
The question of expansion of accessory liability
in general protection claims made under the Fair Work Act

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1. In overview, the general protections regime in Part 3-1 of the *Fair Work Act* 2009 (Cth) ('**FW Act**') is one of the more interesting aspects of that legislation (as to Part 3-1 of the legislation '**GP regime**'). This is not merely because now, after roughly nine years of its operation, we are still exploring some of the aspects of the GP regime. To this extent, the types of claims which may be brought (or may not be brought) under the GP regime are subject to some debate.
2. In this paper, I explain and explore:
 - a. Part A: in the first part of the outline, I set out the broad structure of the GP regime – including the relatively familiar 'complaint and inquiry' provisions; presented with some of the recent decisions. To that extent, this paper is an update of my 2015 presentation on the same subject matter;¹ and
 - b. Part B: in this section of the paper, I examine the recent tendency to expand the accessory liability provisions contained in section 550 of the FW Act, with an particular emphasis on some aspects of the GP regime.

Overview

3. First, it is necessary to take a 'helicopter view' of the GP regime.
4. By contrast to the fairly prosaic unfair dismissal² the GP regime draws in equal parts upon the former section 5 of the *Conciliation & Arbitration Act* 1903 (Cth), upon some aspects of discrimination law and freedom of association, and upon some minor, albeit significant innovation by the FW Act's drafters.
5. Whilst there are seven separate sections headed 'protection' in Part 3-1 of the FW Act³, excluding the discrimination protections in section 351, two have been litigated:
 - a. first, section 341, and in particular the 'complaints and inquiry' which is in sub section 341(1)(c)(ii), and such cases as Murrihy,⁴ per Jessup J;
 - b. next, section 346, and the protections relating to membership or industrial activity: see Barclay, and particular the High Court appeal in that case.⁵
6. This 'complaint/inquiry' provision is one of the more novel sections, appearing for the first time in the FW Act, though it has statutory predecessors of similar (though distinct) nature in earlier termination law.⁶

¹ See my presentation to the National Retail Association which is available at: <http://www.timdonaghey.com.au/wp-content/uploads/2011/11/General-Protections-Nat-Retail-written-paper-26-March-151.pdf>.

² This has well-known counterparts in many common law jurisdictions around the world. For two examples, see: Baragwanath '*Unfair dismissal in NSW*' (Law Book Co, 1999) and Anderman '*Unfair Dismissal*' (Butterworths, 1985). It may be observed that unfair dismissal, despite its various sources as a matter of law, takes largely the same form in many jurisdictions.

³ See sections 340, 343, 344, 345, 346, 348 and 349 of the FW Act.

⁴ Murrihy v Betezy.com.au Pty Ltd [2013] FCA 908 ('**Murrihy**'),

⁵ Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500; (2012) 220 IR 445 ('**Barclay**').

⁶ See section 170CK(2)(e) of the pre-Work Choices version of the *Workplace Relations Act* 1996 (Cth) ('**WR Act**'); and section 659(2)(e) in the post-Work Choices legislation.

7. One would think that after more than nine years of continuous operation,⁷ the strictures as well as the benefits of Part 3-1 of the FW Act would be well understood and generally known. More so for a derivative section like the GP regime. Some terms have stubbornly refused to be clearly defined in case law.
8. In my opinion, this reflects some of the drafters' aims. However, other parts (including the 'workplace right' and 'complaint' components of section 341) are merely open, or inclusive terms, where the parliament's intention is hard to define – or divine.

Part A - Introduction – to whom does the GP regime apply?

9. To take a broad view, the GP regime contained in part 3-1 of the FW Act provides a wide-ranging protection against termination of employment, and a kind of quasi-discrimination. It is of deliberately penetrating effect.
10. The allegation of a contravention of Part 3-1 is a serious matter. It is a prohibited grounds termination, which operates in addition to general law rights. In a manner akin to discrimination, it does not operate to prevent the termination of an employee *per se*, but prevents the termination (or other adverse action) based upon particular proscribed reasons. Those reasons (of course) are set out in the legislation. The GP regime may undo the effect of a termination of employment by a reinstatement order. Few general protections claims result in reinstatement.
11. A GP regime claim is of relatively wide scope: it can be brought against employers, and non-employers. It can be brought, via an allegation of 'knowing involvement' or otherwise in contravention of section 550 of the FW Act, against those human actors who perform the prohibited acts, such as:
 - a. a managing director, company secretary or the sole 'directing mind' (such as manager or sole shareholder) of an employer;⁸
 - b. union officials;⁹ and
 - c. directors of a company.¹⁰

Elements of the GP claim

12. In the following section, I set out the major elements of a claim under Part 3-1 of the FW Act. It is no coincidence that I refer mainly to sections 340 and 341 in the following summary.
13. The major elements of a claim under Part 3-1 of the FW Act are:
 - a. a *workplace right*. This can be the mere 'having' of the workplace right (section 340(1)(a)(i)); or the having or not having exercised the workplace right (section 340(1)(a)(ii)) or the proposal to exercise or not exercise (at any

⁷ Note that the operation of Part 3-1 of the FW Act commenced on 1 July 2009. See section 2 of the FW Act, and the column set out there.

⁸ *FWO v Total Project Marketing Pty Ltd (in Liquidation)* [2014] FCCA 451, at [6].

⁹ *BHP Coal Pty Ltd v CFMEU* [2013] FCA 1291, at [5], per Collier J.

¹⁰ *FWO v Bird* [2011] FMCA 926.

time) the workplace right. In relation to section 346, and other prohibitions, this has been a higher threshold to meet, particularly in relation to whether the particular conduct is 'industrial activity'. By contrast, the question of what amounts to a 'complaint or inquiry' as workplace right is far from settled;

- b. significantly, the 'claim and inquiry' element in section 341 is not within the definition of 'workplace right'. Rather, the subsection does two things:
 - i. deems the ability to make a complaint or inquiry to a particular person or body (namely one with capacity under a workplace law to seek compliance with that law or a workplace instrument) to be a 'workplace right'; and
 - ii. for an employee, the ability to make a complaint or inquiry 'in relation to his or her [ie the employee's] employment' (section 341(1)(c)(ii)).

14. In respect of each of these sections:

- a. they rely upon sections 360-1 for the question of mechanics of the evidence of the reason 'because of', which is so integral to the reasoning of the High Court in Barclay and Murrihy; and
- b. in the case of the other causes of action, such as sections 343, 344, 345, 346 and 351 of the FW Act depend in greater or lesser extent on the terms of the 'evidence sections'.

Historical treatment of 'complaint and inquiry'

- 15. This aspect of the GP regime under section 341(1)(c)(ii) deserves some attention because of its widespread use. Whilst 'workplace rights' and other protections feature equally in section 341, a large number of the proceedings I see involve 'complaints and inquiries'.
- 16. First, let's go back in time. The predecessor sections of the WR Act were not often used. The confined nature and the limits placed upon the operation of section 659(2)(e) under the Work Choices Act resulted in very few cases,¹¹ such as Claveria.¹²
- 17. It is intended (rather than the more confined argument raised in Claveria) that the complaint to the employer has a separate and distinct status from the 'compliance authority'-type complaint made elsewhere under section 341(1)(c)(ii) of the FW Act.
- 18. Turning to the FW Act, it is significant to look at the secondary materials to ascertain intent. The Explanatory Memorandum to the *Fair Work Bill 2008* sets out a further example also at [1370]:

Rachel is employed in a night fill position. The ladder that she uses at work to stock the shelves is missing a rung which makes it dangerous for her to climb. Rachel raises this issue with her employer. Under subparagraph 341(1)(c)(ii) Rachel has a workplace right

¹¹ Note that only 16 cases (including the appeal decision Claveria), appear to have ever been decided involving this section of the WR Act.

¹² CSR Viridian Limited (formerly Pilkington Australia Ltd) v Claveria [2008] FCAFC 177; 171 FCR 554; 177 IR 147 ('**Claveria**').

because she has made a complaint/inquiry to her employer in relation to her safety concerns regarding the ladder.

19. These extrinsic examples are of some use. They illustrate that the former limitations as to section 659(2)(e) are no longer effective. Second, it is clear (from the Rachel example) that the parliament intends complaints and inquiries to have a relatively similar meaning, or at least one which does not necessitate separate consideration of each definition.

Analysis of recent cases

20. There was previously some dispute as to how the broad terms should or may be construed (especially considering the Rachel example from the Explanatory Memorandum).
21. One approach was to imply an obligation into the making of the ‘complaint or inquiry’: see Shea (No 6). In that decision Dodds-Streeton J found that there was a need for a complaint to be ‘genuine’. It was not clear in context whether this requirement:
- a. imported a subjective state of mind, of the complainer-Applicant; or
 - b. was a requirement of some minimum threshold of plausibility, or some other limitation.
22. This is now beyond argument, as the approach was disapproved of by a full Court of the Federal Court on appeal in Shea v EnergyAustralia Services.¹³ In that decision, Rares, Flick and Jagot JJ found:

Considerable care needs to be exercised before implying into section 341 any constraint that would inhibit an employee’s ability to freely exercise the important statutory right to make a “complaint”. To too readily imply into the language of sections 340 and 341 the necessity for a complaint to be a “genuine” complaint, necessarily would be productive of argument about whether a “complaint” is bona fide and may serve to discourage those who may well have mixed motives for making a complaint. The expression or drafting of a “complaint” should not require the sophistication or knowledge of an experienced industrial lawyer or legal advice regarding whether it should in fact be made. Care should also be taken before construing the term “right” in section 341 in a manner which may have more far-reaching implications for the meaning of that term when it is employed elsewhere.

23. This approach to the GP regime has been adopted in recent cases: see Larosa,¹⁴ per Judge Burchardt. In Larosa, the complaints alleged were relating to the collection of superannuation payments. It did not assist Mr Larosa’s claim that the complaints (and on behalf of which employee they were made) was found to be confusing by the trial judge. But it is clear from Judge Burchardt’s reasoning that:
- a. no ‘genuineness’ needed to be identified; nor

¹³ [2014] FCAFC 167.

¹⁴ Larosa v Number 100 Pty Ltd & Anor [2018] FCCA 1312 (8 June 2018). See in particular paragraphs [193] and following.

- b. what some would regard as the 'source' of the complaint, as set out in the words 'able to' which was examined in Harrison v In Control Pty Ltd.¹⁵
24. See also Morley v Monza,¹⁶ in which Judge Riethmuller adopted reasoning to a similar effect to Larosa. Other similar reasoning can be observed in Martens (per Judge Jarrett); and Dipa v Michael Hill Jeweller (Judge Jones).¹⁷ All are recent cases in the Federal Circuit Court, and avoid limits on 'complaints' which may be made.
25. I now turn the specifics of the 'accessorial liability' provisions in section 550 of the FW Act.

Part B - the liability of 'accessories' to prohibited conduct

26. The expression of 'accessorial liability' is one which by its nature extends the reach of any *quasi* criminal provision. Accessorial liability allows expression to the policy or principle that an individual (whilst not the primary actor or the decision maker, engaged in the prohibited conduct) may still be involved with that conduct intimately enough to attract an indirect form of pendant liability.
27. This is one of the limbs of section 550, which refers to 'knowing involvement'. The expression 'knowing involvement' deserves some further explanation. This expression will be familiar to some, as it invokes the contents of section 550 of the FW Act, which provides:

550. Involvement in contravention treated in same way as actual contravention

- (1) *A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.*
- (2) *A person is involved in a contravention of a civil remedy provision if, and only if, the person:*
- (a) *has aided, abetted, counselled or procured the contravention; or*
 - (b) *has induced the contravention, whether by threats or promises or otherwise; or*
 - (c) *has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or*
 - (d) *has conspired with others to effect the contravention.*

[emphasis mine]

28. From the case law, this section is designed to enlarge the capture of the GP regime, and apply its strictures to individuals who are involved in, induce or contribute to the breaches in the way contemplated by the section.¹⁸

¹⁵ [2013] FMCA 149, per the then Burnett FM.

¹⁶ Morley v Monza Imports Australia Pty Ltd [2018] FCCA 622 per Judge

¹⁷ Martens v Indigenous Land Corporation & Anor [2017] FCCA 896; Dipa v Michael Hill Jeweller (Australia) Pty Ltd [2018] FCCA 233.

¹⁸ As was section 793 of the post Work Choices iteration of the WR Act.

29. In the following section I examine ways in which accessories (beyond the usual scope of directors or officers of the company) might be considered liable as accessories for the prohibited conduct.

Expansion of accessories – advisors

30. One of the best known recent cases involving advisors concerned an external accountant. In Fair Work Ombudsman v Blue Impression Pty Ltd & Ors,¹⁹ the Federal Circuit Court had to determine whether an accounting firm, Ezy Accounting, which had processed payroll for the restaurant group, had been involved as an accessory in the underpayments pursuant to an industrial award.
31. Judge O’Sullivan found:
- a. the degree of knowledge necessary was to know the essential facts constituting the contravention. This has long since been the law in relation to other ‘accessory sections’: see Yorke v Lucas;²⁰
 - b. in this particular case the Court found that the accessory Ezy Accounting “*deliberately shut its eyes to what was going on in a manner that amounted to connivance in the contraventions by [its client]*”. Even though the director of Ezy Accounting correctly said that award obligations were outside his professional expertise, the information he received must have served as more than one ‘red flag’.
32. This decision draws upon the foundation case (in Australian law) of Yorke v Lucas, which in turn drew upon other authority. This included British legal authority to the effect that:
- a. the accessory liability provisions contemplate participation and ‘concurring in’ the events which form the elements of charge against the primary wrongdoer; and
 - b. in its aims, section 550 may be described as attaching liability to a knowing participant in the charge directed at the primary wrongdoer.²¹
33. It is clear both from Blue Impression, and from the appeal decision made by Flick, Bromberg and O’Callaghan JJ in EZY Accounting²² that:
- a. a third-party service provider does not escape liability from ‘actual knowledge’ by not being aware of awards or their operation. This reflects the principle that the accessory must know the *facts amounting to contravention* but is not required to know the legal position, nor the law underpinning the contravention; and
 - b. the knowledge of the director need not be only provided by direct evidence. It may be inferred. It may be a necessary conclusion from other available evidence *even if* the director does not give evidence of his or her statement of mind.

¹⁹ [2017] FCCA 810, per Judge O’Sullivan (‘**Blue Impression**’).

²⁰ (1984) 158 CLR 661 at 667.

²¹ Pennycuik VC in Re Maidstone Buildings Provisions Ltd [1971] 1 WLR 1085. See Yorke v Lucas above at n20.

²² EZY Accounting 123 Pty Ltd v Fair Work Ombudsman [2018] FCAFC 134 (20 August 2018).

Expansion of accessories – franchising

34. There has been publicity – principally in the news media – about some claims for underpayment of wages since about mid-2015. Many of the principles applying to underpayment *as a source of liability* also apply equally to the GP regime, when considering either intra-employment adverse action – or dismissal from employment.
35. It is reasonably well known that some of the 7-Eleven franchises were sued by the Fair Work Ombudsman for underpayments and curiously – some cash repayments by the employees of award wages. See for example Amritsaria Four,²³ Mai Pty Ltd²⁴ and Hiyi Pty Ltd.²⁵
36. In none of these 7-Eleven cases was the head franchisor sued for 'knowing involvement or some other head of accessory liability'. The FWO produced a lengthy report into its inquiry into the 7-Eleven group.²⁶
37. This may be contrasted with Yogurberry,²⁷ a case in which a franchisor (in lead of a group of business operations) was found liable; and CL Group, a payroll company, found to have been involved in underpayment of overseas workers brought to Australia.
38. Yogurberry is also notable in that the FWO obtained orders effectively requiring the head franchisor to audit its franchisees for compliance. This is not relief which is restricted to the facts surrounding underpayment: if there were evidence of adverse action more broadly than the facts of one case, then there is no limitation arising from the FW Act, which would prevent an order seeking to prevent future breaches.

Expansion of accessories – in-house HR

39. Given the logical expansion of liability to directors and officers of a particular corporate entity, the commensurate expansion of that liability to HR officers in their personal capacity must seem fairly logical.
40. In Oz Staff,²⁸ the FWO pursued a HR manager in respect of the respondent's unlawful deductions from an employee's pay. In this case, the particular facts contributed to the successful claim: the Court found that the individual HR manager had particular knowledge that deductions were unlawful, due to his interaction with FWO inspections both in 2012 and 2013.
41. Oz Staff is a case which demonstrates the limits of section 550, in a GP regime context: if a HR manager (even one pursuing the stand down of an existing employee, or the dismissal of one) is not aware of a complaint or prohibited ground then it follows that the HR manager cannot be aware of that complaint as *an element* in the prohibited ground for termination. Irrespective of the finding of

²³ Fair Work Ombudsman v Amritsaria Four Pty Ltd [2016] FCCA 968.

²⁴ Fair Work Ombudsman v Mai Four Pty Ltd [2016] FCCA 1481.

²⁵ Fair Work Ombudsman v Hiyi Pty Ltd [2016] FCCA 1634.

²⁶ See "A report of the Fair Work Ombudsman's Inquiry into 7-Eleven", dated April 2016 and available from the FWO's website at www.fwo.gov.au (accessed on 28 August 2018).

²⁷ FWO v Yogurberry World Square Pty Ltd [2016] FCCA 1290.

²⁸ FWO v Oz Staff Career Services Pty Ltd [2016] FCCA 105.

liability against the employer (as primary wrongdoer) the lack of knowledge of the complaint means that it would be unlikely for a finding of liability to be made against the accessory.

42. This was the situation in Milardovic v Vemco Services.²⁹ In that case, the HR manager sent a letter to the Applicant seeking to discuss with the Applicant his dismissal for redundancy. The HR manager, a Ms Finnigan³⁰, was not aware that the Applicant had made a WorkCover claim at this point. Logically, the causation necessary for 'knowing involvement' in the contravention could not follow.

Conclusion

43. In an effort to create a wide-ranging type of application and one which is paradoxically based upon a narrow range of fact situations, the Parliament has stumbled its way into the GP regime as a type of termination and other claim, and a substitution for the former freedom of association provisions under section 298K of the WR Act.
44. The present provisions are those which:
- a. involve interlocking definitions in sections 340, 341 and 342 of the FW Act which create a degree of uncertainty not usual with industrial legislation; and
 - b. at the same time, invoke open ended definitions of 'complaint and inquiry', limited in one instance³¹ by the need to inform a certain recipient of the 'complaint or inquiry'.
45. The result is both unclear and unsatisfying, both in its form and in its substance.
46. It is submitted that the pendant liability – whilst relating to the actual knowledge of the accessories – is one which is quite well designed to attach liability to those who advise companies about breaches, such as:
- a. breaches of award obligations (as in EZY Accounting); and
 - b. those giving advice or assistance in GP regime claims – including in-house HR or external advisors.
47. This second category affects us, the lawyers. Numerically, it must be a smaller group than industrial or employer organisations; payroll companies; accounting and other financial advisors.
48. But for those advisors who have more than merely an advisory role in respect of claims made under the GP regime and get actively involved, then the risk remains that a claim may or will be brought against them, in respect of their active participation. It would be quite hard for those who practice in this area to deny the ubiquitous nature of the GP regime to most employers and employees.

²⁹ [2016] FCA 19, per Mortimer J.

³⁰ Note, this HR manager was not sued as accessory in that case. See in particular her Honour's factual findings at [278].

³¹ See section 341(1)(c)(i) of the FW Act.

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