

340 Protection

(1) [When a person must not take adverse action]

A person must not take adverse action against another person:

- (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right or
- (b) to prevent the exercise of a workplace right by the other person.

340 Protection

(2) [Adverse action because of third party]

A person must not take adverse action against another person (the *second person*) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

341 Meaning of *workplace right*

Meaning of *workplace right*

(1) A person has a *workplace right* if the person:

- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
- (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
- (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
 - (ii) if the person is an employee – in relation to his or her employment

341 Meaning of *workplace right*

Meaning of *process or proceedings under a workplace law or workplace instrument*

(2) Each of the following is a *process or proceedings under a workplace law or workplace instrument*:

- (a) a conference conducted or hearing held by FWA;
- (b) court proceedings under a workplace law or workplace instrument;
- (c) protected industrial action;
- (d) a protected action ballot
- (e) making, varying or terminating an enterprise agreement;
- (f) appointing, or terminating the appointment of, a bargaining representative;
- (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement
- (h) agreeing to cash out paid annual leave or paid personal/carer's leave;
- (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
- (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
- (k) any other process or proceedings under a workplace law or workplace instrument.

341 Meaning of *workplace right*

Prospective employees taken to have workplace rights

(3)A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Exceptions relating to prospective employees

(4)Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.

(5)[**Exception for employee who benefits from transfer of business**]

Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 (which deals with transfer of business).

342 Meaning of *adverse action*

(1) [When a person takes adverse action]

The following table sets out circumstances in which a person takes *adverse action* against another person

Adverse action is taken by

1. an employer against an employee

If ...

the employer:

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

342 Meaning of *adverse action*

***Adverse action* is taken by**

2. a prospective employer
against a prospective
employee

If ...

the prospective employer:

- (a)refuses to employ the
prospective employee; or
- (b)discriminates against the
prospective employee in the
terms or conditions on which
the prospective employer
offers to employ the
prospective employee.

12 The Dictionary

In this Act:

workplace instrument means an instrument that:

- (a) is made under, or recognised by, a workplace law; and
- (b) concerns the relationships between employers and employees

workplace law means:

- (a) this Act; or
- (b) the *Fair Work (Registered Organisations) Act 2009*; or
- (c) the *Independent Contractors Act 2006*; or
- (d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

342 Meaning of adverse action

(2) [Meaning of adverse action]

Adverse action includes:

- (a) threatening to take action covered by the table in subsection (1); and
- (b) organising such action.

(3) [Exception for authorised actions]

- (a) this Act or any other law of the Commonwealth; or
- (b) a law of a State or Territory prescribed by the regulations.

(4) [Exception for certain employees]

Without limiting subsection (3), **adverse action** does not include an employer standing down an employee who is:

- (a) engaged in protected industrial action; and
- (b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

343 Coercion

(1) [When a person must not coerce another person]

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

- (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
- (b) exercise, or propose to exercise, a workplace right in a particular way.

(2) [Exception for protected industrial action]

Subsection (1) does not apply to protected industrial action.

344 Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

- (a) make, or not make, an agreement or arrangement under the National Employment Standards; or
- (b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or
- (c) agree to, or terminate, an individual flexibility arrangement; or
- (d) accept a guarantee of annual earnings; or
- (e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

345 Misrepresentations

(1) [When person must not make a false or misleading representation]

A person must not knowingly or recklessly make a false or misleading representation about:

- (a) the workplace rights of another person; or
- (b) the exercise, or the effect of the exercise, of a workplace right by another person

(2) [Exception where person is not expected to rely on it]

Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

346 Protection

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

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

361 Reason for action to be presumed unless proved otherwise

(1) [When reason for action to be presumed]

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.

361 Reason for action to be presumed unless proved otherwise

(2) [Exception for interim injunction orders]

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