The continuing development of ‘complaints and inquiries’ 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 (and remains) one of the more interesting and at the same time, heavily litigated causes of action in the legislation (as to Part 3-1 of the FW Act generally '**GP regime**'). This is in part because of some aspects of the claims made, and the frequency with which the GP regime is applied.

2. In my own practice, the frequency alone with which general protections claims are presented means that this is an area of interest – if not actually detailed examination.

3. By contrast to the fairly prosaic unfair dismissal[1] the GP regime is distinct. It has elements of other workplace legislation (such as discrimination law, in section 351 of the FW Act). It also draws in equal parts upon the former legislation,[2] and upon some minor, albeit significant innovation by the FW Act's drafters.

4. In this paper, I set out:

   a. my views on the 'workplace right' element in the GP regime, both from the FW Act and from experience; and

   b. a particular aspect of the GP regime: namely the 'complaints and inquiries' which appear in section 341(1)(c) of the FW Act. This has been the subject of some recent Court rulings, which are worth noting; and

   c. some conclusions about the GP regime, both from cases I have been involved in and the state of the authorities.

Background and introduction

5. The 'complaint/ inquiry' provision is one of the more novel of the sections appearing for the first time in the FW Act, though it has statutory predecessors of similar (though distinct) nature in earlier termination law.[3]

6. I wrote a paper on this subject in about 2014. I also co-wrote a book on the whole of the GP regime in 2019. Now, whilst there have been some substantial amendments to the FW Act,[4] affecting other areas of the legislation, it is worth noting:

   a. what has been learned since the recent cases; and

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[1] This has well-known counterparts in many common law jurisdictions around the world. See for two examples 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.

[2] Such as section 5 of the *Conciliation & Arbitration Act* 1903 (Cth), and Part X of the WR Act.

[3] 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.

[4] See the *Fair Work (Secure Jobs, Better Pay) Act* 2022 (Cth) which substantially amended the bargaining requirements under the FW Act, but made few changes to general protections.

b. it is also worth noting that the GP regime has not undergone substantial legislative amendments. The main innovations involve judge-made law.

Part A - Introduction –the 'pillars' of the GP regime. To whom does it apply?

7. To take a broad view, the general protections regime in part 3-1 of the FW Act is a wide-ranging type of termination and quasi-discrimination claim, of deliberately wide and penetrating effect.

8. 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.

9. Such a claim is of relatively wide scope: it can be brought against employers, and non-employers. It can (via an allegation of 'knowing involvement' or otherwise in contravention of section 550 of the FW Act) be brought against those human actors who perform the prohibited acts, like:

   a. managing director, company secretary or sole shareholder of an employer;[5]

   b. union officials;[6] and

   c. directors of a company.[7]

   The categories of those who may be made liable for workplace contraventions (chiefly by section 550 of the FW Act) are not closed: See the EZY Accounting litigation.[8]

10. From the case law, this section is designed[9] 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.

11. The GP regime may be distinguished as a claim from an unlawful termination claim, whether in breach of contract[10] or in the sense of the prohibited grounds in Part 6-4 of the FW Act. In a legislative sense, the GP regime is superior to, and prevails over other forms of termination claim and non-termination dispute claim in the FW Act. This effectively places the GP regime above other termination proceedings in terms of the efficacy under the FW Act.

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[5] FWO v Total Project Marketing Pty Ltd (in Liquidation) [2014] FCCA 45, at [6].
[6] See BHP Coal Pty Ltd v CFMEU [2013] FCA 1291,at [5], per Collier J.
[7] FWO v Bird [2011] FMCA 926.
[8] At first instance Fair Work Ombudsman v Blue Impression Pty Ltd & Ors [2017] FCCA 810; 269 IR 92; (per Judge Sullivan); and Fair Work Ombudsman v Blue Impressions Pty Ltd (No 2) [2017] FCCA 2797. On appeal EZY Accounting 123 Pty Ltd v FWO [2018] FCAFC 134, per Flick, Bromberg and O'Callaghan JJ.
[9] As was section 793 of the post Work Choices iteration of the WR Act.
[10] Part 6-4 of the FW Act refers to 'unlawful termination'. It is submitted that however unwillingly, this descriptor invokes parallels with rescission of a common law contract, including a contract of employment.

12. This hierarchy (in part created by operation of sections 723 and 725 of the FW Act) these sections and the GP sections of the FW Act mean:

    a. the statute has seized upon a series of proscribed or 'prohibited' grounds which may not be a basis for the employer's decision to terminate;

    b. unlike discrimination there is limited work for any indirect effect of the employer's decision or subjective reasons for a party's judgment: Barclay;[11] and

    c. see the description of 'complaints' in many cases, including Beggs v Login Systems Pty Ltd,[12] and see also the cases in that decision which were relied upon by the judge (then a Federal Magistrate, now a member of the Federal Circuit and Family Court of Australia (Division 2)), her Honour Judge Riley.[13]

13. This is the pan-employment model of regulating or prohibiting certain conduct. As with statutory entitlements, it reaches each employee as a right, rather than a section of employees, subject to some threshold being reached, or factual scenario being met.

14. But it operates distinctly, in the sense that the FW Act implicitly recognises non-employee workers. To this extent it is an industrial device, across the span of employment and reaching into other forms of work. From my experience, contractors seeking relief is unusual: a far greater number of GP regime cases are brought by individual employees, seeking relief in respect of termination of their employment.

Overview

15. Some observations may be made here about the basic requirements of Part 3-1:

    a. first, that the claimant be in one of the categories which the head of power allows (whether national system employer, national system employee or one other category), and therefore has the protection of section 340 (and of the GP regime as a whole);

    b. the next requirement is one of 'adverse'-ness[14] from the point of view of the recipient of the treatment. This requirement of a negative impact is one of the notions underpinning the operation of Part 3-1;

    c. third, there is the requirement that the 'adverse' conduct (or termination, or other action) be taken for:

        i. the reason of; or
        ii. a reason which includes the reason of,[15]

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[11] See Board of Bendigo Regional TAFE v Barclay [2012] HCA 32; 248 CLR 500; 86 ALJR 1044; 290 ALR 647; (2012) 64 AILR ¶101–722; 220 IR 445. See also n16 below for the citation of the intermediate (FCAFC) appeal.

[12] (2013) 234 IR 109, note at [11], Federal Circuit Court of Australia, per Judge Riley.

[13] See also Hill v Compass Ten Pty Ltd [2012] FCA 761, Reeve v Ramsay Health Care [2013] FCA 499, Pitrau v Barrick Mining Services Pty Ltd [2012] FMCA 186 and Adam v Apple Pty Ltd [2012] FMCA 881.

[14] Within section 342 of the FW Act.

[15] Within the meaning of section 361 of the FW Act.

the use or forbearance which involves:

iii. the workplace right (or other proscribed reason for the conduct as alleged). The expression 'workplace right' is defined in section 341 of the FW Act.

16. In total, this means there are two main elements or 'pillars' of the GP regime – that is, the 'workplace right' element (which I have confined to one discrete part of section 341 in this paper) and the 'adverse' element. If either element is absent, then the cause of action will fail: see particularly Jessup J in Tattsbet v Morrow.

17. A separate question, arising from cases such as Barclay[16] and BHP Coal,[17] is and remains: causation. The reason to which I referred above need not be sole or 'dominant' reason: section 361 of the FW Act. However, it needs to be an operative reason, in the sense of affecting the decision-maker's judgment and reasons: section 360 of the FW Act.[18] Other than this brief summary, I will not be referring to this issue, though it is a frequently-considered question in the case law.

18. I note that certain other parts of the discrimination section of Part 3-1 (see section 351) and other related prohibitions (such as temporary absence under section 352) appear to operate as a separate cause of action within the GP regime of the FW Act.

19. Despite sections 360 and 361, the Applicant has obligations to prove the bare essentials of the cause of action. This means:

a. that complaints or inquiries (or other workplace rights) were made, or otherwise within section 340 of the FW Act; and that these constituted the exercise of the 'workplace right';

b. the Applicant suffered some form of adverse action, falling within the realm of conduct prohibited by section 342; and

20. When these steps are taken, the evidentiary provisions in section 360 and 361 come into effect. Without one of these, the cause of action is not complete.

Part B - the type and variety of 'complaint/ inquiry'

21. At first blush, these are very wide and extensive provisions. They appear to have as their foundation *any complaint of any kind,* save for the contents of section 341(1)(c)(i) of the FW Act. That section is clearly based upon the predecessor sections 170CK(2)(e), which became 659(2)(e), under the Work Choices iteration of the WR Act. The FW Act does not define 'complaint', either inclusively nor

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[16] See n11 above.

[17] CFMEU v BHP Coal Pty Ltd [2014] HCA 41; 253 CLR 243; 88 ALJR 980; 314 ALR 1; (2014) 66 AILR ¶102–268; 245 IR 354.

[18] See also the Explanatory Memorandum to the Fair Work Bill 2008, at para 1458 and the joint decision of Gray and Bromberg JJ in the intermediate appeal in Barclay (see Barclay v The Board of Bendigo Regional Institute of Technical and Further Education (2011) 274 ALR 570; [2011] FCAFC 14). Whilst the Full Court Federal Court appeal was overturned in the High Court, this conclusion was not disturbed. It is submitted that this is a correct statement of the law.

exhaustively. Accordingly, the meaning of that term is construed to be its plain and ordinary meaning. It is my view that the term can mean any complaint, whether written or oral, electronic or otherwise.

22. It is worth stating the golden rule: that in the FW Act, as with any legislation *only the plain meaning of the words* should be given their due weight. Whilst some guidance is provided by extrinsic materials, caution must be used when considering the Explanatory Memorandum to the *Fair Work Bill* 2008 (Cth), and the second reading speech. In the case of the Explanatory Memorandum, it states at [1370]:

> *Subparagraph 341(1)(c)(ii) specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. Unlike existing paragraph 659(2)(e) of the [Workplace Relations Act 1996 (Cth)], it is not a pre-requisite for the protection to apply that the employee has "recourse to a competent administrative authority". It would include situations where an employee makes an inquiry or complaint to his or her employer.*

23. Thus, the limits placed upon the operation of 649(2)(e) in the very few cases[19] on this section, such cases as CSR Viridian v Claveria[20] are excluded from operation. It is intended (rather than the 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.

24. The Explanatory Memorandum 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 because she has made a complaint/inquiry to her employer in relation to her safety concerns regarding the ladder.*

25. 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 allows the question

26. I now turn to the law on the question of what amounts to a 'complaint' within the meaning of the FW Act.

Complaint, inquiry or neither?

27. Would section 341(1)(c)(ii) include or cover a complaint or inquiry made to any person at all? Could this include a stranger to the employment?

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[19] By my reckoning, only the first instance decision in Claveria, and the cases of Zhang v The Royal Australian Chemical Institute (2005) 144 FCR 347, at 350; [2005] FCAFC 99; and Jennings v Salvation Army (2003) 128 IR 366, at 370-371 refer in any substantial way to section 659(2)(e) of the WR Act or its predecessors. Note that in Murrihy v Betezy.com.au Pty Ltd [2013] FCA 908, Jessup J reflected upon this section: at [141].

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

28. It is my submission that this not so. Rather, in Murrihy,[21] his Honour Jessup J found that the ability to make a complaint required no instrumental source of entitlement. The reasoning appeared to assume the existence of a valid complaint under section 341(1)(c)(ii) required first an entitlement or right to exist, such as an entitlement under an industrial instrument (whether a workplace agreement or enterprise agreement), or contract of employment or some relevant legislation.

29. Jessup J found in Murrihy that (unlike section 170CK(2)) a complaint could be made to the employer. This contrasts with other views on the same subject matter, such as Burnett FM in Harrison v In Control Pty Ltd.[22] Given the Explanatory Memorandum examples, it is submitted that the view in Murrihy is likely to remain the law.

30. In Zhang, the nature of and the content of a complaint fell for consideration. The complaint was contained an email by Mr Zhang to an OH&S officer at the Victorian Trades Hall Council, and it read relevantly:

> *I need an urgent help. I was forced by my director to work more than a full time hours but paid three days per week. It caused me on 3rd stage urgency of right leg operation. I have just recovered since I stopped work overnights, per my director's agreement, my director is now giving me more works than before. If I can not complete on time, the company will dismiss me.*
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> *I was also forced do not keep $1.4m share investment record for the company and I am not allowed to provide proper reports on the shares. I am also forced to input more than $122k wrong amounts to accounting record. I told the Board I can not do it therefore, the Board Chair called me frequently by using awful telephone manners and I am facing termination. I have many written documents to proof my case.*
> *Please help me, thank you very much!*

31. In Zhang, a Full Court of the Federal Court of Australia found[23] that the WR Act predecessor to the current GP regime section, then numbered as section 170(2)(e):

    a. was required to be made "to a person or body having the capacity under an industrial law to seek ... compliance with that law"; and

    b. therefore, the claim available under the then section 170CK(2) did not extend to the making of a complaint to the employer.[24]

32. The other issue in Zhang, and the reason it falls for consideration here, was that the Full Court found that the written appeal to the Trades Hall Council was not a complaint; but rather a request for assistance. Given that the 'complaint' or appeal for assistance in Zhang was made under a different legislative regime than the FW Act, this aspect of the request for assistance deserves some consideration.

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21 Murrihy v Betezy.com.au Pty Ltd [2013] FCA 908.
22 [2013] FMCA 149.
23 Zhang v The Royal Australian Chemical Institute Inc, above n17 per Spender, Kenny and Lander JJ.
24 Above, n23 per Lander J at [37].

33. Both Murrihy and Zhang contrast squarely with the decision in Shea v True Energy (No 6). In Shea No 6,[25] Dodds-Streeton J considered the scope of the complaint which an employee is able to make 'in relation to the employee's employment'.

34. In a careful judgment considering authorities in different contexts, considering the expression 'in relation to', Dodds-Streeton J found that even an indirect connection between the employee's complaint and the employment would suffice.

35. In my view, the question of how broadly the question of connection between the 'employment' must be is not easily to resolve. The plain view of the section is that any material connection between the complain

36. In Shea No 6, the judgment reviewed and made findings about other aspects of 'employee complaints' under section 341 of the FW Act. Dodds-Streeton J considered whether a genuine belief in the complaint was required. Her Honour found in relation to a 'complaint' which an applicant is able to make:

> *620. It does not follow, however, that the making of false, baseless, unreasonable or contrived accusations of grave misconduct against fellow employees constitutes the making of a complaint that an employee is able to make in relation to his or her employment, and thus invokes the statutory prohibition on adverse action.*
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> *621. While the factual basis of a complaint need not be "true" or capable of ultimate substantiation, in my view, the grievance must at least be genuinely held and, where it takes the form of an accusation of fault, the complainant must believe it to be valid. There would otherwise be no real, but merely a spurious, grievance. The exercise of the workplace right constituted by the making of a complaint is not within the scope of statutory protection if it is made without good faith or for an ulterior purpose, extraneous to that for which the statutory protection was conferred.*

37. Dodds-Streeton J considered that, in accordance with the purpose of the GP regime, there was a requirement that the complaint made must be 'genuine'. This creates a problematic overlay to the making of a complaint.

38. It is submitted that even a contrived complaint, one designed to inconvenience the employer, is one which would fall within section 341 of the FW Act. The difficulty in settling upon an 'implicit' requirement in the legislation, is that it departs from the plain meaning of the words used in the section. Absent a conclusion based upon extrinsic materials, it is my view that such a requirement is a mistaken view of the section.

Complaint 'in relation to employment'

39. One of the most obvious limitations or restrictions upon the 'complaints' and inquiries under the FW Act is contained in the words in section 341(1)(c)(ii) of the FW Act itself: namely that a complaint by an employee must be 'in relation to his or her employment'.

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[25] Shea No 6 [2014] FCA 271; 314 ALR 346; 242 IR 1. Note the appeal at [2014] FCAFC 167; the *dicta* that I refer to in this paper was not overturned on that appeal.

40. The then Marshall ACJ in Rowland[26] considered whether a complaint about a supervisor amounted to a complaint 'in relation to' the employee's employment. His Honour found (at [37]):

> *The answer to the question whether the complaint is one of the sort contemplated by s 341(1)(c)(ii) is found partly in the text of the 14 September 2010 letter. The letter refers to four particular patients, in respect of which Mr Rowland requested a thorough review by the hospital. It is also found partly in the letter to Associate Professor Johnson sent by Mr Rowland on 29 September 2010 in response to Associate Professor Johnson's request for further details about the four cases referred to by Mr Rowland in the sixth complaint. Mr Millar alleges that there was a relationship between "Professor Esmore's deteriorating clinical judgment and disorganised administrative ability" and Mr Rowland's employment. However, the Court accepts the submission of counsel for Alfred Health that no such relationship is apparent. The 14 September 2010 letter is essentially a complaint about Professor Esmore and not a complaint about how Professor Esmore related to Mr Rowland in his employment.*

41. Though the complaint occurs in the interaction between the Applicant and Professor Esmore, Marshall ACJ ruled that the complaint was not a complaint able to be brought under section 341 of the FW Act.

42. A persuasive critique of Marshall ACJ's reasoning occurs in Walsh.[27] There, Bromberg J found:

> *Marshall ACJ determined that a complaint made by a doctor about the competency of another doctor with whom he worked was not a complaint in relation to the complainant's employment. Whether the clinical competence of the doctor complained about had potential implications for the employment of the complainant is not a matter that appears to have been raised before or addressed by Marshall ACJ. His Honour does not appear to have been referred to Pilbara and did not have the benefit of Shea. A contention that an indirect nexus would be sufficient does not appear to have been relied upon by the applicant in that case. Further, his Honour's conclusion seems to turn on a factual dispute as to whether the relevant complaint related to the complainant's employment because it also included a complaint that the doctor concerned had taken a patient from the complainant: see Rowland at [29]-[38].*

43. Whilst a single decision does not compel (through comity or otherwise) Bromberg J to follow this observation, it is submitted that the better view is that of the latter judge. There is of course no surprise that (despite being *obiter*) Bromberg J's reasoning has been routinely followed by other judges: no warrant exists to ruling out 'indirect' treatment from the construction of section 341(1)(c); indeed it seems positively in accordance with the section.

44. However, the expression 'in relation to' must be a restriction of some kind. Indeed, if there had been *no connection,* whether direct or indirect at all, then it is submitted that such a complaint, if made, would have been outside the scope of section 341(1)(c).

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[26] Rowland v Alfred Health [2014] FCA 2.

[27] Walsh v Greater Metropolitan Cemeteries Trust (No 2) [2014] FCA 456, at [44].

Post PIA Mortgage

45. Section 341 of the FW Act stands out because of subsection 341(1)(c)(ii). This is the only subsection I am aware of in the whole of workplace law which deems utterances by an employee to found a cause of action. The contents of the subsection (in summary):

    a. contains novelty. Complaints *per se*, were not previously a part of the rights protected by the pre-FW Act legislation, such as the WR Act. A more confined category of complaint to a 'competent administrative authority' was; but this was seldom used,[28] in part because of the narrowness of the protection offered; and

    b. in my view (and. anecdotally, based upon my practice), many more of the workplace rights alleged involve 'complaints and inquiries' than any of the 154 other possibilities which exist in section 341. It is simply the most often used.

46. The main limitation in recent case law identifies Shea No 6 as the source of a particular limitation: that of the existence of a right. Dodds-Streeton J in Shea No 6 at [625]. That decision is to this effect:

    In my opinion, the requirement that the complaint be one that the employee "is able to make" in relation to his or her employment suggests that there are complaints which the employee is not able to make in relation to his or her employment. The ability to make a complaint does not arise simply because the complainant is an employee of the employer. Rather, it must be underpinned by an entitlement or right. The source of such entitlement would include, even if it is not limited to, an instrument, such as a contract of employment, award or legislation.

47. The Full Court of the Federal Court (by majority) in PIA Mortgage[29] applied this element of Shea No 6. Whilst Snaden J dissented on the question of the whole meaning of 'able to' in section 341(1)(c), preferring a narrower definition, his Honour agreed with the underlined element in the quote from paragraph [625] of Shea No 6. The key paragraphs from Rangiah and Charlesworth JJ from the majority decision in PIA Mortgage are in paragraphs [12]-[14], and [19]-[20] of the medium-neutral report.

48. The current position is:

    a. the complaining applicant must have an underpinning entitlement or right. In PIA Mortgage, (in line with the single-judge decision in Shea No 6) the majority held that the words "is able to make" in section 341(1)(c)(ii) are, impliedly, words of limitation, and not every complaint made by an employee in relation to his or her employment is one that the employee is "able to make"; and

    b. the majority further held that section 341(1)(c)(ii) requires that an employee have an entitlement or right to make a complaint in relation to his or her employment. That does not (*contra* Snaden J in that case) mean that the

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[28] See CSR Viridian (formerly Pilkington Australia Limited) v Claveria [2008] FCAFC 177, per Gray, Goldberg and Jessup JJ. This (and the first instance decision at [2007] FCA 1917). Few other reported cases (and no appeals) were brought under sections 170CK(2)(e) (later section 659(2)(e)) of the then legislation: see fn19 above.

[29] PIA Mortgage v Mortgage Services Pty Ltd v King [2020] FCAFC 15; 274 FCR 225; 292 IR 317.

complaint requires an instrumental source, such as a dispute resolution mechanism. Rather, it means a source of such an entitlement (upon which the claim is based) must exist. That source may include a statute, a contract of employment, or the general law; and

c. this leads to certain conclusions about decided cases. For example, the 'linen complaint', from Walsh, even if sincerely made cannot be a 'workplace right'. This is because that particular employee did not have a 'right' which the complaint would actually protect. Hypothetically, if the same employee, Ms Walsh had complained about her wages, her Award coverage, her commission entitlements or her remuneration then such complaint could potentially fall within section 341.

49. PIA Mortgage is not the subject of universal acceptance. I now turn to contrary views, expressed in the case.

Contra – PIA Mortgage

50. It is to be expected, with such opaque language as in section 341, that there will be a contrary view of a judge whether looking at the same factual situation as Shea No 6, or a different one.

51. In contrast to PIA Mortgage, the majority of judges (Bromberg and Mortimer JJ) in Cummins South Pacific[30] *would have* found that the ability of an employee to complain or inquire within the meaning of section 341(1)(c) need not be underpinned by a right or entitlement held by the employee. His Honour Anastassiou J (in Cummins South Pacific) dissented, preferring the PIA Mortgage approach. That is, had it been necessary to do so, his Honour would have followed PIA Mortgage.

52. Some judges have struggled with the concepts in PIA Mortgage. These include former and current Federal Circuit Court judges. In Cavanagh v Lexastar Pty Ltd,[31] and others disagree with it. Few authoritative cases have decided to the contrary, but as we will see, some contrary (in *obiter*) does exist.

Contra – PIA Mortgage – but also Shea No 6

53. In Sabapathy,[32] a Full Court considered an application by an applicant for leave to appeal against a first instance decision. The plurality (Logan and Katzmann JJ) found at [57], with the remaining member of the bench, Flick J agreeing:

A broad interpretation of s 341(1)(c) is required consistent with the reasons of Bromberg J (with whom Mortimer J agreed) in South Pacific Pty Limited v Keenan *[2020] FCAFC 204 at [45]. In that case, Bromberg J held that the ability of an employee to complain or inquire within the meaning of s 341(1)(c) need not be underpinned by a right or entitlement held by the employee.*

[emphasis is mine]

54. The Sabapathy reasoning is contra PIA Mortgage – and Shea No 6. A less radical departure from authority (and a further variation) is found in the Full Court in Alam v NAB – which consisted of White, O'Callaghan and Colvin JJ.

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[30] Note, per Bromberg J at [45], with whom Mortimer J agreed at [209].
[31] [2021] FedCFamC2G 375, per Judge Tonkin, at [219]-[220].
[32] Sabapathy v Jetstar Airways [2021] FCAFC 25.

55. In Alam,[33] their Honours held that the correct construction of section 341(1)(c) is that applied by the Full Court (Greenwood, Logan and Derrington JJ) in Cigarette & Gift Warehouse.[34]

56. This decision endorsed as "unremarkable and correct" what Collier J had held at the first instance trial in Whelan v Cigarette & Gift Warehouse Pty Ltd.[35] In Alam the Full Court found the conclusion that a workplace right must be "underpinned by an entitlement or right" derived from an instrumental source,[36] in PIA Mortgage to be less persuasive, on the basis that it was inconsistent with the *ratio decidendi* of Whelan,[37] that did require a right, but did not require that the right have as its source an instrument (such as an employment contract) underpinning the particular complaint.

Conclusions

57. Just as not all statements are 'complaints' or 'inquiries', not all complaints (using the word in the vernacular are 'workplace rights'. This is supported by Dodds-Streeton J in Shea No 6, and the majority in PIA Mortgage - but has been developed since.

58. As I have written previously, the Commonwealth parliament has created a type of claim which depends upon judicial interpretation and a fair degree of knowledge to make basic sense of the provisions. This makes the GP regime in part a specialist field, and counter-intuitive to a significant degree.

59. In my view, the vagueness in the GP regime, and its use of what has been described as 'statutory fictions'[38] upon which to base a cause of action, must be a deliberate decision. That is, the present provisions are those which:

    a. involve interlocking definitions in sections 340, 341 and 342 of the FW Act which creates 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 instance[39] by the need to inform a certain recipient of the 'complaint or inquiry'.

60. What has developed since this time, based upon PIA Mortgage, is both unclear and unsatisfying, both in its form and in its substance. On the one hand, some decisions require an 'instrumental' basis for the rights underpinning section 341(1)(c) of the FW Act – such as PIA Mortgage itself, and related decisions. By contrast, Cummins South Pacific (though in *obiter*) militates against this view, and against Shea No 6 – two judges in Cummins South Pacific would have found both earlier decisions to be wrong at law. By further contrast, Alam promotes a third

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[33] (2021) 393 ALR 629 at 658 [97].
[34] Cigarette & Gift Warehouse Pty Ltd v Whelan [2019] FCAFC 16; (2019) 268 FCR 46 at 55–56 [28].
[35] [2017] FCA 1534; (2017) 275 IR 285 at 298 [33]–[34].
[36] See Alam, at 393 ALR at 653 [81]. See also Rangiah and Charlesworth JJ in PIA Mortgage [2020] FCAFC 15; 274 FCR 225 at 229–230 [13]–[14].
[37] Whelan, above, n32, 268 FCR 46 at 55–56 [28].
[38] See then Steward J in Maric v Ericsson Aust Pty Ltd [2020] FCA 452; 293 IR 442 [21].
[39] See section 341(1)(c)(i) of the FW Act.

way, by supporting the view in Whelan, and finding that PIA Mortgage is inconsistent with that earlier decision, albeit to a limited degree.

61. The current law is that in PIA Mortgage, because is the most recent ratio. That decision also receives support by the sheer the number of decisions endorsing this authority; and because most of the other voices are either interlocutory decisions (eg Sabapathy) or obiter (Cummins South Pacific).

62. This does not mean that PIA Mortgage is unassailable, or that it has a kind of force of reasoning not evident from its terms – rather, it is what we have at the moment. And 'at the moment' means that there could well be a challenge, to reconciling inconsistent reasoning: as the only method of resolving this inconsistency is to have the High Court draw a conclusion.

DATED: 2 March 2023

Tim Donaghey
Aickin Chambers
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