrote on a narrow range of matters, and had a poor attitude. The news editor 'denied that he was in any way influenced in favour of retrenching [the employee] because of his union position or ... union activities ...', adding: "If anything it was a little to the contrary. I was quite worried on that score."<sup>313</sup>

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<sup>306</sup> (2001) 108 IR 23, 37.

<sup>307</sup> *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251. The matter was remitted back to Marshall J who ultimately maintained his conclusion that the employer had discharged the onus: *Elliott v Kodak Australasia Pty Ltd* [2002] FCA 154 (26 February 2002).

<sup>308</sup> *Hamberger v Ramsey Food Packaging Pty Ltd* [2004] FCA 842 (23 June 2004).

<sup>309</sup> [2004] FCA 842 (23 June 2004) [2].

<sup>310</sup> [2004] FCA 842 (23 June 2004) [7].

<sup>311</sup> (1985) 10 IR 252.

<sup>312</sup> (1985) 10 IR 252, 266.

<sup>313</sup> (1985) 10 IR 252, 267-8.

The Court found the chairman of the News Ltd Group, Rupert Murdoch, indicated (through media interviews) the dismissals related to more than just the economics of cutting staff numbers, and that 'he understood them to involve, at least in part, a clearing out of the people who had caused industrial trouble.'<sup>314</sup> Further, the Court found that at least two employees who were ultimately retrenched were put on the list not by the news editor, for journalistic reasons, but by superiors who considered them to be union activists. The Court also considered it a 'real possibility' that if the employee had not been on the news editor's original list, he would likewise have been added by more senior managers on the grounds of his union activities.<sup>315</sup> However, that was not the case. The Court ultimately found the operative decision was made by the news editor, and accepted his evidence that it was 'made entirely upon editorial grounds'.<sup>316</sup>

The Court examined detailed evidence about the employee's productivity, and ultimately found the view that the employee's 'output was less than might reasonably be expected of a senior journalist was well open to' the news editor who compiled the list.<sup>317</sup> Further, the Court ultimately accepted the news editor's evidence that he placed the employee on the list because he was highly paid, unproductive, had a narrow range of interests, and an unsatisfactory attitude.<sup>318</sup> The Court also accepted the evidence of the more senior employee who ultimately approved the list that he was not influenced by the employee's union activities, although he was aware that he held a union office.

This case is an example of a court applying the Barclay Approach (in the sense that the ultimate question the court was seeking to answer was whether the decision-maker's evidence was accurate), but in doing so taking into account in some detail the surrounding circumstances to assess the veracity of the employer's evidence.

In some instances, a judge's reason for accepting the employer's evidence seems to be a reluctance to make a finding that the employer lied in giving evidence. One case goes so far as to say that a finding against the two decision-makers' evidence would amount to a finding that they had conspired to commit perjury.<sup>319</sup> And in 2001, Weinberg J considered the evidence of the two decision-makers, noted that they were 'extensively cross-examined ... in a forceful manner',<sup>320</sup> and found that he was 'unable to conclude that [the decision-makers] gave perjured evidence before me.'<sup>321</sup> However, it is important to note that it is possible for a court to make a finding contrary to a witness' evidence without also making a finding that the witness lied. In one case it was noted that the 'High Court [has] pointed out that evidence may be rejected without descending

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<sup>314</sup> (1985) 10 IR 252, 271.

<sup>315</sup> (1985) 10 IR 252, 273.

<sup>316</sup> (1985) 10 IR 252, 273.

<sup>317</sup> (1985) 10 IR 252, 279.

<sup>318</sup> (1985) 10 IR 252, 281.

<sup>319</sup> *Pryde v Coles Myer Ltd* (1990) 33 IR 469.

<sup>320</sup> *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90, 120.

<sup>321</sup> (2001) 108 FCR 90, 120.

into the making of findings that a witness deliberately lied.’<sup>322</sup> On another occasion, Branson J of the Federal Court considered that ‘[i]t is possible that, with the passage of time, [a witness] has unconsciously rationalised aspects of his conduct...’<sup>323</sup>

#### *Decision-Maker’s Evidence Not Accepted*

Some other cases taking a Barclay Approach have found in favour of the applicant because the decision-maker’s evidence was not accepted. (It should be noted that some of these cases could also be considered as examples of a Broader Approach, because the court looked at a range of other evidence and the surrounding circumstances in deciding to reject the decision-maker’s evidence.)

For example, in the 1967 case of *Joiner v Muir*,<sup>324</sup> a nurse was dismissed. She claimed the reason for her dismissal was her union membership. She was employed by Mr and Mrs Muir. The employee gave evidence that Mr Muir had asked if she was a union member (she refused to reply), and said that he would find out which employees were members and get rid of them. He gave her two weeks’ notice. A couple of days later, he gave her two weeks’ pay in lieu of notice and then asked her again whether she was a union member. The employee’s evidence was that she answered yes. However, Mr Muir swore that he did not know the employee was a union member until he received the summons in the case.<sup>325</sup> Mr Muir maintained that the employee had a poor attitude, had failed to perform her duties satisfactorily, and had threatened to resign several times. He maintained that he gave her pay in lieu of notice because she had been dishonest in saying she was attending a doctor’s appointment when in fact she attended wages board proceedings, and because she told a member of staff that he could not dismiss that member of staff.

Contrary to the employer’s evidence, the Court found that the employee’s participation in a ‘stop work’ union meeting outside the hospital ‘was the precipitating factor which led the defendants to give her ... two weeks notice of the termination of her employment.’<sup>326</sup> The Court also had to consider whether the employer knew she was a union member at that time. The Court found that when she participated in the meeting Mr and Mrs Muir had come to the view that she was ‘probably’ a member of the union.<sup>327</sup> The Court found that Mr and Mrs Muir:

had firmly in mind their other reasons for dissatisfaction with [the employee] and the arrangements already made with [another staff member] to take her place, but that it was her

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<sup>322</sup> *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28 (16 March 2010) [31] (Graham J, referring to the High Court’s decision in *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 268).

<sup>323</sup> *Community and Public Sector Union v Commonwealth* (2007) 163 FCR 481, 496.

<sup>324</sup> (1967) 15 FLR 340.

<sup>325</sup> (1967) 15 FLR 340, 345.

<sup>326</sup> (1967) 15 FLR 340, 352-3.

<sup>327</sup> (1967) 15 FLR 340, 353.

participation in the meeting ... and her probable membership of the federation as shown by that participation which was the precipitating factor in making the decision to give her two weeks notice.<sup>328</sup>

The Court also found that by the time the employer gave the employee pay in lieu of notice a few days later, Mr and Mrs Muir had concluded that there was no doubt that she was a member of the union,<sup>329</sup> and that this membership 'did actuate' the decision to dismiss her with pay in lieu of notice. 'Further, the existence of additional actuating circumstances does not mean that a breach of the Act has not occurred.'<sup>330</sup> The employer had not met the onus of proving on the balance of probabilities that they were not actuated by the employee's union membership.<sup>331</sup>

In *Jones v Thiess Bros Pty Ltd*, the decision-maker gave evidence, but Keely J of the Federal Court considered his evidence was unsatisfactory and unreliable.<sup>332</sup> The decision-maker advanced a number of reasons for his decision to dismiss, some of which were accepted by the Court as being substantial and operative reasons for the dismissal, including the fact that the employee had called a meeting of union members, the terms of the resolution of the meeting, the fact that the union representatives (including the employee) allowed the union members to return to work before discussing the terms of the resolution and possible exemptions with management, and the employee's 'attitude to his fashion of administering what he called the union activity on the job'.<sup>333</sup> The Court found that the employer had *not* discharged the onus of proving that it was not actuated by the prescribed reasons alleged – 'to the contrary ... the evidence has established that both [alleged reasons] were substantial and operative factors in the dismissal.'<sup>334</sup>

In the 1980 case of *Bowling v General Motors-Holden's Pty Ltd*, the Full Federal Court said '[i]n determining such a question, the credibility of a witness, particularly perhaps when dealing with circumstances which actuated him in a decision, is of prime

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<sup>328</sup> (1967) 15 FLR 340, 354.

<sup>329</sup> (1967) 15 FLR 340, 355.

<sup>330</sup> (1967) 15 FLR 340, 355.

<sup>331</sup> (1967) 15 FLR 340, 356. Interestingly, despite finding a breach of the legislation, the Court demonstrated sympathy with the employer in saying (at 356):

...we would add that the defendants certainly had a justifiable sense of grievance against Sister Fairley, who was matron of the hospital and their nursing manager when she identified herself with their opponents in an industrial dispute in which strike threats were undoubtedly made. They could not have been expected to tolerate a situation in which the [sic] would have to rely upon her to manage the nursing side of their hospital and to supervise nursing and non-nursing staff when she had become a leader of some of the staff in the industrial disputation with them. Consequently, although the defendants must, on the law, be convicted, we will impose no penalty.

<sup>332</sup> (1977) 15 ALR 501, 510.

<sup>333</sup> (1977) 15 ALR 501, 511-12.

<sup>334</sup> (1977) 15 ALR 501, 512.

importance',<sup>335</sup> and held that the Court on appeal could not substitute its finding for the trial judge's finding that the decision-maker's evidence was not credible.

Another case in which the decision-maker's evidence was not accepted is *Sutherland v Hills Industries Ltd*.<sup>336</sup> The employee was a union member and had been handing out information to other employees about how to join the union. The employee claimed that he had been dismissed by reason of the circumstances that (amongst other things) he was a union member, and being a union member he had done a lawful act for the purpose of furthering the union's industrial interests. The decision-maker gave evidence that he did not know the employee had been handing out union information cards until after the employee was dismissed, and that even if he had known it would not have made any difference to his decision. However, Keely J rejected this evidence as 'a deliberate attempt to mislead the court'.<sup>337</sup> His Honour found that the decision to dismiss was for reasons 'which included, as a substantial factor operating on their minds, the fact that Mr Sutherland was at the time a member of the union and as such was likely ... to seek to enrol ... other employees'.<sup>338</sup>

In 2000, Merkel J considered a situation where an Ansett employee (a union delegate) was dismissed after she distributed a union bulletin to union members on the employer's internal email system. The employer claimed the dismissal was because distributing the union bulletin constituted misconduct (a misuse of the email system), particularly given the material contained in the bulletin was quite colourful and critical of the employer.<sup>339</sup> The employee had previously been warned not to post union material onto the employer's online 'bulletin board'. Justice Merkel noted that the decision-maker was

conscious that his action would result in a serious dispute with the [union]. [This] awareness that the matter involved union issues ... is significant. I infer that ... this awareness led him to formulate the reasons he gave for [the employee's] dismissal as broadly as possible.<sup>340</sup>

The decision-maker said that the reasons 'driving' him to dismiss the employee was 'her use of the email system to distribute [a] highly objectionable ... bulletin, which was a "union activity" prohibited by his earlier direction'.<sup>341</sup> But the document given to the employee at the time of her dismissal (which was formulated after legal advice) also referred to a number of other matters, including her duty of good faith to her employer, the policy regarding conflicts of interest, and the policy on the use of email. His Honour said:

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<sup>335</sup> (1980) 50 FLR 79, 88.

<sup>336</sup> (1982) 2 IR 287.

<sup>337</sup> (1982) 2 IR 287, 291 and 292.

<sup>338</sup> (1982) 2 IR 287, 292.

<sup>339</sup> *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 174, 179.

<sup>340</sup> (2000) 175 ALR 173, 181.

<sup>341</sup> (2000) 175 ALR 173, 182.

In my view the other grounds stated by [the decision-maker] for [the] dismissal, which were formulated after legal advice, were intended by [the decision-maker] to proffer all of the *possible* legal bases for his decision to dismiss her. However, the operative factors that moved [the decision-maker] to make his decision were not those legal factors but, rather, that [the employee] had again distributed union material using Ansett's IT system.<sup>342</sup>

His Honour found that the decision-maker's reliance on these legal factors 'as factors that activated him to make his decision reflects adversely on his credit and reliability as a witness.'<sup>343</sup>

Interestingly, Merkel J considered in some detail whether sending the email actually did constitute misconduct under the various policies, and found that it did not.<sup>344</sup> This approach is slightly unusual because cases of this type tend to focus on whether the employer genuinely held the belief, rather than on whether the employer's belief was correct. However, his Honour explained this by saying:

in a case in which the dismissal of a union official or delegate occurs in circumstances that are closely associated with the activities of the employee in that capacity, the employer carries the onus of rebutting the very real possibility that the dismissal was associated with the circumstance that the employee was an official or delegate.<sup>345</sup>

Accordingly, if the employee's use of the email system

was an authorised use and in so using Ansett's e-mail system she was discharging her duties and functions as a delegate, it becomes commensurately more difficult to conclude that Ansett has excluded the possibility that her dismissal was associated with the circumstance that she was an ASU delegate.<sup>346</sup>

Justice Merkel found that the decision-maker was an unreliable witness and the 'union' aspects of the employee's actions were important and relevant to him.<sup>347</sup> Further, the grounds asserted by the employer for the dismissal 'could fairly be described as having "puzzling or unreasonable aspects"'.<sup>348</sup> The Court found that the employer had failed to discharge the onus of excluding the 'very real possibility' that the dismissal was 'associated with the circumstance' that the employee was a union delegate.<sup>349</sup>

A 2001 decision<sup>350</sup> concerned an email sent by the Telstra managing director for employee relations, Mr Cartwright, to 275 managers and team leaders regarding a proposed reduction in staff by 10,000 positions. Earlier cases had found that the email would have been regarded by many managers as an instruction to discriminate against

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<sup>342</sup> (2000) 175 ALR 173, 182 (emphasis in original).

<sup>343</sup> (2000) 175 ALR 173, 182.

<sup>344</sup> (2000) 175 ALR 173, 185.

<sup>345</sup> (2000) 175 ALR 173, 190-1.

<sup>346</sup> (2000) 175 ALR 173, 191. In some ways, this focus on whether there actually was misconduct places an emphasis on an objective, rather than subjective, consideration of the employer's reasons.

<sup>347</sup> (2000) 175 ALR 173, 192.

<sup>348</sup> (2000) 175 ALR 173, 192, quoting *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67 at 78.

<sup>349</sup> (2000) 175 ALR 173, 192.

<sup>350</sup> *CPSU, Community and Public Sector Union v Telstra Corporation Limited* (2001) 108 IR 207.

employees covered by awards or agreements when selecting staff for redundancy, and that this instruction constituted a prejudicial alteration to the employees' position.<sup>351</sup> Justice Finkelstein considered whether Mr Cartwright gave the instruction in the email for a prescribed reason. His Honour said:

I propose to consider Mr Cartwright's evidence in the following context. First, there is the effect of s 298V. So far as is presently relevant s 298V provides that in an application under s 298K, it must be presumed that conduct was carried out for the reason alleged unless the opposite is proved. The result is that Telstra must establish that the email was not sent for a prohibited reason.

Second, I must have regard to the terms of the email. That is, to decide why Mr Cartwright sent the email it is appropriate to consider what is stated in the email. If Mr Cartwright's evidence is inconsistent with what he wrote, that inconsistency will bear upon the persuasiveness of Mr Cartwright's explanation, though it need not be decisive.

Finally, there is Mr Cartwright's explanation. When a person gives sworn testimony explaining why he took certain action, this will often be the only direct evidence the court will have on the issue. *If the evidence is accepted as true, it will resolve the issue one way or the other.*<sup>352</sup>

Mr Cartwright gave evidence that he intended the email to be an instruction that managers *not* discriminate against employees on AWAs, rather than an instruction that they *should* discriminate against employees on awards and agreements.<sup>353</sup>

Justice Finkelstein took into account surrounding circumstances (including that there was a detailed redundancy procedure which focused on fair procedures – arguably making it unnecessary for any instruction to not discriminate against AWA employees), and held that while he could not reject the managing director's evidence (because it might be true), he was 'not sufficiently persuaded by his testimony to reach the conclusion that it overcomes both the effect of s 298V and the language of the email.'<sup>354</sup>

In a 2003 decision, North J refused to accept the employer's evidence because the employer relied on assertion and did not provide any supporting evidence, even though the reasons advanced lent themselves to supporting documentation (such as expert analysis of past accounting records and projections).<sup>355</sup>

In a 2008 decision under the WR Act, Moore J considered an employer's argument that the employee was dismissed for misconduct (rather than because the employee was a union member and delegate).<sup>356</sup> Justice Moore found that the employer had not

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<sup>351</sup> See *CPSU, The Community and Public Sector Union v Telstra Corporation Ltd* (2000) 99 IR 238; *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93.

<sup>352</sup> (2001) 108 IR 207, 208-9 (emphasis added).

<sup>353</sup> (2001) 108 IR 207, 210.

<sup>354</sup> (2001) 108 IR 207, 210.

<sup>355</sup> *Australasian Meat Industry Employees' Union v Beldra Pty Ltd* (2003) 126 IR 165, 228. See also *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Eaton Electrical Systems Pty Ltd* (2005) 139 IR 260, where no documentary evidence was provided by the employer to support its argument that the reason for the dismissals was redundancy and Moore J found it 'curious, at the least, that [the relevant manager] was not able to immediately place his hands on relevant documents or, indeed, that such documents were not advanced by the Company as part of its evidentiary case': 264.

<sup>356</sup> *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306.

discharged the onus.<sup>357</sup> His Honour did not accept the decision-maker's evidence that the dismissal was because of misconduct, and that he had no regard to the prescribed grounds. His Honour did not think the decision-maker 'has been entirely truthful in his evidence', and considered that 'his evidence was tailored, perhaps unconsciously, to support and avoid damaging the respondent's case.'<sup>358</sup> His Honour pointed to inconsistencies in evidence under cross-examination, and a number of factors that 'collectively raise a real issue in my mind about whether the dismissal ... was for the stated purpose',<sup>359</sup> including the way the investigation into the alleged misconduct was carried out, the fact that no other employees were investigated, the way the termination was effected, and the 'manifest convenience' to the employer of having the union delegate out of the workplace.<sup>360</sup>

In another 2008 case,<sup>361</sup> North J did not accept the employer's evidence that two employees were dismissed because of a general reduction in the workforce and because the two employees were still in their three month trial period. His Honour noted that their shift did not close down until some months later,<sup>362</sup> other employees commenced at about the time they were dismissed,<sup>363</sup> other employees who were also still in their trial period retained their jobs,<sup>364</sup> and when the employer was asked about the decision-making process 'he was not recalling an actual process of selection which had been undertaken but rather constructing a possible way in which the decision could have been made.'<sup>365</sup> His Honour also did not accept the employer's evidence in relation to a third employee, who the employer claimed was dismissed because he was unsuitable as a quality inspector. Justice North found the employee was praised by his immediate supervisor, and the alleged reason (poor performance on 9 December) did not result in dismissal until 21 December, in circumstances in which it was unlikely that the employer would have waited so long to dismiss him.<sup>366</sup> The immediate supervisor was not called to give evidence, and North J drew a *Jones v Dunkel* inference that his evidence would not have assisted the employer. This allowed the Court more confidently to accept the employee's evidence that he was praised for his work.<sup>367</sup> Justice North considered that the employer had a 'propensity ... to raise unfounded allegations in an attempt to support the case of the respondent.'<sup>368</sup> His Honour did not

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<sup>357</sup> (2008) 177 IR 306, 322.

<sup>358</sup> (2008) 177 IR 306, 322.

<sup>359</sup> (2008) 177 IR 306, 322-3.

<sup>360</sup> (2008) 177 IR 306, 323-4.

<sup>361</sup> *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* (2008) 176 IR 377.

<sup>362</sup> (2008) 176 IR 377, 382.

<sup>363</sup> (2008) 176 IR 377, 383.

<sup>364</sup> (2008) 176 IR 377, 384.

<sup>365</sup> (2008) 176 IR 377, 385.

<sup>366</sup> (2008) 176 IR 377, 387.

<sup>367</sup> (2008) 176 IR 377, 387.

<sup>368</sup> (2008) 176 IR 377, 388.

accept that the employee was, or that the employer believed he was, 'unsatisfactory as a quality inspector'.<sup>369</sup>

### *Need for Explanation of a 'Real Reason' to Rebut the Presumption*

In some cases, employers seek to establish a 'real' (non-prescribed) reason for their action to support their assertion that the action was not taken for a prescribed reason. Courts tend to accept that, although proof of a non-prescribed reason is *not* technically required to satisfy the reverse onus, such proof can assist an employer's case. For example, in the 1957 case of *Atkins v Kirkstall-Repco Pty Ltd*,<sup>370</sup> an employer claimed that the reason for dismissal was the employee's absenteeism, not his status as a union delegate. The Commonwealth Industrial Court stated:

Provided that the company shows on the evidence that it was not actuated in dismissing [the employee] because he was a union delegate, it is of course *unnecessary for it to prove why it dismissed him*, or whether it did so on reasonable grounds, but at the same time *when it advances a reason of dismissal, the reasonableness of its conduct may be of importance in weighing the truth of the evidence which its officers give as to what actuated the dismissal*.<sup>371</sup>

In 1987, Gray J of the Federal Court considered a case where two council employees claimed they were dismissed because of a number of prescribed reasons, including that they were members of a union and had appeared as witnesses in proceedings under the Act.<sup>372</sup> Justice Gray noted:

As a matter of logic, s 5(4) of the Act does not impose on an employer charged with an offence under s 5 the burden of showing that it had a reason, good or bad, for dismissing an employee. It is sufficient if the employer concerned establishes that it was not actuated by any of the proscribed circumstances charged. No doubt, however, the failure of an employer to advance a positive reason to justify a dismissal must make it more difficult to satisfy the onus than if a reason is advanced. Further, the existence of a genuine reason, established as a matter of evidence, justifying the dismissal, must give an employer the best possible defence against a charge under the section. The advancement of a reason which is found to have been non-existent in fact may render the employer's task of establishing innocence more difficult.<sup>373</sup>

In the case, the four members of the local council who voted in favour of the motion to dismiss gave evidence. Each gave their own reasons for voting for the dismissals, and each said that they were not influenced by any prescribed reason. The main reasons offered by the council members included that the employees had refused, or failed, to complete certain tasks as directed, and that they were a disruptive influence in the workplace. Justice Gray noted that the employer did not make any real attempt to

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<sup>369</sup> (2008) 176 IR 377, 389.

<sup>370</sup> (1957) 3 FLR 439.

<sup>371</sup> (1957) 3 FLR 439, 441 (emphasis added).

<sup>372</sup> *Gibbs v Palmerston Town Council* (Unreported, Federal Court, Gray J, 21 December 1987).

<sup>373</sup> (Unreported, Federal Court, Gray J, 21 December 1987) at 18.

provide evidence to justify the dismissals (for example, there was no evidence that the directions to complete the tasks were lawful instructions, within the scope of employment, or that the employees could reasonably have been expected to complete them in the timeframe given). The employer relied completely on the evidence of the four decision-makers as to what they believed at the time. Justice Gray accepted that if the decision to dismiss 'was motivated solely by beliefs as to their conduct, *even if those beliefs were unfounded*, the decision will not have been actuated by any of the circumstances proscribed by s 5 of the Act'.<sup>374</sup> However, at the meeting of the four decision-makers, there was no discussion as to the reasons for the dismissal. His Honour said:

The meeting had all the signs of a group of people bent upon the dismissal of two employees, uncertain whether they should give reasons, and searching for appropriate reasons to give, whether they be genuine or not. ... Indeed, one might search the transcript of the tape recording of the meeting, and listen to the tape recording itself, in vain for any indication as to why Mr Richardson was to be dismissed.<sup>375</sup>

The Court considered that the chain of events disclosed in the evidence was very improbable, and it was highly likely the decision-makers had discussed the matter before the meeting (although this was not confirmed by the witnesses, who 'did not recall' if there had been a previous discussion).<sup>376</sup> 'In all of the circumstances, the meeting ... shows clear signs of having been organized and recorded as a piece of window dressing, so as to avoid any suggestion that the defendant was in breach of s 5 in ridding itself of its two most troublesome union members.'<sup>377</sup> The employer failed to discharge the onus.<sup>378</sup>

In a 1988 Federal Court decision,<sup>379</sup> Gray J considered a situation where a group of employees joined the union and refused to return to work until one of their colleagues, who had been dismissed, was reinstated. The employer warned them that failure to attend work would be considered misconduct. When they refused to return, they were dismissed. The decision-maker gave evidence that his decision to dismiss had not relied on union membership, and that the only reason for the dismissal was because they had 'refused to obey lawful directions to return to work'.<sup>380</sup> The Court stated '[s]uch evidence should always be scrutinised carefully. It is easy for an employer, after the event, to assert that a dismissal was the result only of factors unrelated to the proscribed circumstance alleged under s 5 of the Act.'<sup>381</sup> The Court found that the

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<sup>374</sup> (Unreported, Federal Court, Gray J, 21 December 1987) (emphasis added) at 19.

<sup>375</sup> (Unreported, Federal Court, Gray J, 21 December 1987) at 23.

<sup>376</sup> (Unreported, Federal Court, Gray J, 21 December 1987) at 25-26.

<sup>377</sup> (Unreported, Federal Court, Gray J, 21 December 1987) at 27.

<sup>378</sup> See also *Voigtsberger v Council of the Shire of Pine Rivers (No 2)* (1981) 58 FLR 239, where the Court rejected the employer's stated reason for dismissal (redundancy), finding the employer had failed to prove on the balance of probabilities that the employee's entitlement to the benefit of an award was not a substantial and operative reason for her dismissal.

<sup>379</sup> *Australasian Meat Industry Employees' Union v Sunland Enterprises Pty* (1988) 24 IR 467.

<sup>380</sup> (1988) 24 IR 467, 477.

<sup>381</sup> (1988) 24 IR 467, 477, referring to *Sandilands v Australian Newsprint Mills Ltd* (1982) 3 IR 386.

decision-maker's evidence was untruthful in many respects, and attempted to cast the employer in a good light.<sup>382</sup> His 'performance in the witness box would be sufficient to require extreme caution in accepting anything he said in the defendant company's interest, unless that item of evidence were corroborated from some other source.'<sup>383</sup> The Court also noted that the employer did not want its employees to be union members,<sup>384</sup> and had assisted some junior employees to resign from the union – including by giving them the union's resignation form and asking them to copy it out in their own handwriting before signing it.<sup>385</sup>

Justice Gray found that dismissing employees for failing to obey a lawful direction to return to work was not inconsistent with dismissing them because they had become union members – in fact, these 'two factors were in their nature closely related'.<sup>386</sup> Further, 'the assertion of a single legitimate reason for dismissal does not preclude the existence of another reason or other reasons, one or more of which may be proscribed by s 5 of the Act.'<sup>387</sup> Ultimately, the Court was unable to accept 'that it is more probable than not that [the decision-maker] did not regard Union membership as a substantial operative factor when he came to decide to dismiss' the employees.<sup>388</sup>

In a 2006 case, Buchanan J considered a situation where an employer made 10 employees redundant, including two union delegates.<sup>389</sup> The two delegates were long-serving employees, and at the time of the redundancies, they were involved in negotiations for a new agreement with the possibility of industrial action.

The two union delegates ... who had been ... intimately involved in the negotiations were removed from the scene. The respondent, at the same time, seemed to be embarking on a program of altering the nature of style or [sic] industrial negotiations from a collective to an individual basis.<sup>390</sup>

His Honour said:

[b]ecause the respondent must exclude delegateship and membership as a reason for termination, normally sworn evidence denying any such reason is necessary and, in most cases, an explanation of the real reason for dismissal consistent with the absence of delegateship or membership as a reason is, in a practical sense, also necessary.<sup>391</sup>

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<sup>382</sup> (1988) 24 IR 467, 478.

<sup>383</sup> (1988) 24 IR 467, 478.

<sup>384</sup> (1988) 24 IR 467, 479.

<sup>385</sup> (1988) 24 IR 467, 479.

<sup>386</sup> (1988) 24 IR 467, 480. Note that this case could be described as belonging to the Broader Approach category, because of the recognition of the close relationship between the failure to return to work and the union membership.

<sup>387</sup> (1988) 24 IR 467, 480.

<sup>388</sup> (1988) 24 IR 467, 480.

<sup>389</sup> *Seymour v Saint-Gobain Abrasives Pty Ltd* (2006) 161 IR 9.

<sup>390</sup> (2006) 161 IR 9, 13.

<sup>391</sup> (2006) 161 IR 9, 14.

Further, '[w]here more than one person contributes to a decision to dismiss it may be necessary to lead appropriate evidence from each such person.'<sup>392</sup>

The decision as to which employees to make redundant was made using a 'skills matrix'. One of the 'skills' (which both delegates lacked) was operation of a particular printer. However, the evidence was that it would take one to two days for a person to be trained and become proficient in the use of that printer. This 'skill' was originally identified as a criterion for redundancy in a report by the plant manager. His Honour said:

It was urged upon me by counsel for the respondent that it was not the function of the Court to pass upon the adequacy of a reason for dismissal, or factors which contributed to it, provided those reasons or factors were real ones. I accept that in many cases this might be an appropriate position to take. However, in the present case, one possibility which arises is that the use of the Off-line Printer criterion was not genuine but, rather, calculated to produce a selection of persons for retrenchment which included the applicants.<sup>393</sup>

Further, a table created in early August to estimate redundancy costs was based on the redundancy entitlements of the actual employees who were ultimately made redundant in late September (aside from one employee).<sup>394</sup> The plant manager's evidence, in effect, was that this was simply a coincidence.<sup>395</sup> The employer argued that the judge should not 'dabble' in probability theory and should accept the evidence. However, his Honour accepted the employees' argument that 'common sense denied the likelihood of such a close correspondence as a pure coincidence.'<sup>396</sup>

There was some doubt about whether the redundancy process adopted by the employer met the requirements of the certified agreement. His Honour said:

Although the question of compliance with the Certified Agreement does not arise, the arbitrary and simplistic nature of this criterion, and of the use of the Skills Matrix, does not assist the respondent in any endeavour to suggest an objective and realistic foundation for the selection process which excludes union-based prejudice against the applicants.<sup>397</sup>

His Honour determined that the decision-makers were the plant manager and the human resources manager. His Honour considered that the managing director (who gave final approval for the retrenchments) was not involved in the selection process and was not a decision-maker.<sup>398</sup> His Honour was satisfied with the evidence of the human resources manager that she did not have in mind the reason that the employees were delegates or members (in particular, this evidence was accepted in light of the fact that before the selection meeting, she arranged for the final pay of all volunteers for redundancy to be made up, because she assumed they would be first in line to be

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<sup>392</sup> (2006) 161 IR 9, 14.

<sup>393</sup> (2006) 161 IR 9, 22.

<sup>394</sup> (2006) 161 IR 9, 23.

<sup>395</sup> (2006) 161 IR 9, 24.

<sup>396</sup> (2006) 161 IR 9, 25.

<sup>397</sup> (2006) 161 IR 9, 26.

<sup>398</sup> (2006) 161 IR 9, 26.

retrenched – even though this did not ultimately end up being the case).<sup>399</sup> However, in relation to the plant manager, his Honour was not satisfied that his evidence showed that his reasons for dismissal did not include the fact the employees were delegates/members, ‘despite his sworn denial’.<sup>400</sup> This was because his Honour was not satisfied that the table prepared in early August bore no relationship to the ultimate redundancy selection (that is, his Honour did not accept the ‘coincidence’ argument), and ‘[i]n light of these reservations I am not prepared to accept the balance of [the plant manager’s] evidence at face value. His explicit denial of delegateship or membership as a reason for retrenchment is insufficient to prove this aspect of the respondent’s case.’<sup>401</sup>

His Honour said:

Had the applicants borne the onus in this case of positively establishing a prohibited reason for dismissal it is doubtful that they could have discharged it notwithstanding the matters to which I have referred. But they do not. It is the respondent which must discharge the presumption directed by the WR Act by proving that the fact that the applicants were delegates or members of an industrial organisation was not a reason for their dismissal. It need only be proved on the balance of probabilities but it must be proved at least to that standard.<sup>402</sup>

His Honour was not satisfied that the employer had met the reverse onus.

In a 2007 case, Collier J found that ‘in most cases an explanation of the *real* reason for dismissal consistent with the absence of a prohibited reason is, in a practical sense, also necessary to rebut the presumption’.<sup>403</sup> Her Honour ultimately accepted the evidence and explanation offered by the employer. The employer argued that the reason for dismissal was that the employees were still within their probationary period, and it was decided not to extend their employment beyond the probationary period in light of alleged misconduct. The employees were not given any reason for dismissal at the time they were dismissed. Her Honour was satisfied that the employees were not dismissed for prohibited reasons.<sup>404</sup> Her Honour found that the decision-maker was a credible witness, and that her version of events was consistent with the evidence of other witnesses for the employer and various pieces of documentary evidence.<sup>405</sup> Whether the reasons for dismissal were ‘fair’ was not relevant.<sup>406</sup>

In another 2007 case,<sup>407</sup> Cowdry J considered an employer’s stated reason for a ban on leave on the day of a WorkChoices protest. His Honour found that the employer’s stated reason and concern - operational requirements - was unjustified, since no investigations were made into whether there would likely be significant increases in applications for

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<sup>399</sup> (2006) 161 IR 9, 27.

<sup>400</sup> (2006) 161 IR 9, 27.

<sup>401</sup> (2006) 161 IR 9, 27.

<sup>402</sup> (2006) 161 IR 9, 28.

<sup>403</sup> *Construction, Forestry, Mining and Energy Union v CE Marshall & Sons Pty Ltd* (2007) 160 IR 223, 229.

<sup>404</sup> (2007) 160 IR 223, 235.

<sup>405</sup> (2007) 160 IR 223, 237.

<sup>406</sup> (2007) 160 IR 223, 239.

<sup>407</sup> *Community and Public Sector Union v Commonwealth* [2007] FCA 1861 (4 December 2007).

leave, or additional demand for assistance from its clients.<sup>408</sup> Accordingly, ‘...the Court is satisfied that the motivation of the [employer], albeit arising from the concern to provide adequate staffing, was not founded upon a genuine assessment of operational requirements and that the ban was accordingly unjustified’.<sup>409</sup> Despite this finding that the employer’s stated reason was not justified, his Honour ultimately held that the employer had discharged the onus, stating:

The fact that arguably proper and genuine assessments of operational requirements were not carried out does not detract from the Court’s finding that the immediate purpose of the ban was to ensure provision of sufficient staffing levels...<sup>410</sup>

In 2008, Moore J of the Federal Court commented that, generally speaking, it is not enough for a respondent to merely deny the existence of a prescribed reason in order to rebut the presumption. Rather, ‘in most cases an explanation for the real reason for the dismissal, consistent with the absence of a prohibited reason, is, in a practical sense, also necessary...’.<sup>411</sup>

In the same year, Wilson FM gave the matter a slightly different emphasis. Federal Magistrate Wilson found that there is no need for an employer to prove it had a valid reason – it merely needs to prove that it did not have a proscribed reason:

... not only is it not sufficient for an employer to prove a valid reason for dismissal, it is not necessary for it to do so. The onus on the employer is to prove, to the satisfaction of the court, that the reason or reasons for dismissal did not include a proscribed reason. The Court may conclude that the reason established by the employer was entirely unmeritorious, or even capricious. In those circumstances, provided the reason for dismissal did not encompass a proscribed reason, the respondent would successfully discharge its onus of proof.<sup>412</sup>

Ultimately, however, in that case, the fact that the employer proved the real reason for the employee’s dismissal (aggressive and inappropriate behaviour in the workplace) was a relevant factor in Federal Magistrate Wilson’s finding that the dismissal was not for a prescribed reason.<sup>413</sup>

In a 2009 case before Moore J,<sup>414</sup> the decision-maker gave four reasons for the decision to dismiss the employee, including performance matters, lack of willingness to follow directions, inability to work with colleagues, and lack of trust and respect for senior management. He also expressly denied that the alleged prescribed reasons were a reason for the dismissal. His Honour considered the evidence (including, it appears, documentary evidence) and the cross-examination, and accepted that the decision-maker had ‘concluded on reasonable grounds’ that the employee was not performing

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<sup>408</sup> [2007] FCA 1861 (4 December 2007) [71].

<sup>409</sup> [2007] FCA 1861 (4 December 2007) [74].

<sup>410</sup> [2007] FCA 1861 (4 December 2007) [75].

<sup>411</sup> *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306, 321.

<sup>412</sup> *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 101.

<sup>413</sup> (2008) 221 FLR 91, 114.

<sup>414</sup> *Dowling v Fairfax Media Publications Pty Ltd* (2009) 182 IR 28. An appeal against the decision of Moore J was dismissed: *Dowling v Fairfax Media Publications Pty Ltd (No 2)* [2010] FCAFC 28.

and was difficult to manage.<sup>415</sup> It is interesting that his Honour considered the ‘reasonableness’ of the employer’s stated reasons. His Honour stated:

The task of [the employer] ... is to displace the legislative presumption that it has acted for a reason that contravenes the WR Act, and I am satisfied that, having regard to all the evidence, [the employer] has successfully discharged the onus ... I am satisfied that [the employer] has provided an explanation of the real reasons for the termination of the applicant’s employment, which I accept were the reasons, and there is no basis for concluding that the alleged reasons played any role whatsoever in the decision to terminate...<sup>416</sup>

A 2009 Federal Magistrates Court decision<sup>417</sup> seems to take the search for a non-prescribed reason a step further, and place even greater emphasis on the employer’s ability to point to a non-prescribed reason. In that case, an employee sought to return to work after maternity leave, but was told she could not return to her original position and would have to return at a more junior position with the same salary but loss of entitlements. The employee contacted her union, and there was much correspondence over several months about her return to work, including a conciliation conference at the Australian Industrial Relations Commission (‘AIRC’). Ultimately, the employer did not allow her to return to work even in the more junior position. The employee alleged that the employer had prejudicially altered her position, injured her in her employment, and dismissed her, for prescribed reasons (namely, her entitlement to the benefit of an industrial instrument, which included the right to return to work; the fact that she had referred her grievance to the union; and the fact that she had participated in conciliation proceedings at the AIRC).

The employer said the reason for dismissal was unsatisfactory performance. Federal Magistrate Lucev said: ‘Because this allegation relates to a reason, other than a prohibited reason, it can, if proved, defeat the presumption under s 809 of the WR Act that conduct alleged to contravene s 792(1) of the WR Act was carried out.’<sup>418</sup> The Court noted the employer had not expressed dissatisfaction with the employee’s performance before she went on maternity leave,<sup>419</sup> and said:

... the Court considers that the reasons advanced by [the employer] for its treatment of Ms Poppas ... *were entirely spurious*, and were not the reason for [the employer’s] conduct... Therefore, [the employer] has not established that the conduct was for a non-prohibited reason, and has failed to satisfy the Court that it has fulfilled the evidentiary onus imposed on it by s 809.<sup>420</sup>

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<sup>415</sup> (2009) 182 IR 28, 44.

<sup>416</sup> (2009) 182 IR 28, 44.

<sup>417</sup> *Liquor, Hospitality and Miscellaneous Union v Cuddles Management Pty Ltd* (2009) 183 IR 89. There was a later decision on penalty at (2009) 188 IR 435.

<sup>418</sup> (2009) 183 IR 89, 105.

<sup>419</sup> (2009) 183 IR 89, 119.

<sup>420</sup> (2009) 183 IR 89, 119-120 (emphasis added).

Federal Magistrate Lucev went on to state: 'In the absence of a proven non-prohibited reason for the conduct the Court considers (or, at the very least considers it can be inferred) that the conduct ... was conduct for a prohibited reason...'.<sup>421</sup>

### *Subjective View*

To some extent, the Barclay Approach may be seen to support a subjective view of the issue, because the focus is on determining what was in the mind of the decision-maker. Although the issue of whether the court should use an objective or subjective approach in determining whether the causal link was made out was of importance to the trial judge and Full Federal Court in the *Barclay* litigation,<sup>422</sup> this distinction was rejected by the High Court in *Barclay*.<sup>423</sup> Nonetheless, the subjective/objective question appears in cases prior to the FW Act, and for that reason it is interesting to review earlier cases that considered the issue. Several cases support a subjective approach. These are discussed immediately below.<sup>424</sup> Cases supporting an objective approach are discussed under the heading of the Broader Approach (part IVB below).

In a 1975 case, the Australian Industrial Court rejected an argument that offences relating to injury in employment and altering of position are continuing offences, saying:

Each of the three offences provided for by the section is constituted by the combination of an overt act and a motive or reason for that act which renders the act unlawful. We think that the motive or reason can only be examined as at the time of the overt act which injures or changes the position of the employee.<sup>425</sup>

The use of the word 'motive' may be interpreted as suggesting a subjective approach to the issue.

In a 1979 case, it was argued that logically the employer could not 'escape a finding that it was actuated by [the prescribed reason], because, substantially, it was from that circumstance that all the other factors by reference to which [the decision-maker dismissed the employee] followed.'<sup>426</sup> However, Smithers J did not accept this argument, and said:

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<sup>421</sup> (2009) 183 IR 89, 122.

<sup>422</sup> *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2010] FCA 284 (25 March 2010) [23], [33]; *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) [28], [32], [33], [74] (Gray and Bromberg JJ), [197], [199] (Lander J in dissent).

<sup>423</sup> *Barclay* (2012) 290 ALR 647, [40], [44], [45] (French CJ and Crennan J), [107], [119], [121], [126] (Gummow and Hayne JJ), [149] (Heydon J).

<sup>424</sup> Some of the cases discussed under the heading 'Factor/Cause versus Reason' under the Broader Approach (in part IVB below) also tend to support a subjective approach.

<sup>425</sup> *Roberts v General Motors-Holden's Employees' Canteen Society Inc* (1975) 25 FLR 415, 418.

<sup>426</sup> *Wood v City of Melbourne Corporation* (1979) 26 ALR 430, 438.

One must go to the words of the section, as expounded by the High Court, look into the mind of [the decision-maker] and ask what were the substantial and operative factors in his mind. This is to be determined not as a matter of logic, but of fact.<sup>427</sup>

Accordingly, Smithers J found that the prescribed reason (failure to strike) was not an operative factor – instead the reason for the action was the union’s reaction to the employee’s failure to strike. Further, his Honour indicated that there must be an element of disapproval in the employer’s mind for a breach to have occurred (which was not present in this case).<sup>428</sup>

In *Musgrove v Murrayland Fruit Juices Pty Ltd*,<sup>429</sup> an employee (who had previously been warned about performance and attitude issues) was dismissed after he turned off his machine and went to lunch at precisely 12 noon even though his replacement had not yet arrived. The relevant award provided that the employee was entitled to take his lunch at that time because he had worked for five hours that morning. Justice Smithers had to decide whether the dismissal was by reason of the circumstance of the employee’s award entitlement. His Honour found that the employer knew about the award generally, but did not specifically know about the entitlement to meal breaks after five hours. His Honour said:

It may be said that the prosecutor ought to have known and that ignorance of the law is no excuse, but the question is as to the reason which actuated the defendant in taking the action that it did and that involved not what the defendant ought to have known or what ought to have been in its manager’s mind but what actually was in their minds. What circumstances were in their minds when they dismissed him? They could not act by circumstances of which they had no knowledge.<sup>430</sup>

The employee argued that he was dismissed because he had gone off to lunch (and this was the circumstance in the mind of the decision-maker), the entitlement to go to lunch was provided under the award, and accordingly he was dismissed by reason of his award entitlement. Justice Smithers did not accept this argument. His Honour noted that the CA Act section was a criminal section and must be ‘read according to the natural meaning of the words’, which imply that the dismissal took place ‘because in the mind of the employer the employee was entitled to something under the award.’<sup>431</sup> His Honour also commented:

Section 5 is directed to the protection of the Arbitration and Conciliation system created by the [CA Act] and that system works by the making of awards which bind the various parties. Any attack upon an award by an employer which is consciously directed to an award must be in grave danger of offending sub-s. (1)(b) of s. 5 but where a man acts in complete ignorance of the circumstance that the matter of dispute between himself and his employee is something in respect of which the employee has the award on his side, and completes his action remaining in

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<sup>427</sup> (1979) 26 ALR 430, 438.

<sup>428</sup> (1979) 26 ALR 430, 443.

<sup>429</sup> (1980) 47 FLR 156.

<sup>430</sup> (1980) 47 FLR 156, 160.

<sup>431</sup> (1980) 47 FLR 156, 161.

that state of ignorance, I cannot think that it can be said that on the proper construction of s. 5(1)(b) that he has offended.<sup>432</sup>

In another case, Ellicott J found that ‘the test ... is subjective in the sense that the court must consider what was in the mind of the defendant.’<sup>433</sup> And on another occasion, his Honour held:

[t]he section requires one to look into the mind of the employer and ask what were the substantive and operative factors in his mind. If the employer did not know [of the prescribed circumstance] the employer could hardly be actuated by that circumstance in dismissing him.<sup>434</sup>

Again, these comments support a subjective approach to the issue.<sup>435</sup>

In a 2001 case, Goldberg J agreed that the question is really ‘what was in the decision-maker’s mind?’<sup>436</sup> In a 2006 case, Greenwood J considered whether evidence which relates to the employer’s tendency to act in a particular way, or have a particular state of mind, is admissible evidence,<sup>437</sup> having regard to the ‘tendency rule’ in s 97 of the Evidence Act 1995 (Cth). In that context, his Honour said:

It should, however, be remembered (absent any question of the operation of s 298V), in the context of a case such as this one, that the reason or reasons for engaging in conduct lie *entirely* within the mind of the relevant decision-maker. The state of mind of that person can only be established or proven (absent documents decisive of the question emerging on disclosure) as a conclusion based on inferences drawn from evidence (facts) of conduct or expressions of attitude towards matters relevant to the ultimate facts. Such inferences might be drawn out of many examples of conduct or expressions of attitude and in that sense be collectively of significant probative value so as to make the Court reluctant to *affirmatively* conclude that the tendency evidence “would not have significant probative value” for the purposes of s 97 of the Evidence Act.<sup>438</sup>

In a 2008 decision, Federal Magistrate Wilson found that ‘[w]hether the conduct of the employer has been actuated by a prohibited reason or reasons that include a prohibited reason is a question of fact’.<sup>439</sup>

Some cases have involved situations where a decision was made on the basis of an *incorrect* belief, or where the link to a prescribed reason was unintentional (in the sense that it was unknown to the decision-maker). These cases provide some insight into whether the subjective reasons of the respondent, or the broader objective circumstances, are relevant. For example, in a 1987 Federal Court decision, Gray J considered an argument that the reason for dismissal was the employee’s failure to

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<sup>432</sup> (1980) 47 FLR 156, 161.

<sup>433</sup> *Linehan v Northwest Exports Pty Ltd* (1981) 57 FLR 49, 63.

<sup>434</sup> *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981).

<sup>435</sup> See also the discussion above regarding the requirement that the employee prove the employer knew about the prescribed ground.

<sup>436</sup> *Australian Workers’ Union v John Holland Pty Ltd* (2001) 103 IR 205, 216.

<sup>437</sup> *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 121, 213-7.

<sup>438</sup> (2006) 154 IR 111, 215-6 (emphasis in original).

<sup>439</sup> *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 115, referring to *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 83.

follow directions (although the evidence did not establish that there had been any such failure). His Honour held that if the decision 'was motivated solely by beliefs as to [the employee's] conduct, *even if those beliefs were unfounded*, the decision will not have been actuated by any of the circumstances proscribed by s 5 of the Act'.<sup>440</sup> This reasoning appears to place the focus squarely on the employer's subjective reasons for acting, rather than an objective view of the situation.

In *Australian Workers' Union v John Holland Pty Ltd*,<sup>441</sup> one of the reasons given for the dismissal was the decision-maker's belief that the employee had failed to comply with certain procedures in its enterprise bargaining agreement. The Court held that even if this failure would not have warranted the dismissal, it was a factor which the decision-maker took into account, 'rightly or wrongly'.<sup>442</sup> This reasoning seems to support a subjective approach.

## B THE BROADER APPROACH TO PROOF AND LIABILITY

In contrast to the Barclay Approach to the causal link discussed above, where the courts' main focus appears to be determining whether or not to accept the respondent's evidence, other cases have taken a Broader Approach to considering the causal link. In some cases, the courts take a broad view of the respondent's reasons. The courts do not necessarily accept the respondent's characterisation and subdivision of their reasons. Unlike the Barclay Approach cases discussed above, this is not simply because the respondent's evidence is found to be unreliable. Rather, the courts independently consider the extent to which the employer's stated reason is linked to the alleged prescribed ground.

This approach is similar to the analogy used by Isaacs J in his dissenting judgment in *Pearce v WD Peacock & Co Ltd*,<sup>443</sup> discussed above. His Honour considered that the employer's stated reason for acting (that the employee was dissatisfied with his wages and conditions) was 'bound up' with his union membership, and that if the employer could not say 'one is independent of the other', the employer could not rely on the excuse that the dismissal was because the employee was dissatisfied. Justice Isaacs said

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<sup>440</sup> *Gibbs v Palmerston Town Council* (Unreported, Federal Court, Gray J, 21 December 1987) 19 (emphasis added). Ultimately, however, in this case his Honour did not accept that the decision was based on such beliefs. See also *Pryde v Coles Myer Ltd* (1990) 33 IR 469 where the Court rejected a claim that the employee was dismissed because he was a union delegate. Rather, the Court found he was dismissed because the managers believed he had used bad language in the presence of a customer, even though the Court found this belief was incorrect and the employee had not used that language.

<sup>441</sup> (2001) 103 IR 205.

<sup>442</sup> (2001) 103 IR 205, 215.

<sup>443</sup> (1917) 23 CLR 199.

'[s]uch an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached'.<sup>444</sup> The cases discussed in this section take a similar approach.

### *The Halter and the Horse Analogy*

In the 1980s, the Australian Building Construction Employees' and Builders Labourers' Federation ('BLF') imposed significant bans at sites across the building industry. The Master Builders' Association of Victoria delivered an ultimatum to the BLF that BLF members would be dismissed unless the bans were lifted. The bans were not lifted and many employees were dismissed. In the 1986 case of *Lewis Construction Co Pty Ltd v Martin*,<sup>445</sup> a Full Bench of the Federal Court dealt with four appeals by four separate employers who had each been convicted of dismissing one or more employees by reason of the fact that they were members of the BLF.

In one of the cases, the employer argued that it did not dismiss the employees because they were union members – rather, it dismissed the employees because it believed that the dismissal of all BLF members 'was the only course open to it as a means of countering' the BLF campaign.<sup>446</sup> It argued that this was the 'real' reason for the dismissal, and the employee's union membership was merely a criterion for selection for dismissal, not the 'reason' for dismissal. The employer was not successful. The Full Bench found that 'an offence was committed if [the employee's] membership of the BLF was a "substantial and operative factor" in the decision to dismiss him'.<sup>447</sup> The Court held:

there is no inconsistency between the presence of a perceived need to dismiss BLF members in order to counteract a BLF campaign as a reason for dismissal, and the existence of other reasons for that dismissal. The search for the "real" reason for a dismissal is not one sanctioned by the authorities.<sup>448</sup>

The employer had failed to lead any evidence to support the proposition that union membership was not a substantial and operative factor in the decision to dismiss. The Court also considered the attempt to characterise union membership

as a factor in a reason, rather than a reason in itself, must also fail ... The attempt to decide whether a particular circumstance was a factor in a reason, or a reason itself, tends to distract from the essential question, which is whether that circumstance was a substantial and operative factor or reason in the dismissal.<sup>449</sup>

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<sup>444</sup> (1917) 23 CLR 199, 207.

<sup>445</sup> (1986) 70 ALR 135.

<sup>446</sup> (1986) 70 ALR 135, 137 (regarding *Lewis Construction Pty Ltd v Martin*).

<sup>447</sup> (1986) 70 ALR 135, 137 citing *General Motors-Holdens Pty Ltd v Bowling* (1976) 12 ALR 605.

<sup>448</sup> (1986) 70 ALR 135, 138.

<sup>449</sup> (1986) 70 ALR 135, 139.

The Court also noted that the very nature of the 'real' reason advanced by the employer was one which required, as an essential step in the decision to dismiss, a consideration of whether the employee was a union member.<sup>450</sup>

It is clear that the Court went beyond the Barclay Approach of simply considering whether or not to believe the decision-maker's evidence, to also looking at the substance of the reasons advanced, and to determining how to characterise those reasons.

In another of the four cases, the Court noted the decision-maker had given evidence that if the employee 'had not been in the BLF he would not have been terminated'.<sup>451</sup> The Court said '[s]uch express evidence made it very difficult, if not impossible, for [the employer] to discharge the onus of proving that it was not actuated by the circumstance that [the employee] was a member of the BLF.'<sup>452</sup> The Court also emphasised the importance of focusing on the phrases 'by reason of the circumstance', and 'substantial and operative factor', rather than the term 'actuated' in the reverse onus provision.<sup>453</sup>

Another interesting example is given by the High Court's decision in *General Motors Holden Pty Ltd v Bowling*.<sup>454</sup> At first instance, the Court rejected the employer's argument that the reason for the dismissal was the employee's work record and attitude. On appeal, the employer did not seek to overturn this finding, but instead sought to argue that the real reason for the dismissal was that the employee 'deliberately disrupted production and thus was setting a very bad example to others', and that this view was not connected to his status or activities as a shop steward.<sup>455</sup>

In Mason J's view, the primary reason for the dismissal was the employer's view that the employee was a troublemaker, but he considered it a big leap to find that this was 'a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstance that the respondent was a shop steward'.<sup>456</sup> This was particularly the case in light of the fact that the two directors who ultimately made the decision (on the manager's recommendation) were not called to give evidence.<sup>457</sup> Justice Mason also noted that the relevant activities were not undertaken in the employee's capacity as a shop steward, but his position as a shop steward meant that he had a 'status in the work force and a capacity to lead or influence other employees',<sup>458</sup> which effectively meant that he was more able to set a 'bad' example for other employees.

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<sup>450</sup> (1986) 70 ALR 135, 139.

<sup>451</sup> (1986) 70 ALR 135, 141.

<sup>452</sup> (1986) 70 ALR 135, 141-2.

<sup>453</sup> (1986) 70 ALR 135, 142.

<sup>454</sup> (1976) 12 ALR 605.

<sup>455</sup> (1976) 12 ALR 605, 617.

<sup>456</sup> (1976) 12 ALR 605, 617.

<sup>457</sup> (1976) 12 ALR 605, 617-9.

<sup>458</sup> (1976) 12 ALR 605, 618.

In a 2000 case,<sup>459</sup> Einfeld J found that a union officer had advised, encouraged or incited<sup>460</sup> an employer to remove an employee from a worksite on the basis that the employee refused to join the union. The site had been a 'closed shop'. The union officer gave evidence that his suggestion that the employer relocate the employee 'was aimed not at injuring him in his employment, but at preserving the preference agreement and preventing an on-site industrial dispute that appeared imminent.'<sup>461</sup> However, Einfeld J disagreed, saying:

It is, in my view, very artificial to suggest that [the union official's] reasons for acting were to settle a dispute and that these reasons were completely unconnected to the reason why that dispute was arising. It is simply not realistic to argue that the reason there is a pending dispute is because one employee does not wish to become a union member but that the inciter's reasons for acting are only to prevent the dispute and have nothing to do with the fact that the employee does not wish to join the Union.<sup>462</sup>

And further:

In my opinion, it is not permissible to disconnect [the union official's] claim that he was trying to avoid a dispute (employing a non-member in a "closed shop") from the cause of the dispute (a non-member on site) and the means he advocated of avoiding the dispute (removing the non-member).<sup>463</sup>

In a 2002 Federal Court decision under the WR Act, Wilcox J considered a situation where a bank manager (who was also the National President of the Finance Sector Union) took part in protected industrial action and spoke to the media about job security for women in the banking industry.<sup>464</sup> She was counselled and given a written warning that if she failed to act as directed, her employment might be terminated. The employee brought a number of claims, including that the counselling and warning altered her position to her prejudice, and had been taken because she had participated in industrial action and was a union officer, delegate or member.<sup>465</sup>

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<sup>459</sup> *Employment Advocate v National Union of Workers* (2000) 100 FCR 454.

<sup>460</sup> See s 298P(3).

<sup>461</sup> (2000) 100 FCR 454, 457.

<sup>462</sup> (2000) 100 FCR 454, 487.

<sup>463</sup> (2000) 100 FCR 454, 488.

<sup>464</sup> *Finance Sector Union v Australia and New Zealand Banking Group Ltd* (2002) 120 FCR 107.

<sup>465</sup> The employee claimed ANZ had breached provisions under two separate parts of the WR Act: Pt VIB and Pt XA. Part VIB dealt with certified agreements. Section 170MU(1) provided that an employer must not dismiss, injure or prejudicially alter the position of an employee, or threaten to do any of those things, 'wholly or partly because the employee ... has engaged in ... protected action'. Section 170MU(3) provided 'it is to be presumed, unless the employer proves otherwise, that the alleged conduct of the employer was carried out wholly or partly because the employee ... had engaged ... in protected action.' Part XA dealt with freedom of association, and has been discussed elsewhere in this paper. It contained ss 298K, 298L and 298V. The union argued that ANZ had injured the employee in her employment, or prejudicially altered her position, because she was a union officer, delegate or member; because, being a member of a union seeking better industrial conditions, she was dissatisfied with her conditions [this was not upheld because there was no evidence about her conditions]; and being an officer or member of the union, she did an act (spoke to the media) 'for the purpose of protecting the industrial interests of the industrial association, being an act that is ... lawful' and within the authority conferred on her by the rules [this was not upheld because the rules did not expressly provide for her to talk to the media]. Section 298V

In relation to the reverse onus provision,<sup>466</sup> Wilcox J agreed with counsel's summary of the following propositions:

- a. A reason is an impermissible reason if it is one of the operative reasons for the conduct;
- b. To be an operative reason there must be a causal connection between the conduct and the proscribed reason relied upon by the applicant;
- c. Whether the respondent was actuated by a prohibited reason is a question of fact which will often involve questions of fact and the characterisation of the employer's reasons.<sup>467</sup>

His Honour considered whether the employer had shown that the counselling and warning 'was not carried out, wholly or partly, because [the employee] ... had engaged ... in the stoppage of work'.<sup>468</sup> The manager who called the counselling meeting said the employee's participation in the industrial action 'played no part in his decisions to conduct a counselling meeting and to issue a warning letter'.<sup>469</sup> Further, the employer pointed out that 'no complaint was made' about the industrial action in the counselling meeting or warning letter. Justice Wilcox said:

The question is whether I should accept [the manager's] assertion. I need to ask myself whether it is probable that, if [the employee] had not participated in the stoppage, [the manager] would, nonetheless, have decided to require her to attend a counselling meeting and/or to give her a written warning of future disciplinary action.<sup>470</sup>

Justice Wilcox determined that he could not answer this question affirmatively, and the main reason was his Honour's assessment of the relevant manager. His Honour considered that the manager's 'knowledge of industrial matters [was] sparse and his attitude to them simplistic and naïve'.<sup>471</sup> The manager strongly believed that it was the employee's responsibility (as branch manager) to promote the bank's position to employees, and to keep the branch open when the industrial action was proposed. His Honour found that the manager 'must have thought it a betrayal for her, not only to fail to urge the staff to work, but to give a lead in the opposite direction by stopping work herself'.<sup>472</sup> One of the main grounds relied on in the counselling meeting and warning letter was that the employee had 'failed to take appropriate steps in ensuring the ... branch would open for business' on the day of the industrial action.<sup>473</sup> His Honour considered that this was a 'wooly' expression,<sup>474</sup> and it was not clear what the manager thought she should have done. His Honour found that really the manager meant she should have persuaded her staff not to join in the action, and she herself should not

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provides, relevantly, that 'it is presumed ... that the conduct was ... carried out for [the alleged] reason or with [the alleged] intent, unless the [employer] proves otherwise.'

<sup>466</sup> Section 298V, and s 170MU(3) which was substantively identical.

<sup>467</sup> (2002) 120 FCR 107, 122-3.

<sup>468</sup> (2002) 120 FCR 107, 134.

<sup>469</sup> (2002) 120 FCR 107, 134.

<sup>470</sup> (2002) 120 FCR 107, 134-5.

<sup>471</sup> (2002) 120 FCR 107, 135.

<sup>472</sup> (2002) 120 FCR 107, 135-6.

<sup>473</sup> (2002) 120 FCR 107, 137.

<sup>474</sup> (2002) 120 FCR 107, 137.

have joined in the action. Justice Wilcox quoted from *Cuevas v Freeman Motors Ltd* in which it was said:

where it is probable that an employer believes it would be in his interest to be without an employee because his position as a shop steward results in situations disturbing to him in the management of his business, the fact that the grounds of dismissal asserted by the employer in a particular case have puzzling or unreasonable aspects is of considerable importance.<sup>475</sup>

In relation to the alleged prescribed ground of being a union officer, delegate or member, Wilcox J considered that in giving a media interview and taking industrial action, the employee was wearing her union 'hat', and

the activities for which she was disciplined were associated with her position in the FSU. Therefore ... it is necessary to ask whether the particular activities that gave rise to the disciplinary action may have constituted misconduct of a sufficient degree of seriousness as to exclude the possibility that she was being counselled and warned because of her position in the FSU.<sup>476</sup>

His Honour went on to find that speaking to the media was not a 'serious transgression' of her employment duties,<sup>477</sup> and that the manager's views of the employee were 'shaped' by her union position and activities. Accordingly 'it would be naïve to accept his assurance that they had nothing to do with his decision' to counsel and warn her.<sup>478</sup>

The approach taken by Wilcox J is interesting, and appears to be a type of 'but for' approach to the issue of the causal link - but for the employee's participation in industrial action, would she have been counselled and warned? This indicates a broader inquiry than the Barclay Approach.

In a 2005 case,<sup>479</sup> a shop steward was involved in a dispute about the use of contractors on site, and whether the employer had complied with requirements in its enterprise agreement regarding the use of contractors. He called a stop work meeting. The employer called him out of the meeting, and ordered him to return to work. He returned to the meeting, explained what had happened, and adjourned the meeting until lunchtime. When he emerged from the meeting five to twelve minutes later, he was dismissed for failing to follow directions. The question was whether, on the balance of probabilities, the employer had proved that his status as a delegate played no part in the decision to dismiss.

The employer argued that the reason for the dismissal was the employee's failure to follow directions ('three or four' times that morning),<sup>480</sup> and that his union status was not a reason for the dismissal. However, Marshall J did not accept that evidence. Justice Marshall identified only two main issues that the employer pointed to – the employee's

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<sup>475</sup> (2002) 120 FCR 107, 137, quoting *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67 at 78.

<sup>476</sup> (2002) 120 FCR 107, 141.

<sup>477</sup> (2002) 120 FCR 107, 143.

<sup>478</sup> (2002) 120 FCR 107, 144.

<sup>479</sup> *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2005) 147 IR 315.

<sup>480</sup> (2005) 147 IR 315, 321.

'refusal' to arrange for electricians to assist the contractor (in fact, he spoke to the union about the clause in the agreement and then notified the employer that there was a dispute about the use of that contractor), and the employee's 'refusal' to return to work during the stop work meeting. Justice Marshall found that '[t]here was a clear connection between Mr Williams' shop steward status, his Union activity and his termination. No aspect of the conduct of Mr Williams which actuated [the employer] is divorced from his role as a delegate.'<sup>481</sup> Similar to the other cases discussed under this sub-heading, the Court took a broader approach to considering the causal link, beyond determining whether or not to accept the employer's evidence.

### *Factor/Cause versus Reason*

The cases discussed above are examples of courts rejecting a respondent's narrow characterisation of their reasons for acting. However, in some other cases that can be characterised as taking a Broader Approach, courts have found that a narrow characterisation of a respondent's reasons is appropriate. These cases tend to draw a distinction between a respondent's reason for acting (sometimes called the subjective reason for acting), and the circumstances or factors that led to that reason (the objective circumstances).<sup>482</sup>

In a 1961 decision,<sup>483</sup> the Commonwealth Industrial Court considered a situation where an employer dismissed almost all of his employees when the business became unprofitable. Before the dismissal, the employer sought to reach an agreement with the employees to reduce their existing rates, albeit to a level above the minimum award rates. The award provided that the employer could not reduce the rates without the agreement of the employees. The employees refused, and accordingly they remained entitled, by virtue of the award, to the existing higher rates. The employees argued they

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<sup>481</sup> (2005) 147 IR 315, 324.

<sup>482</sup> In addition to the cases discussed in this section, see, eg, *Howarth v Frigrite Kingfisher Pty Ltd* [1998] FCA 612 (29 May 1998) where the employee was dismissed for misconduct after an argument with a production manager over his late return after lunch. He was late because of a meeting in his capacity as a shop steward. The managing director saw him arriving back to work late and sent the production manager to investigate. 'Even if it was their shop steward status that excited [the managing director's] interest ... it is drawing a very long bow to suggest that this then prompted [the production manager] ... to provoke them and maximize the chance of creating a pretext for the dismissal...'; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 83-4 where the Court said '[I]f an employer made a decision to make his operation more efficient or to facilitate the provision of services to the service users at a lower cost (and for no other reason) that action is not open to the interference of having been taken for reasons which include that the employees are members of a union or have the benefit of an award... if members of the GPA were aware and welcomed a reduction in payments of penalty rates or the power and influence of the MUA as a probable, or even inevitable, consequence of its conduct, it does not follow that the GPA engaged in that conduct for reasons which included those reasons...'. Ultimately the Court found that three of the five board members had failed to negate the reverse onus.

<sup>483</sup> *Klanjscek v Silver* (1961) 4 FLR 182.

were dismissed because they were entitled to the benefit of the award. The Court acknowledged that the fact the employees were entitled to the existing rates under the award 'was an element in the dismissal of the employees'.<sup>484</sup> However, the Court found that the employer was 'not actuated by the reason that the employees [were] entitled to the benefit of the award, but by the reason that his operations [had] become unprofitable.'<sup>485</sup>

In the 1979 case *Wood v City of Melbourne Corporation* ('*Wood*'),<sup>486</sup> a union organised a strike. When the strike became protracted, an employee resigned his union membership and returned to work. This caused a further dispute with the union, and the union members refused to work with the employee or return to work until he was dismissed. This resulted in a serious public health issue when rubbish was not collected and piled up in the streets. The employer eventually gave into the union and dismissed the employee.

The employee claimed the employer had breached the legislation by dismissing him by reason of the circumstance that he refused to join in strike action. The employer denied this, arguing that it dismissed the employee not because he refused to strike, but because of the union pressure. Justice Smithers of the Federal Court said:

[A]lthough it is a crime to stand down an employee by reason of the circumstance that he has refused or failed to join in strike action, it is not a crime under the Act ... to dismiss an employee by reason of the conduct of other persons, although that conduct may have been induced by the employee's refusal or failure to go on strike.<sup>487</sup>

It was argued that logically the employer 'cannot escape a finding that it was actuated by [the employee's failure] to stay on strike, because, substantially, it was from that circumstance that all the other factors by reference to which [the decision-maker dismissed the employee] followed.'<sup>488</sup> However, Smithers J did not accept this argument, and said:

One must go to the words of the section, as expounded by the High Court, look into the mind of [the decision-maker] and ask what were the substantial and operative factors in his mind. This is to be determined not as a matter of logic, but of fact.<sup>489</sup>

Applying this approach, Smithers J found that the failure to strike was not an operative factor – instead it was the attitude and reactions of the union to the employee's failure to strike.

The outcome in *Wood* is in direct contrast to that in another 1981 Federal Court case, *Linehan v Northwest Exports Pty Ltd*.<sup>490</sup> In that case, an employee claimed he was

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<sup>484</sup> (1961) 4 FLR 182, 186.

<sup>485</sup> (1961) 4 FLR 182, 187.

<sup>486</sup> (1979) 26 ALR 430. An appeal against this decision was struck out as incompetent: *Wood v City of Melbourne Corporation* (1979) 26 ALR 449.

<sup>487</sup> (1979) 26 ALR 430, 436.

<sup>488</sup> (1979) 26 ALR 430, 438.

<sup>489</sup> (1979) 26 ALR 430, 438.

<sup>490</sup> (1981) 57 FLR 49.

dismissed<sup>491</sup> because of his refusal to join the union.<sup>492</sup> The decision-maker stated that he acted because the union had threatened to stop work if the employee did not become a union member. Justice Ellicott held that the employer had breached the CA Act, stating:

The test in determining whether the action was actuated by the reason that the employee not being a member of an organization [sic] is subjective in the sense that the court must consider what was in the mind of the defendant. ...In this case the factor in [the decision-maker's] mind which actuated him to terminate [the employee's] employment was [the employee's] refusal to join the union. His object may well have been to avoid an industrial stoppage, but I do not think the defendant, because this was its object and in a sense a reason for acting as it did, can thereby avoid the consequence that, in the circumstances in which it found itself facing industrial problems, [the employee's] non-membership of the union was at least a substantial reason why it acted as it did...<sup>493</sup>

Justice Ellicott distinguished *Wood*, saying that in *Wood* the Court 'held that the failure of the employee to stay on strike was not an operative factor in the mind of the council's representative',<sup>494</sup> whereas in this case his Honour was 'quite satisfied' that the employee's 'non-membership of the union was an operative factor' in the decision-maker's mind.<sup>495</sup>

In a 1982 case, a union member was dismissed because he had attended a union meeting. However, the meeting was open to all employees (not just union members), and the employer had warned all employees that if they attended the meeting their employment would be reviewed. The employee had been actively involved in a movement to have certain employees represented by the union (rather than another union which had traditionally represented the employees and with which the employer had an agreement). The Court concluded that the decision to dismiss the employee 'was connected with the [union] campaign to secure recognition. The defendant was really concerned to defeat that campaign if it could.'<sup>496</sup> The question was whether the employee's union membership 'was a circumstance in activating the company in effectuating that dismissal.'<sup>497</sup> The Court noted that the dismissals were determined by reference to whether the individual left their job to attend the meeting, not by whether the individual was a member of the relevant union. 'The circumstance that by leaving work and attending the meeting he participated in the campaign to force the company to recognise the [union] was the real and sole factor influencing it. That while so

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<sup>491</sup> Ultimately the Court found he was not dismissed, as he was employed on a daily basis, but that his position was altered to his prejudice: (1981) 57 FLR 49, 61-2.

<sup>492</sup> The employee brought his claim under s 144A of the CA Act, which allowed an employee with a conscientious objection to joining a union to obtain a certificate from the Registrar. If an employee obtained such a certificate (which the employee in this case did), the employer was prohibited from altering the employee's position to his prejudice by reason of the circumstance that the employee was not a union member: s 144A(5). The relevant reverse onus provision appeared in s 144A(8).

<sup>493</sup> (1981) 57 FLR 49, 63-4.

<sup>494</sup> (1981) 57 FLR 49, 64.

<sup>495</sup> (1981) 57 FLR 49, 64.

<sup>496</sup> (1982) 3 IR 386, 391.

<sup>497</sup> (1982) 3 IR 386, 391.

participating in this exercise he was a member, was but incidental.’<sup>498</sup> Justice Smithers determined that the employee’s union membership was *not* a reason actuating the dismissal.<sup>499</sup>

The 1995 case of *Kelly v Construction, Forestry, Mining and Energy Union (No 3)*<sup>500</sup> involved an allegation that a union officer had encouraged an employer to remove an employee from a particular site because the employee had refused to participate in industrial action. During a workplace dispute between the union and the employer, the union officer demanded that the employees not return to work until certain payments had been made.<sup>501</sup> One of the employees indicated that he wanted to keep working, and there was a ‘tense and heated’ argument between the employee and the union officer.<sup>502</sup> The union officer believed the employee tried to attack him with a putty knife. Later, the union officer told the employer that he wanted the employee removed from the site. The employee was told to go home and the next day was moved to a different site (where his income fell).

The union failed to call the union officer involved, and the prosecutor argued that the Court should draw an adverse inference from that fact.<sup>503</sup> The Court said ‘[i]t may be accepted that in the absence of an explanation as to why [the union officer] was not called, such an inference might be drawn’.<sup>504</sup> However, here, the union stated that its reason for not calling the union officer was that he repeatedly failed to provide a written statement when requested.

The Court found that the reason the union officer wanted the employee removed from the site was that he believed that during the dispute the employee was going to ‘remove from his pocket a putty knife for aggressive purposes.’<sup>505</sup> (The Court ultimately accepted that the employee did not have a putty knife, but that was not material – it was the union officer’s belief that mattered.) The Court found:

the reason motivating the action of [the union officer] was to punish someone who had confronted him with an act of physical aggression together with a defiant attitude which questioned his authority. The defiance concerned the assertion of a right that, in other circumstances, the provisions in ss 334 and 335 are intended to protect, namely the right to refuse to engage in industrial action. However the conduct of [the union officer] was not intended to deny the right to the employee or punish the employee for asserting it.<sup>506</sup>

In other words, the Court found the union officer took action against the employee because the employee stood up to him, not because the employee refused to engage in

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<sup>498</sup> (1982) 3 IR 386, 392.

<sup>499</sup> (1982) 3 IR 386, 392.

<sup>500</sup> (1995) 63 IR 119.

<sup>501</sup> (1995) 63 IR 119, 121.

<sup>502</sup> (1995) 63 IR 119, 123.

<sup>503</sup> (1995) 63 IR 119, 127.

<sup>504</sup> (1995) 63 IR 119, 127.

<sup>505</sup> (1995) 63 IR 119, 128.

<sup>506</sup> (1995) 63 IR 119, 130.

industrial action (even though the argument was about the employee's refusal to engage in industrial action).

Accordingly, the Court found that the union had established, on the balance of probabilities (and based on the prosecutor's evidence) that the union officer's conduct 'was not motivated in part by the reason that [the employee] had refused to engage in industrial action'.<sup>507</sup>

In 2001, in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union ('Greater Dandenong')*,<sup>508</sup> a council made a group of its employees redundant and awarded their work to an external company, on the basis that the external company could do the work at a lower cost because it was bound by a different award with lower wage rates. The union claimed that the council had breached s 298K(1) by dismissing or prejudicially altering the position of the employees because they were entitled to the benefit of an industrial instrument.<sup>509</sup>

Justice Merkel stated:

... s 298K is not concerned with the cause of the prejudicial conduct. Rather, it is concerned with the employer's reason or reasons for engaging in that conduct. Thus, there can be a significant difference between the employer's subjective reason for engaging in prejudicial conduct and the objective circumstances that led to the employer engaging in the conduct. Where the employer's reason is inability to pay the award entitlement, the conduct will not breach s 298K(1) because the circumstance that led to the employer engaging in that conduct was the employees' increased award entitlements.<sup>510</sup>

His Honour found:

an operative reason for the council's resolution to accept Silver Circle's tender was its lower price and that a circumstance that led to it accepting the lower price was the higher Award and Agreement entitlements of the HACC employees ... The inference drawn by the primary judge to the contrary was based on an approach that, erroneously, failed to distinguish between the operative reason for the council acting and the circumstances that led to the price of the in-house bid being higher ... The fact that the councillors were aware of, or considered, those circumstances does not make them a reason for their decision.<sup>511</sup>

Justice Finkelstein (in dissent) reached a similar view that 'it is necessary to draw a distinction between the "reason" or motive behind the dismissal and what produced that motive.'<sup>512</sup>

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<sup>507</sup> (1995) 63 IR 119, 131.

<sup>508</sup> (2001) 112 FCR 232.

<sup>509</sup> It was clear that the council's actions were not taken merely because the employees were *covered* by an industrial instrument – they were taken because of the *content* of the industrial instrument (namely, the higher wage rates). Accordingly, a major issue was whether s 298L(1)(h) of the WR Act should be interpreted as referring to the 'mere fact of entitlement' to an industrial instrument (regardless of its content), or whether it is enough that 'the conduct was a response to the *content* of a particular instrument' ((2001) 112 FCR 232 at 244). Both Wilcox and Merkel JJJ agreed that the second interpretation was correct ((2001) 112 FCR 232 at 251 and 262).

<sup>510</sup> (2001) 112 FCR 232, 276.

<sup>511</sup> (2001) 112 FCR 232, 277.

<sup>512</sup> (2001) 112 FCR 232, 287.

Ultimately, however, Merkel J upheld the original decision that the council had breached the provisions because the council had failed to adduce evidence to negative the view that a reason for the majority councillors' decision was that the in-house employees had acted unreasonably in refusing to agree to a reduction in their entitlements. If this was a reason, the employees' position was altered to their prejudice for reasons including that they had insisted on retaining the benefit of their full award and agreement entitlements.<sup>513</sup>

In another 2001 case,<sup>514</sup> the AWU claimed that the employer dismissed an employee because he was an AWU member and he planned to become an AWU delegate. When the employee commenced work, CFMEU members on site (and, later, at three other sites) complained about his employment and stopped work. A few days later, the employee was dismissed. The decision-maker gave two reasons for the dismissal.<sup>515</sup> First, his belief that the employer had failed to comply with certain procedures in its enterprise bargaining agreements (the Court held that even if that would not have warranted the dismissal, it was a factor which the decision-maker took into account, 'rightly or wrongly'<sup>516</sup>). Second, the desire to get the workers at the four sites back to work. He denied that the employee's AWU membership and proposal to become a delegate had any bearing on his decision. Justice Goldberg found that he was a truthful witness and accepted his evidence.<sup>517</sup> The fact that the union membership started the chain of events which led to the dismissal did not mean that it was a reason for the dismissal.<sup>518</sup>

His Honour said:

Properly characterised, the respondent's reasons for terminating Mr McGee's employment did not include the fact that he was a member of the AWU, or was proposed as a delegate of the AWU on site, notwithstanding the fact that Mr McGee's AWU membership, and the CFMEU's antipathy to it, was the circumstance which started the train of events which ultimately resulted in the termination of Mr McGee's employment.<sup>519</sup>

His Honour agreed with a proposition put by counsel that 'the question really here is "what's in [the decision-maker's] mind?"'.<sup>520</sup>

In the 2002 Federal Court case *Maritime Union of Australia v CSL Australia Pty Ltd* ('*CSL Australia*'),<sup>521</sup> an employer decided to sell the vessel 'CSL Yarra' to a related company, and dismiss the current crew. When sold, the vessel was to operate with a Ukrainian crew. The union argued that the employer had threatened to dismiss the crew for

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<sup>513</sup> (2001) 112 FCR 232, 278.

<sup>514</sup> *Australian Workers' Union v John Holland Pty Ltd* (2001) 103 IR 205.

<sup>515</sup> (2001) 103 IR 205, 213.

<sup>516</sup> (2001) 103 IR 205, 215.

<sup>517</sup> (2001) 103 IR 205, 213.

<sup>518</sup> (2001) 103 IR 205, 216.

<sup>519</sup> (2001) 103 IR 205, 215.

<sup>520</sup> (2001) 103 IR 205, 216.

<sup>521</sup> (2002) 113 IR 326.

reasons including that the crew were entitled to the benefit of an award and agreement. The main issue in the case was the reason or reasons for the employer's conduct.<sup>522</sup>

Justice Branson held that the senior manager's decision (which was based on the advice of, and implemented by, a more junior manager) was the relevant conduct, and accordingly it was the senior manager's reasons that were relevant for the purposes of s 298K(1).<sup>523</sup> Her Honour was satisfied that the difference in cost between an Australian crew and another crew 'was a factor, and probably a significant factor' in the senior manager's thinking.<sup>524</sup> However, Branson J found that:

what motivated Mr Jones to make his decision was the longer term, strategic advantages which would flow from the CSL Yarra being able to be integrated into the CSL International fleet as an internationally flagged vessel crewed on a consistent basis with the other vessels in the fleet so that it could be utilised in a cost effective way both in and outside Australia.<sup>525</sup>

Her Honour quoted at some length from the judgments in *Greater Dandenong*, and concluded:

It is difficult, if not impossible, to identify the ratio decidendi of *Greater Dandenong*. However, two members of the Full Court (Merkel and Finkelstein JJ) concluded that the learned primary judge had erroneously failed to distinguish between the operative (or immediate) reason for the Council's conduct and the cause (or proximate) reason for the Council's conduct.<sup>526</sup>

While acknowledging that this is a difficult distinction to draw in some cases, her Honour considered she should be guided by that approach, and said:

...I am satisfied that the Company has proved on the balance of probabilities that the operative or immediate reason (or perhaps reasons) for the conduct of the Company ... was Mr Jones' desire that each of the CSL Pacific and CSL Yarra should have the flexibility to trade as part of the CSL International fleet not only on the Australian coast but elsewhere in a cost effective way. I do not doubt, indeed Mr Jones did not deny, that in the process of reaching his decision that the CSL Yarra should be sold and reflagged, he gave consideration to the cost differential between an Australian crew and a foreign crew. As mentioned above, that cost differential flows from the content of the industrial instruments. However, it is necessary for me ... to characterise the Company's reasons, which in this case are in reality Mr Jones' reasons. ... In my judgment, part of the reason (or perhaps one of the reasons) for Mr Jones' decision was the desirability, as he saw it, of the CSL Yarra being able to be used in a cost effective way. I am satisfied that he considered that the freedom to crew the CSL Yarra with a crew which did not enjoy the protection of the industrial instruments would contribute significantly to the cost effective utilisation of the vessel. However, it seems to me that *the fact that the crew of the CSL Yarra were entitled to the protection of the industrial instruments, while in part a cause of the decision taken by Mr Jones, was not an operative reason for his decision* ... The relevant operative reason, I find, was the need to be able to utilise the vessel in a cost effective way.<sup>527</sup>

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<sup>522</sup> (2002) 113 IR 326, 330.

<sup>523</sup> (2002) 113 IR 326, 332.

<sup>524</sup> (2002) 113 IR 326, 336.

<sup>525</sup> (2002) 113 IR 326, 336. Her Honour noted 'it is now clear' (on the basis of *Greater Dandenong*) that the provisions apply both to conduct motivated by the mere fact that an industrial instrument applies, and to conduct motivated by the content of the industrial instrument (at 336).

<sup>526</sup> (2002) 113 IR 326, 342.

<sup>527</sup> (2002) 113 IR 326, 342 (emphasis added).

After considering s 298V, her Honour concluded that the fact the crew were 'entitled to the protection of industrial instruments was neither the reason, not included in the reasons',<sup>528</sup> for the conduct.

In a 2007 case regarding an employer's ban on leave on the day of a national protest against WorkChoices, Collier J found that the employer's motivation for the ban was a 'relevant consideration', quoting Merkel J's distinction in *Greater Dandenong* between the *cause* of the conduct and the employer's *reasons* for the conduct.<sup>529</sup> His Honour found courts have interpreted the provisions 'as requiring the dominant or immediate purpose of the conduct to be considered and not the ultimate purpose in determining the motivation for the prohibited conduct',<sup>530</sup> and that this approach has been used with respect to other statutes.

In another case regarding the national day of protest, Branson J considered an advice issued by the Department of Employment and Workplace Relations ('DEWR') to other Commonwealth departments and agencies. Her Honour found that the relevant official in DEWR 'either intended, or was willing to allow, the DEWR Advice to convey the message to Agencies that leave ... should not be granted to a Commonwealth employee if leave was sought for the purpose of attending the Day of Protest.'<sup>531</sup> Further, her Honour found that the advice was issued because a significant number of employees were union members and many might wish to attend the protest.<sup>532</sup>

With regard to the individual agencies' decisions on their policy towards leave applications on that day, however, her Honour found that the reason for the decisions was DEWR's advice, not the fact the employees were union members:

However, despite the link ... between attendance at the Day of Protest and membership of an industrial association, I am satisfied that the relevant determinations made by [the individual agencies] were not made because employees affected by the determinations were members of an industrial association. Rather the evidence shows that the immediate or operative reason for the determinations was the circulation of the DEWR Advice ... The officers concerned felt obliged to ensure that their respective agencies complied with the DEWR Advice.<sup>533</sup>

Similarly, with respect to managers' individual decisions to refuse leave, her Honour found the 'immediate or operative reason that the decisions were made was because of the Agency determinations ... which were themselves made because of the DEWR Advice.'<sup>534</sup>

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<sup>528</sup> (2002) 113 IR 326, 343.

<sup>529</sup> *Community and Public Sector Union v Commonwealth* [2007] FCA 1861 (4 December 2007) [54].

<sup>530</sup> [2007] FCA 1861 (4 December 2007) [55].

<sup>531</sup> *Community and Public Sector Union v Commonwealth* (2007) 163 FCR 481, 496.

<sup>532</sup> Her Honour said: 'For the reasons given by Greenwood J in *Mcllwain v Ramsey Food Packaging Pty Ltd* it is immaterial that the DEWR Advice might additionally have impacted on the positions of Commonwealth employees who were not members of an industrial association. Although the DEWR Advice did not in terms refer to membership of an industrial association, it was issued because of the CPSU membership of a significant number of Commonwealth employees' ((2007) 163 FCR 481 at 506).

<sup>533</sup> (2007) 163 FCR 481, 506.

<sup>534</sup> (2007) 163 FCR 481, 507.

In a 2009 case, Federal Magistrate Smith relied heavily on this decision of Branson J. In that case, an employee was a union member and officer, and spent considerable time performing union functions (about 1.5 days per week). This was supported by her employer.<sup>535</sup> The employer was required to reduce the number of positions due to budgetary cuts, and as a result of the restructure a new position was created. The employee was not selected for the new position and was 'denied a detailed merits competition'<sup>536</sup> with the successful applicant, because it was a full time position and the employer believed she would not have time, in light of her union duties, to fulfil the role. The employee complained that this decision altered her position to her prejudice because she was a union officer and was carrying out union activities. (She was offered, and accepted, another position which allowed her sufficient time to complete her union functions.)<sup>537</sup>

Federal Magistrate Smith held:

... an employer can clear itself from a finding that a prohibited reason was part of the reasons for its prejudicial action, if it establishes that the action was connected to the union official's activities only in a remote causal sense, and that the associated union activities themselves played no part in the employer's reasons for its action.<sup>538</sup>

Federal Magistrate Smith found support for this construction in the judgment of Branson J in *CPSU v Commonwealth*.<sup>539</sup> His Honour went on:

Branson J's test of an 'immediate or operative reason' for an employer's action excludes causal circumstances which would not themselves be characterised as the actuating reason of the employer nor part of its reasons.

...

Branson J's citation in *CPSU* at [116] makes the point that an employer will have discharged the reverse onus of proof if it establishes that its prejudicial actions were connected to the union membership of the affected employee only as part of the causal background to the actions, and that the union attributes of the employee were not an immediate or operative or proximate reason of the employer for taking the action.

In the present case, I consider that the Commonwealth has established this in relation to the challenged actions of Ms Backhous' managers.

...

I accept their evidence that Ms Backhous' union membership and offices, and any activities she had or would perform in those capacities, played no part in their consideration. Those attributes were connected to their reasons for excluding her from the new position only in the sense that they provided the causal background which explained her unavailability for the new position. They did not provide the reason, or part of the reasons, for their actions which distressed Ms Backhous.<sup>540</sup>

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<sup>535</sup> *Community and Public Sector Union v Commonwealth of Australia* (2009) 184 IR 317, 321.

<sup>536</sup> (2009) 184 IR 317, 322.

<sup>537</sup> (2009) 184 IR 317, 326.

<sup>538</sup> (2009) 184 IR 317, 330.

<sup>539</sup> *Community and Public Sector Union v Commonwealth* (2007) 163 FCR 481.

<sup>540</sup> (2009) 184 IR 317, 331-2.

In contrast, in the 2003 case *Australasian Meat Industry Employees' Union v Belandra Pty Ltd*,<sup>541</sup> North J discussed the distinction between the 'cause of the situation' and the 'reason' for taking the conduct that was drawn by Merkel J and Finkelstein J in *Greater Dandenong*, and followed by Branson J in *CSL Australia*, and said:

the existence of the necessary causal connection will involve questions of judgment and characterisation. By referring to a distinction between a reason for an action and a cause of the situation which an employer seeks to address, Merkel and Finkelstein JJ in *Greater Dandenong* did not establish any principle to be applied to the construction of the section. They merely engaged in a process of characterization of the particular facts before them. In the end, the question remains whether the conduct was carried out 'because' of the specified conduct. ... No verbal formula, whether by reference to a distinction between reason and cause, or between an immediate cause and a proximate cause, can take the place of the statutory requirement that the conduct be carried out "because" of the specified reason.<sup>542</sup>

### *Objective View*

The Broader Approach to proof and liability may, in some respects, support an objective view of the causal link, because the court is willing to look beyond the employer's subjective reasons and consider whether those reasons are objectively connected to a prescribed ground. A number of cases take an objective approach, and these are discussed below.

In the 1982 case *Sandilands v Australian Newsprint Mills Ltd*,<sup>543</sup> Smithers J considered the evidence of the decision-makers that union membership was not a factor, and said:

These statements were of course self serving and could easily be made. They concern the difficult problem of identifying which, of various factors in one's mind that might have actuated the conduct in question, actually did so. Accordingly they require careful consideration before being accepted as representing the real state of affairs. But I do so accept them.<sup>544</sup>

Despite this initial focus on subjective reasons, other aspects of Smithers J's decision seem to emphasise objective factors. For example, his Honour said 'the reality of the situation was that ... it was not membership of the [union] that was critical, but the fact that the union campaign had reached the stage of direct challenge to the company...'.<sup>545</sup>

*Elliott v Kodak Australasia Pty Ltd*<sup>546</sup> involved a challenge to the retrenchment of a union delegate. At first instance, Marshall J said that the reverse onus in this case has two limbs: first, 'that the redundancy selection criteria was not inherently biased' against the employee in his role as a union delegate, or against union delegates in general; and second, that the particular employee 'was not selected for redundancy

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<sup>541</sup> (2003) 126 IR 165.

<sup>542</sup> (2003) 126 IR 165, 194.

<sup>543</sup> (1982) 3 IR 386.

<sup>544</sup> (1982) 3 IR 386, 392.

<sup>545</sup> (1982) 3 IR 386, 392.

<sup>546</sup> (2001) 108 IR 23.

because he was a union delegate, and then allocated low points under the selection criteria'.<sup>547</sup> The first limb identified above is particularly interesting, because it appears to accept at least the possibility that the redundancy selection criteria might have been *unintentionally* biased against union delegates, and that this would have constituted a breach. This would have suggested that an objective, rather than subjective, view of the situation is most appropriate. However, ultimately Marshall J found that the selection criteria were not inherently biased against union delegates,<sup>548</sup> and the possibility of an unintentional breach was not explored further. There was an appeal from Marshall J's decision,<sup>549</sup> but this aspect of his Honour's decision was not challenged.

On appeal, the Full Federal Court considered Marshall J's treatment of the evidence of the senior decision-maker (Walshe) who gave final approval of the redundancy decisions, and whose evidence was not subject to cross-examination. Justice Marshall had found 'the fact that Mr Walshe was not cross-examined on that evidence to be a critical factor in support of Kodak's discharge of its onus under s 298V'.<sup>550</sup> However, the Full Court found that even if one of the more junior decision-makers (Lay) had been influenced by a prohibited reason, that would have affected process, as Walshe had taken Lay's initial rankings and worked from there.

It follows that if the Lay/Shannon assessment is affected (or infected) by either Lay or Shannon having held an undisclosed prohibited reason, then he would have, in effect, inadvertently adopted it so that its force continued regardless of the lack of any express prohibited reason in the mind of Walshe.<sup>551</sup>

Again, this reasoning appears to support an objective approach. Even though Walshe, the decision-maker, did not have a prescribed reason in his mind when making the final decision (and so subjectively the final decision was not made because of a prescribed reason), there may still have been a breach if the initial rankings prepared by Lay had been tainted by a prescribed reason.

In a 2010 decision of the Federal Magistrates Court,<sup>552</sup> an employee faced disciplinary action. He wanted his union representative to be present, but the employer would only allow the union representative to act as an observer. The employee refused to agree that the role of the union representative be limited to observation. He was dismissed for refusing to 'obey a reasonable direction' to attend a meeting without his union representative.<sup>553</sup> The employee argued that his dismissal was for reasons including a prohibited reason, namely that he was a union member, and that he made a complaint

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<sup>547</sup> (2001) 108 IR 23, 30-1.

<sup>548</sup> (2001) 108 IR 23, 32.

<sup>549</sup> *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251, 255.

<sup>550</sup> *Elliott v Kodak Australasia Pty Ltd* (2001) 108 IR 23, 36.

<sup>551</sup> (2001) 129 IR 251, 260.

<sup>552</sup> *Vong v Sika Australia Pty Ltd* (2010) 203 IR 214.

<sup>553</sup> (2010) 203 IR 214, 223.

to a body (the union) having the capacity under industrial law to seek compliance with that law.<sup>554</sup>

Federal Magistrate Lloyd-Jones said that as the employer had 'not addressed its case under the framework of s 809, where the [employer] is required to bear a reverse onus to prove that [the employee] was not terminated for the prohibited reasons alleged, [the employee's] application, supported by the evidence, must be viewed favourably.'<sup>555</sup> Further:

To participate in the disciplinary hearing, [the employee] was forced to relinquish his right to representation by the NUW of which he was a member. *On an objective review* of the decision to dismiss [the employee], I find it to be a direct result of his insistence on having his union representative present at the disciplinary meeting.<sup>556</sup>

Accordingly, this decision expressly took an objective approach to the issue.

In *Harrison v P & T Tube Mills Pty Ltd*,<sup>557</sup> a dismissal for misconduct (where the employee defied a direct ban on stickers in the workplace by wearing a pro-union sticker) was found not to breach the provisions. The trial judge accepted the decision-maker's evidence that the dismissal was for wilful disobedience (disobeying a lawful and reasonable direction to remove the union sticker), and that the employee's union membership was not a factor. The appellants argued that the direction to remove the sticker was not reasonable or lawful. The Full Federal Court disagreed, finding that it was lawful and reasonable, although noted that even if it had been unreasonable or unlawful it would not necessarily follow that the dismissal was for a prescribed reason.<sup>558</sup> It is interesting to note that, although it was not held to be determinative, the reasonableness and lawfulness of the direction was considered. This goes beyond a simple focus on what the decision-maker believed, and therefore supports an objective view.

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<sup>554</sup> The relevant enterprise agreement included a dispute resolution procedure which envisaged a role for the union. Federal Magistrate Lloyd-Jones noted that the employee and his union representative 'believed that they were seeking to enforce a right which is contained in an authorised Enterprise Agreement to attend a disciplinary hearing' (at 237). There was an argument that the dispute resolution procedure was no longer effective because of the transitional provisions in the WR Act relating to preserved state agreements. However, Lloyd-Jones FM noted that the employer and the union had behaved as though the enterprise agreement was still operational. His Honour said '[r]egardless of what industrial regime [the HR manager] believes she is operating under, whether it be the Enterprise Agreement or the provisions of the [WR Act], she is in breach of both and ultimately the outcome will be the same in both cases' (at 237).

<sup>555</sup> (2010) 203 IR 214, 238.

<sup>556</sup> (2010) 203 IR 214, 239 (emphasis added).

<sup>557</sup> (2009) 188 IR 270.

<sup>558</sup> (2009) 188 IR 270, 275.

## V CONCLUSION

This paper maps the history and development of the union victimisation protections, considering both the legislative and case developments from the very early provisions in 1904, up until the position immediately before the FW Act commenced. It has examined the gradual expansion of the prohibited actions and prescribed grounds, the shifting purposes of the legislative provisions, and the changing approach to multiple reasons for acting.

The majority of this paper has focused on the causal link and reverse onus provisions. It has considered how the causal link and reverse onus sits in the context of a litigated matter as a whole, and explored the matters that the applicant must prove before the reverse onus comes into effect as well as the level of proof required. The remainder of the paper reviewed a number of cases, grouping them into two broad categories: cases taking a *Barclay Approach* (a reference to the High Court's decision in *Barclay* where the fact that the decision-maker's evidence was accepted was a complete answer to the claim); and cases taking a *Broader Approach* (those that look beyond the decision-maker's evidence to consider the broader factual matrix). These categories are used in this paper for convenience only, and are not clearly defined - some cases display elements of both approaches. Overall, it is difficult to discern any clear themes that explain why some courts took a *Barclay Approach* and others a *Broader Approach*, but it is interesting to note that examples of both categories can be found right throughout the history of the union victimisation provisions.

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