An examination of section 341 of the Fair Work Act

and some recent authority

A supplemental overview*

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Overview

In this short paper, I examine some of the recent developments in the law concerning a contentious- and oft-examined part of the *Fair Work Act* 2009 (Cth).

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1. Despite what may appear to be many claims under discrimination legislation and under the *Fair Work Act* 2009 (Cth) ('**FW Act**'), employment disputes which result in litigation are relatively rare. Many applications are threatened, some are issued, very few run to the end or to judgment.

2. In amongst those claims which are threatened and brought – one cause of action stands out: and this is Part 3-1 of the FW Act, which contains the general protections regime. It is referred to in correspondence, and demands; it is considered and the subject of advice and of course, it is the subject of pleadings.[1] I would go so far as to say – it's a daily part of practice.

3. This paper assumes a relative familiarity with Part 3-1 of the legislation. It is by way of review of recent case law, and the likely developments which lie in front of us. It is not intended to be exhaustive – there are books[2] and plentiful practitioner commentary which examines details of the section. Rather than traverse older ground, this paper deals with recent authorities and a part of the law which may be said to be in a state of flux.

4. In this paper, I put forward the thesis that this uncertainty, or flux is a major source of uncertainty in the general protections sections of the FW Act; and likely to be the main cause of the next special leave application going to the High Court, to resolve differences between certain judges and other uncertainties which are yet to be fully explored

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*This overview is intended to be 'supplemental' in the sense of being additional to an otherwise thorough understanding of the provisions of Part 3-1 of the FW Act.

[1] Pleadings are frequently used in general protections cases, because of the complexity (both causative, and otherwise) of the claims as they are made. See for a recent example the complaints made by the Respondent about the Applicant's pleading in Farrell v Choosewell Health Link Pty Ltd [2021] FCCA 910, per Judge Kirton (6 May 2021).

[2] Donaghey and Goodwin 'General Protections under the Fair Work Act' (LexisNexis Butterworths, 2019) comes to mind.

Part 1 – Terms of the legislation

5. It is necessary to examine the contents of section 341, which are:

> ***341. Meaning of workplace right***
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> *(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.*
>
> [underlining mine]

6. In daily practice, it is necessary to consider what the words of section 341 mean – given that they will undoubtedly govern what is in or out of the definition of 'workplace right'.

7. The first point is that the expression "is able to make a complaint or inquiry" in section 341 above operates to limit the scope of the protection provided. In Shea v TRUenergy Services Pty Ltd (No 6), Justice Dodds-Streeton found as follows:[3]

> *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*

[3] (2014) 314 ALR 346; [2014] FCA 271, Dodds–Streeton J (at [65]).

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.

[underlining mine]

8. Put slightly differently, a 'complaint' as it is known in ordinary parlance may fall within the category of a 'complaint or inquiry' under the FW Act; or else it may not. Analysis of the facts of the complaint alleged by the Applicant's pleading (and an examination of the relevant section) will be required to reach either available conclusion.

Part 2 – Case law

9. The main subject matter of this paper is recent superior Court decisions – especially appeals – construing section 341 of the FW Act and indicating its scope. There are three recent decisions in relation to section 341 of the FW Act, and I examine them to a limited extent in this paper. They are:

a. Cigarette Warehouse (8 February 2019);[4]
b. PIA Mortgage (24 February 2020);[5] and
c. Cummins v Keenan (24 November 2020).[6]

10. I deal with each of these Full Court decisions differently, though under headings below:

Cigarette Warehouse:

11. In Cigarette Warehouse the unsuccessful Respondent-employer complained in its appeal that the question of 'complaint and inquiry' had been wrongly decided at first instance, both at law and in relation to the pleaded case.

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[4] Cigarette & Gift Warehouse Pty Ltd v Whelan [2019] [2019] FCAFC 16; 268 FCR 46; 285 IR 290; per Greenwood, Logan and Derrington JJ.
[5] PIA Mortgage Services Pty Ltd v King 2020] FCAFC 15; 274 FCR 225; per Rangiah, Charlesworth and Snaden JJ.
[6] Cummins South Pacific Pty Ltd v Keenan [2020] FCAFC 204, per Bromberg, Mortimer and Anastassiou JJ.

12. The Applicant alleged 'he had a workplace right' in that '[he] *was able to make a complaint or inquiry in relation to his employment with* [the employer]'. That complaint concerned repeated requests by the employee, Whelan, for bonus payments and a bonus plan.

13. The Full Court examined complaints about the pleadings, about procedural fairness and the characterising of certain exchanges between one of the respondents (a Mr Beynon) and found that:

    a. the Applicant-employee (and the respondent on the Full Court appeal) had a contract of employment which referred to a bonus in the primary judgment;[7] and

    b. the employee was 'entitled' to make an inquiry in relation to the payment of bonus, or the failure to create a bonus plan, or to related subjects.[8]

14. In Cigarette Warehouse, the Full Court drew the clear conclusion that it was 'unremarkable and correct' that a complaint (in order to fall within section 341) must be founded on a source of entitlement, whether instrumental or otherwise.[9] Just how that 'ability' or (as the Full Court put it, 'an entitlement' to complain) is to be examined is not clear from the decision: the Full Court dispensed with the appeal grounds concerning this and did not greatly expand beyond it.

PIA Mortgage:

15. PIA Mortgage concerned the most senior employee managing a mortgage broking business. Chief amongst the Applicant's complaints were the contention that the employer had '*terminated* [the Applicant's] *employment in contravention of section 340* of the FW Act, based upon his complaint or inquiry.

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[7] Whelan v Cigarette & Gift Warehouse Pty Ltd [2017] FCA 1534; 275 IR 28, at [36] per Collier J.

[8] Cigarette Warehouse, above n4, at [28] per Full Court.

[9] For clarity, note the conclusion in these terms of Judge Curtain in Farrell v Choosewell, which is noted in this paper at fn1 above: see [44].

16. At trial, Mr King succeeded. The Employer appealed, alleging that Mr King did not make complaints or inquiries – and if he did, then these were not 'complaints or inquiries' to which section 341 applied.[10]

PIA: Snaden J dissent

17. Snaden J's dissent is significant. It follows two lines of reasoning:

a. *first*, on the question of the entitlement or capacity to 'complain', Snaden J found that both Shea No 6 (and the appeal, from that first-instance decision, in Shea v Energy Australia[11]) as summarised by the Full Court in Cigarette Warehouse did not deal with the question of 'ability' to make a complaint. Whilst not explicit, this appears to be characterised by the judge as a lacuna in the reasoning contained in Cigarette Warehouse; and

b. *next*, his Honour's dissent focuses not on the main subject matter of Cigarette Warehouse, which is the 'entitlement' which lies at the heart of the complaint. Rather, is Honour examines the question of the phrase "*is able to make*" (which is underlined in section 341(1)(c) above) in a particular sense: "was Mr King endowed with an ability to make a complaint or inquiry?"

18. This is a much narrower set of reasoning. In short, Snaden J would ask the question in relation to each 'complaint and inquiry' as to whether the instrumental basis:

a. gave an entitlement to complain; and

b. if no entitlement, in contract or other instrument (such as an enterprise agreement) existed, then the complaint itself would fall outside section 341, and any claim would fail.

PIA Mortgage: the majority decision

19. Rangiah and Charlesworth JJ formed the majority in PIA Mortgage. In effect, their Honours found that (to attract the protection contained in section 340), a complaint or inquiry must be:

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[10] PIA Mortgage, at [120], per Snaden J.
[11] [2014] FCAFC 167; (2014) 66 AILR ¶102–303; 242 IR 159.

a. underpinned by a source of 'entitlement or right'. In particular, their Honours found[12] that Dodds-Streeton J in Shea No 6 found that the word 'able' in section 341 referred to an entitlement or right;

b. a consequence of this analysis of Shea No 6, is that absent such 'entitlement or right', the complaint is not effective to engage section 341 at all. The underpinning of such a complaint[13] may be instrumental, such as in a contract of employment, industrial instrument or legislation. The Court left open the possibility of there being other sources of such an 'entitlement or right' without specifying what these were or even what they might be; and

c. as an overview, the distinction between Snaden J's dissent and the majority decision in PIA Mortgage may be put shortly: Snaden J would not allow any 'complaint' to fall under section 341 unless there were a separate entitlement to complain (such as under a dispute resolution mechanism, in an enterprise agreement.) By contrast, the majority of Rangiah and Charlesworth JJ found that does not to be an entitlement or right to complain, but there does need to be an entitlement or right to complain about.

20. Such a complaint must also be made genuinely and in good faith (for example, a spurious complaint made solely for the purpose of attracting the section 340 protection would not qualify).[14] It is significant to note: any practical difficulties in inferring (or even proving) the intention of an applicant were not explored in the majority judgment of Rangiah and Charlesworth JJ.

21. When taken as a whole, PIA Mortgage is a striking decision. On the one hand, a majority and minority of judges disagreeing as to the outcome is not at all novel – it is commonplace in contested Full Court appeals. What is relatively unusual is that the majority and the dissenting judge took such diametrically opposed views about the meaning of a relatively simple legislative provisions. These provisions in the FW Act have been law since enactment, which at the time of writing is longer than a decade.

22. In the case of Snaden J, his Honour did not merely take issue with the conclusion of the majority; rather, it travelled to the extent of even disagreeing with the very approach of the majority, as well as the outcome. It is clear that the meaning of the statement made by Dodds-Streeton J that a complaint "must be underpinned by an entitlement or right" (as is

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[12] PIA Mortgage, above n5, at [13].

[13] Which was referred to as the 'source' of the right, in Farrell v Choosewell, see fn1 above, particularly per Judge Curtain at [40]-[51] of the decision.

[14] PIA Mortgage, above n5, at [19]-[20]. Cf Roohizadegan v TechnologyOne Limited (No 2) [2020] FCA 1407, at [57]-[60] per Kerr J. As is widely known, Roohizadegan is subject to a forthcoming appeal.

emphasised in the quote in paragraph 7 of this paper) is sufficiently ambiguous as to require further expansion and analysis.

Cummins v Keenan

23. More recently, the Full Federal Court delivered judgment in Cummins v Keenan. In that decision the majority (Bromberg and Mortimer JJ) took the time to disagree with the majority in PIA Mortgage.

Cummins v Keenan: Bromberg and Mortimer JJ as majority

24. In Cummins v Keenan was an appeal against a first-instance decision in the Federal Circuit Court of Australia. In that decision, then Judge Wilson found that section 340 of the FW Act has been breached by the employer; and ordered reinstatement of the employee-Applicant, plus substantial relief.[15] The appellant made claims including that Mr Keenan was not able to make a complait' and that these complaints did not constitute the exercise of a 'workplace right' as the legislation required.[16]

25. On appeal, the majority judges were Bromberg J (writing the main judgment) and Mortimer J, agreeing.[17] The majority set aside the first-instance decision on unrelated grounds, and ordered urgent mediation before a remitter to the Federal Circuit Court.

26. The majority in Cummins v Keenan found:

a. contra Shea No 6, that either of the limitations imposed by Dodds-Streeton J upon the terms of section 341 are not supported by the text of that section;[18]

b. whilst the majority in Cummins v Keenan allowed the appeal on other grounds, if required the majority would not have followed PIA Mortgage in respect of its conclusion about the operation of section 341 of the FW Act, and would have held that the primary judge (in respect of the question of 'workplace right') was not in error.[19] In effect, the

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[15] Keenan v Cummins South Pacific Pty Ltd [2018] FCCA 2600, in particular at [384].
[16] Cummins v Keenan, fn6 above at [7] per Bromberg J.
[17] Cummins v Keenan, fn6 above. As for Bromberg J, see [50] and following; and Mortimer J see [207]-[209].
[18] Cummins v Keenan, fn6 above at [20] per Bromberg J.
[19] Cummins v Keenan, fn6 above at [67]-[68] per Bromberg J; and Mortimer J [209].

majority in this decision gave a hypothetical answer disputing the correctness of the previous full bench in PIA Mortgage.

Cummins v Keenan: Anastassiou J's dissent

27. Anastassiou J dissented on the construction of section 341 – and specifically, the rejection by Bromberg and Mortimer JJ of the majority decision in that case.

28. A summary of his Honour's finding is as follows:

a. his Honour urged compliance with the Full Court's finding in Pia Mortgage, noting that this was the law which bound the Full Court; unless it was demonstrably wrong. Whilst Bromberg J found that the majority was *demonstrably wrong*, Anastassiou J gave a detailed examination of the section, as founding his Honour's disagreement with that conclusion; and

b. whilst other complaints may have more tenuous basis, the 'PIP complaint' (also called the Third Complaint: which was a complaint by Mr Keenan that the employer had invoked a performance improvement plan) was not one. Rather, this had a contractual foundation, and therefore fell within section 341 of the FW Act.[20]

c. the conclusions in Cummins v Keenan on this subject are reduced in force. That is, they have the status of *obiter* given they do not guide the outcome of the deicsion in that case;

Conclusion

29. The disagreements between PIA Mortgage (and the Full Court in that case) and the majority in Cummins v Keenan are fundamental and irreconcilable. Neither is able to co-exist sensibly with the other.

30. This collision of reasoning means that there is a fundamental bifurcation in the law in relation to section 341 of the FW Act. In effect:

a. the question as to what amounts to a pre-requisite for an employee to 'make a complaint' remains temporarily unresolved; whilst the conclusions by the majority in Cummins v Keenan on this subject have the status of *obiter* (given they do not guide

[20] Cummins v Keenan, above at fn6, at [297] onwards, per Anastassiou J.

nor form part of the outcome of the decision in that case) they do form a comprehensive response to attempts to restrict the operation of the general protections regime;

b. usefully, they chart how several members of the Federal Court are likely to decide similar cases in future, given those views are now set out in PIA Mortgage and Cummins v Keenan itself. It is likely that other judges remain to be persuaded.

31. As a result of the irreconcilable nature (between this aspect of Snaden and Anastassiou JJ's dissents) there is only one likely consequence: that a litigant will seek to ventilate the differing views of 'complaint and inquiry' in section 341, and shed light on the two diametrically opposed views of Shea (No 6) and Cigarette Warehouse. These competing constructions of the section can only be reconciled by the High Court. In my view, the High Court is very likely to extend special leave to a suitable case

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