

(b) engages, or has at any time engaged or proposed to engage, in lawful/ protected 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).”

## ‘Industrial Activity’ means (s 347)

A person engages in industrial activity if the person:

(a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

(vii) seek to be represented by an industrial association; or

(c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or

(d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or

(e) complies with an unlawful request made by, or requirement of, an industrial association; or

(f) takes part in industrial action; or (g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or

(ii) to which an employee is not entitled because of that Division.

## CFMEU v BHP Coal Pty Ltd (2014) 253 CLR 243

- Was Doevendans subject to adverse action because of his industrial activities?

- The GM said the adverse action was because D had engaged in a course of conduct of this nature, his conduct was intentional, deliberate and repeated, breached the employer's workplace policy and values, demonstrated arrogance when employer approached him about this
- Majority of the High Court accepted this reasoning as "true in fact"
  - Irrelevant that the adverse action "had a connection, in fact, to the industrial activity" (French CJ, Kiefel J, [22])

## Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 290 ALR 647

- Greg Barclay was subject to disciplinary action following an email he sent to other employees which contained allegations (based on information staff had given him that the Bendigo Regional Institute of Technical and Further Education) was falsifying documentation as part of its re-accreditation.
- Mr Barclay said he was subject to adverse action because he sent this email in his capacity as a member of the Australian Education Union.
- The employer agreed it was AA but said it did so because of the way he dealt with the allegations by failing to raise them directly with management.
- The high court agreed with employer...
- Hard to separate adverse action with industrial action..

### Coercion (s 348)

"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 engage in industrial activity."

### Misrepresentation (s 349)

"(1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:

- (a) another person's obligation to engage in industrial activity;
- (b) another person's obligation to disclose whether he or she, or a third person:
  - (i) is or is not, or was or was not, an officer or member of an industrial association; or
  - (ii) is or is not engaging, or has or has not engaged, in industrial activity.

- Protects person's freedom of association across employment relationship

## Protection from Adverse Action for Exercising a Workplace Right (s 340)

“(1) 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.”

## What is a ‘Workplace Right’ (s 341)

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

(a) is entitled to the benefit of, or has a role or responsibility under (OHS manager, etc.), a workplace law (FWA etc.), workplace instrument (award, etc.) or order made by an industrial body (like FWO); 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.

## Wilkie v National Storage Operations Pty Ltd [2013] FCCA 1056

- Issuing the employee with a warning letter, demoting her from Centre Manager to Assistant Centre Manager, changing her work location found to be adverse action
- Because of  
Ms Wilkie’s rights under ss 96 and 97 of the FW Act to take personal/carer’s leave and s 102 to take unpaid leave due to an emergency affecting a family member (namely unexpectedly needing to collect a primary school child from school)
- Held to be workplace rights
- Was adverse action because she exercised her workplace rights? Found to be unlawful

## Coercion (s 343)

“(1) 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.”

## Undue Influence or Pressure (s 344)

“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.”

## Misrepresentations (s 345)

“(1) 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.”

## Discrimination (s 351)

“(1) An employer must not take **adverse action** against a person who is an employee, or prospective employee, of the employer because of the person'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.”

- Attributes = race, colour etc.
- Attributes not defined in FWA, matter of courts to decide e.g. especially with mentally disability

## Wilkie v National Storage Operations Pty Ltd [2013] FCCA 1056

- Issuing the employee with a warning letter, demoting her from Centre Manager to Assistant Centre Manager, changing her work location found to be adverse action
- Because of
  - Family responsibilities (s 351)
  - “As the employee left the workplace because of an unexpected emergency related to her responsibilities as a parent and the employer was aware of why the Applicant had left the workplace, a reason for the warning must be that she closed the Centre in order to pick up her son from school. Her family responsibilities were, therefore, a reason for the action.”

## Fair Work Ombudsman v Tiger Telco Pty Ltd (in liq) [2012] FCA 47

- Yes, Injuring or altering employee’s position (AA) moving her to store further away from home
- Because of:
  - Family or carer’s responsibilities
- Also contravened the NES by failing to return employee to her pre parental leave position (s 84)
- Civil penalty awarded (\$5,940) paid to the employee

## Exceptions to s 351

Section 351 “does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed-- taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.”