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'It's a Discrimination Law Julia[1], But Not As We Know It': Part 3-1 of the *Fair Work Act*

Simon Rice *
Cameron Roles *

Abstract

At first glance, Part 3-1 of the Fair Work Act 2009 *(Cth) seems to overlap with long-established anti-discrimination laws, offering protection against adverse, attribute-based conduct in employment. On close analysis, however, it turns out to be a new and quite different regime. Although the* Fair Work Act *offers a simple alternative to dated and complicated anti-discrimination laws, its provisions are at times overly-simple, raising uncertainty about how they will operate. Our analysis leads us to conclude that the approach to discrimination protection in the* Fair Work Act*, while an important addition to the remedies available to Australian workers, is compromised by failing to take account of lessons learned in the long history of anti-discrimination law.*

Keywords

Adverse action; anti-discrimination law; direct discrimination; indirect discrimination; dismissal protections; employment discrimination; employment law; Fair Work Act Australia; labour law; labour rights; victimisation.

Introduction

There have for some years been anti-discrimination provisions in industrial law, limited to termination of employment on the basis of certain defined attributes (race, sex and so on). The overlap with anti-discrimination legislation's own provisions regulating termination of employment has been of little practical relevance for employees except in the few weeks after dismissal, when an employee is required to choose a jurisdiction. If a dismissed employee received advice, it was usually to commence unfair dismissal proceedings in the industrial jurisdiction, and to gain a quick and generally effective outcome that was usually good advice. Remedies for discrimination in the course of employment, and in the arrangements for deciding who would be employed, have however been found only in anti-discrimination law, not in industrial law.

* ANU College of Law, The Australian National University

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The *Fair Work Act 2009* (Cth) (*FW Act*) has established a new regime for protection against discrimination, where the overlap between anti-discrimination laws and the discrimination provisions in employment law seems substantial. In fact, aspects of the *FW Act* exceed what is on offer to an aggrieved worker under anti-discrimination legislation. But the initial sense of overlap is deceptive, and closer scrutiny pares back the extent of the overlap and highlights the different nature of the *FW Act* discrimination provisions. What appears to be a convergence of anti-discrimination laws in the area of employment turns out to be the creation of a separate, quite different form of protection.

The provisions of the *FW Act* which (appear to) deal with discrimination in employment, ss 342 and 351, are a significant innovation in Australian labour law. The *FW Act* brings together concepts from two previously separate areas of employee protection — anti-union victimisation and unlawful termination — to create a new, general protection against attribute-based conduct in employment. For reasons we explain below, the description in the *FW Act* of this attribute-based protection as a 'discrimination' provision is misleading, and it is better described as 'attribute-based protection'.

This innovation in the *FW Act* comes with both exciting possibilities and significant causes for reservation. The possibilities lie in the fact that attribute-based protection in the *FW Act* offers employees, in some circumstances, a refreshingly simple alternative to overly complicated anti-discrimination laws. The reservations concern the absence of a definition of the term 'discriminate', the incoherency of the exceptions and exemptions, and the Act's simplistic defence of 'inherent requirements'. In this article we analyse the new attribute-based protection in the *FW Act*, comparing it to similar provisions in Australian anti-discrimination law.

In Part 1 we set out the history of federal industrial provisions from which the attribute-based protection is derived — those which have protected employees against anti-union victimisation, and those which have protected against attribute-based unlawful termination. The *FW Act* refers to discrimination in two ways, as attribute-based protection and as a form of adverse action. In Parts 2 and 3 below we explore the meaning(s) of 'discrimination' as the term is used by the *FW Act*, by reference to the well-established form and content of Australian anti-discrimination law. A difficult technical question is whether the concept of 'discrimination' in the *FW Act* has the same complex meaning it has in anti-discrimination law. We conclude that 'discrimination' in the *FW Act* is clearly of similar effect to what is known as direct discrimination and, further, that it arguably extends to what is known in anti-discrimination law as indirect discrimination, thereby considerably broadening the reach of protections.

The *FW Act* cross-refers to Australian anti-discrimination law as a short cut to establishing exceptions to the attribute-based protection. In Part 4, we point out that this is an overly-simple device, with the (presumably) unintended consequence of opening up the *FW Act* jurisdiction to the near-incoherent collection of provisions in anti-discrimination law (exceptions, exemptions, defences and special measures) which render discriminatory conduct 'not unlawful'. We observe as well that the similarly simple reference to the 'inherent requirements' of

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a job fails to incorporate some of the safeguards in anti-discrimination law. The limited range of personal attributes which are prescribed as reasons for unlawful behaviour under the *FW Act* is a further example of the extent to which the *FW Act* is different from, and less comprehensive than, anti-discrimination law; we address these differences in Part 5.

We conclude that attribute-based protection in the *FW Act* is a real and viable alternative to the complexity of proving discrimination under anti-discrimination law in Australia. Its usefulness is, however, compromised by failure to take account of the lessons learned in anti-discrimination law as to how best to anticipate the circumstances in which employees can be discriminated against. Nevertheless, the *FW Act* — not a discrimination law as we know it — is an important addition to the remedies available to Australian workers.

1. Historical Context for Adverse Action under the *FW Act*

Broadly speaking, workplace laws in Australia have been concerned primarily with terms and conditions of employment at work and, in more recent times, with an employer's obligations on termination of employment.[2] The broader concept of equality in the workplace has been the separate domain of anti-discrimination law.[3] Apart from when an employee's employment was terminated for a discriminatory reason, an employee who believed that they had been discriminated against in employment because of a personal attribute (their race, sex, etc.) was required to pursue a claim under anti-discrimination law. All this changed on 1 July 2009, when the majority of the provisions of the *FW Act* came into effect, including a new protection for attribute-based conduct in the combined operation of ss 342 and 351.

In this Part we trace how the Labor government came to create this new protection, amalgamating concepts previously located on the one hand in provisions dealing with the victimisation of trade unionists and, on the other, in provisions dealing with unlawful termination on the ground of a prescribed attribute.

Commonwealth Industrial Laws

For most of the twentieth century, Commonwealth industrial laws were made under the power to make laws with respect to conciliation and arbitration for the prevention and settlement of interstate industrial disputes (for the historical development of s 51(xxxv), see Kirby 2004). The Commonwealth had no power to legislate directly with respect to industrial relations, while the States have had the power, except that under s 109 of the Constitution a Commonwealth law prevails to the extent of any inconsistency over a State law.

The *Conciliation and Arbitration Act 1904* (Cth) created a system in which interstate industrial disputes were resolved by an independent industrial tribunal.[4] Awards made by the tribunal to settle industrial disputes contained conditions of employment which would apply to all parties to the dispute,[5] including employers and employers' associations, trade unions, the members of trade unions, and non-unionists employed by the relevant employers.[6] These awards, along with the employees' contracts of employment, set the bulk of employee

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terms and conditions, and dominated industrial relations in Australia for most of the twentieth century.[7]

Protection from Anti-Union Victimisation

At the outset of the conciliation and arbitration system it was recognised that unions and their members would need protection from the conduct of capricious employers who might wish to undermine the award system (Quinn 2004: 5–6). Essentially to protect freedom of association, and more generally to protect employees from victimisation because of their union membership and activities, s 9 of the *Conciliation and Arbitration Act 1904* (Cth) prohibited dismissal from employment if it was done because of union membership or an entitlement to the benefit of an award, order or agreement.[8] The range of prohibited employer conduct was broadened by amendment in 1914, giving trade unionists protection against not only dismissal, but also against an employer's causing injury in employment and/or altering an employee's employment to their prejudice.[9] In 1988, two more prohibitions were added: to refuse to employ a person because of their union activities, and 'to discriminate against a person in the terms or conditions on which the employer offers to employ the person' (s 334(2) *Industrial Relations Act 1988*).[10]

Just as coverage of employers' prohibited anti-union conduct expanded over the years, so too did the range of the employees' protected union-related activity. By the time of the introduction of the *Industrial Relations Act* 1988 (Cth), protection extended to union delegates, to those appearing or proposing to appear as witnesses in proceedings, and to officers, delegates or members of a trade union acting to further the union's industrial interests (ss 334(1), 334(2) *Industrial Relations Act 1988*). These anti-union victimisation protections were extended to cover the freedom *not* to be a union member (Part XA *Workplace Relations Act 1996* (Cth); Owens and Riley 2007: 475).[11] They continued in operation up until they were incorporated into the *FW Act* as we describe below.[12]

Protection for Attribute-Based Unlawful Termination

In 1993, the then Labor government introduced a new employee protection in s 170DF(1)(f) of the *Industrial Relations Reform Act* 1993 (Cth), prohibiting employment termination on the basis of a prescribed attribute (race, sex etc.). While these have commonly been referred to as the 'unlawful termination' provisions, reflecting the title of Part VIA, Division 3 Subdivision C, we have called them here '*attribute-based* unlawful termination' provisions to highlight the basis on which they operated.

The attribute-based unlawful termination provisions gave effect to Australia's obligations under International Labor Organisation conventions, and followed closely the terms of Article 5 of the *Termination of Employment Convention 1982 (No 158)* (C.158). They were enacted pursuant to the external affairs power in s 51(xxix) of the Constitution, and continued in operation until they were incorporated into the *FW Act*.[13]

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Consolidation in the FW Act

The immediate successor to the *Conciliation and Arbitration Act 1904* and the *Industrial Relations Act 1988* was the Coalition government's *Workplace Relations Act 1996* (Cth) ('*WR Act*'). By the time a Labor government came to power in November 2007 the *WR Act* protected employees' rights in a range of circumstances, as well as prohibiting anti-union victimisation (Part 16), and attribute-based unlawful termination (s 659(2)(f)). It prohibited employer conduct such as coercion and duress in relation to agreement making (s 400), the reckless making of false or misleading statements in relation to agreements (s 401), dismissal for refusing to sign a workplace agreement (s 659(2)(g)), and dismissal and other prejudicial treatment for taking protected industrial action (s 448). These various provisions were, however, scattered throughout the legislation in a patchwork of workplace regulation.

Under the new Labor government, elected on a platform of industrial law reform, the drafters of the *FW Act* tried to simplify the maze of provisions by consolidating them into Part 3-1, *General Protections*. As a result, Part 3-1 is now home to a range of prohibitions against employer conduct such as coercion (ss 343, 348, *FW Act*), undue influence and pressure (s 344), knowing and reckless false or misleading representations (ss 345, 349), inducement regarding industrial association (s 350), and dismissal for temporary absence (s 352). Significantly for our purposes, Part 3-1 is also home to the prohibitions against both anti-union victimisation, and attribute-based unlawful termination, which have been moulded around the single concept of 'adverse action' (s 342).[14] We set out the legislative definition of 'adverse action' later in this article, but for present purposes it is sufficient to say that the conduct which is adverse action is a combination of the conduct which was trade union victimisation — dismissal from employment, injury in employment or prejudicial alteration of an employee's employment — and the conduct which was unlawful termination because of a prescribed attribute.

The effect of moulding the prohibitions against both anti-union victimisation and attribute-based termination around a single concept of 'adverse action' is to make the personal attributes, which were previously grounds only for unlawful termination, into grounds for the much broader range of conduct encompassed by adverse action. Whereas an employee or prospective employee previously had to go to anti-discrimination law for a remedy when an employer's conduct (other than termination) was because of an employee's attribute, there is now a remedy for 'adverse action' under the *FW Act*. This gives Part 3-1 of the *FW Act* at least the appearance of being a new anti-discrimination law in Australia.

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2. 'Discrimination' in s 351 *FW Act*

Section 351 sets out the reasons for which 'adverse action' described in s 342 is unlawful:

> 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.

In short, the conduct which is adverse action in s 342 is any of dismissal, causing injury, prejudicially altering an employee's position, and discrimination. We return below to look at this in more detail, particularly the use of the term 'discrimination' in that context. Our focus at this stage is on the operation of s 351.

Section 351 is the legacy of the previous attribute-based termination protection, the history of which we outlined above. Subject to some observations we make in Part 5 below regarding the particular attributes that have been listed, the provision is a close copy of what was s 659(2)(f) *WR Act*. But where the previous provision had prohibited an employer from *terminating employment* because of an attribute, an employer is now prohibited from taking (the much broader) *adverse action* because of an attribute. In doing so s 351 looks like — but as we explain below it is not — an anti-discrimination provision such as is found in Australia's extensive suite of anti-discrimination laws.

Just Plain Prejudice

Because it makes conduct unlawful when it is done because of a person's attribute, s 351 has the superficial appearance of what anti-discrimination law knows as 'direct discrimination', even to the extent that it uses the same language the High Court has said is the correct test for causation in anti-discrimination law: 'because of' (*Purvis v New South Wales* (2003) HCA 62; 217 CLR 92). But despite the heading to s 351, 'Discrimination',[15] it is not a discrimination provision as we know it. Rather, it is a straight-out prohibition on attribute-based treatment.

To establish that attribute-based adverse action is unlawful under s 351, the relevant inquiry is simply 'why did the employer take the adverse action?'. It is not necessary to inquire how an employee was treated compared to anyone else, or to have regard to another employee at all. If an employee is dismissed because of, say, his or her race, then the dismissal is unlawful; if an employee's position is prejudicially altered, because of, say, his or her carer's responsibilities, the conduct is unlawful. The only issue to be resolved under s 351 is cause-and-effect, proving the causal link between the prescribed reason and the adverse action.

In anti-discrimination law, by way of contrast, conduct is not unlawful only because the reason for it is a prescribed attribute. It is usually the case that an employee must show as well that they were treated less favourably in the same circumstances than someone *without* their attribute was treated.[16] In other words, the unlawfulness of the conduct depends on making a comparison with

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another employee.[17] A representative example is s 5(1) *Sex Discrimination Act 1984* (Cth):

> a person … discriminates against another person … on the ground of the sex of the aggrieved person if, by reason of
>
> (a) the sex of the aggrieved person …
>
> the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

By way of contrast, the approach in the *FW Act* is appealingly simple: to establish unlawful conduct, show there was conduct, and show that the reason for the conduct is a prescribed reason. This is not 'discrimination' as we know it, but straightforward attribute-based conduct; a better description of the provision might be 'prejudice' (Smith 2008).

Proving 'Because'

Under the *FW Act* an employee claiming to have been subject to adverse action does not have to show, as they would under anti-discrimination law, how a comparator would have been treated in the same circumstances. But they do have to show *why* the employer engaged in the adverse action. Proving attribute-based adverse action does require proof of the causal link — proof of 'because of' — just as a complainant must do in discrimination law (*Purvis v New South Wales* (2003) HCA 62; 217 CLR 92).

It can of course be very hard to know — let alone to prove — what was on another person's mind and why they acted as they did: only the person who perpetrated the treatment knows why they did it, and proving that without their co-operation is very difficult (Hunyor 2003; Senate Standing Committee on Legal and Constitutional Affairs (2008) [6.46]–[6.51] Recommendation 22). In anti-discrimination law a common device for determining why an employer acted as they did is to draw an inference from evidence as to how the employer treated or would have treated an actual or hypothetical employee in substantially the same circumstances. The legal and evidentiary onus is on the employee to show this, a demanding and often insurmountable burden. An actual comparator will necessarily be a fellow employee or ex-fellow employee, and so may be unwilling to cooperate in giving the required evidence, and commonly there is no actual comparator, leading to the conceptually difficult exercise of relying on a hypothetical.

A comparative exercise is one way, but not a necessary way, to demonstrate the reason for another's conduct: it is merely an aid to reasoning, if a powerful one.[18] But most anti-discrimination legislation in Australia elevates the comparative exercise to a necessary element of proving a claim for direct discrimination, despite recommendations to avoid the comparative exercise having been made as long ago as 1999, and as recently as 2008. (NSW Law Reform Commission (1999) [3.51]–[3.57] Recommendation 3; Standing Committee on Legal and Constitutional Affairs, (2008): [3.15]–[3.23], [11.12], [11.16] Recommendation 5).

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The fact that the *FW Act* does not require a comparative exercise to establish the reason for an employer's conduct may seem an advantage, but nevertheless it requires proof of the reason for the employer's conduct. Precisely because this is so hard to prove, the *FW Act* offers what anti-discrimination law in Australia does not: a reverse onus of proof.

Reverse Onus of Proof

The reverse onus has a long and unremarkable history in Australian industrial law, dating back to s 5(4) of the *Conciliation and Arbitration Act 1904* (Cth) (*Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 266–271), and appearing most recently in the immediate predecessors to the *FW Act*.[19] Northrop J explained the importance of reversing the onus in *Heidt*, saying that 'the circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly with the knowledge of the employer' (*Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 267). Recognition of this continues, with provision of a reverse onus of proof now in s 361 of the *FW Act*.

In the absence of a reverse onus, proving the reason for an employer's conduct in anti-discrimination law is notoriously difficult (Allen 2009). In the ACT and Victorian anti-discrimination laws, which do not require comparative reasoning and, like the *FW Act*, prohibit direct prejudicial conduct because of an attribute, there is no provision for a reverse onus (s 8(1) *Discrimination Act 1991* (ACT); s 8(1) *Equal Opportunity Act 2010* (Vic)). As a result, even though a comparative exercise is not explicitly required in those statutes, a complainant has little choice but to resort to that difficult reasoning process, and challenging evidentiary exercise, to try to show why the employer acted as they did. The reverse onus is a logical complement to the absence of a comparative test, and makes proving attribute-based adverse action under the *FW Act* a clearly preferable alternative to proving unlawful conduct under anti-discrimination law.

Multiple Reasons

On the question of proving why an employer acted as they did, there is a small but important further point of differentiation between the *FW Act* and anti-discrimination law in some cases. There may of course be a number of reasons for an employer's conduct. Under some anti-discrimination laws it is not enough that the prohibited reason — the personal attribute — is a reason for the conduct, it has to be a substantial reason (s 8(2)(b) *Equal Opportunity Act 1995* (Vic); s 8(2)(b) *Equal Opportunity Act 2010* (Vic); s 10(4) *Anti-Discrimination Act 1991* (Qld)). The *FW Act* is less demanding in saying, in s 360, simply that for purposes of establishing the reason for adverse action, 'a person takes action for a particular reason if the reasons for the action include that reason'.

3. 'Discriminates' in s 342(1) *FW Act*

Separately from the heading of s 351, the word 'discriminates' is used within the idea of adverse action in s 342. The meaning of adverse action is set out in a table in s 342(1):

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Item	Column 1	Column 2
	Adverse action is taken by . . .	**if . . .**
1	an employer against an employee	**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.
2	a prospective employer against a prospective employee	**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.

The conduct described in s 342(1) Items 1(a)–(c) for current employees, and in s 342(1) Items 2(a) and (b) for prospective employees, is familiar from the history of freedom of association and protection against anti-union victimisation noted above. But differently from these provisions, the prohibition in s 342(1) Item 1(d) — not to discriminate between employees — has no industrial law history; it is a new provision in Australia's federal industrial law, and is not 'discrimination' as we know it. What does it mean?

The Meaning of 'Discriminate'

The *FW Act* does not define 'discriminate' for this (or any other) purpose, and so takes a worryingly simple approach to a complex idea.[20] The aphorism attributed to Einstein is apt: 'A scientific theory should be as simple as possible, but no simpler'.

In the absence of a definition, it might be reasonable to turn for an answer to long-standing Australian anti-discrimination law, in which the words and phrases have finely honed meaning, responsive to a wide range of circumstances, if not always construed by the courts as beneficially as they might have been (see Gaze 2002; Rees, Lindsay and Rice 2008: 30; Rice 2010; Smith 2010b). But this accumulated jurisprudence is not easy to work with. Anti-discrimination law has become extremely complex, in part because it is dealing with conceptually difficult issues (Smith 2010b): it is not easy to codify standards of moral behaviour, with allowances for exceptions and excuses, in a way that makes the standards amenable to being contested in a conventional adversarial system. That is, however, what anti-discrimination law has tried to do, and there are now well-established technical understandings of what 'discrimination' means in Australia.

Gaze and Chapman (2009) suggest it is not appropriate to look to Australian anti-discrimination law to understand the *FW Act*, saying that to do so is 'difficult to justify since parliament has not included a definition or any direction to draw on other areas of law'. But legislation rarely contains such a direction, and where else would one look to understand the 'rigid and often highly complex and artificial manner' in which discrimination is defined in anti-discrimination law (*IW v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J), other than to the extensive jurisprudence on just that term? Before looking elsewhere,

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however, the first question is whether the word 'discriminate' in s 342(1) Item 1(d) has its 'ordinary meaning' (see s 15AB Acts Interpretation Act 1901 (Cth)).

It is not clear what the 'ordinary meaning' of the word 'discriminate' is in the *FW Act*. In *Street v Queensland Bar Association* (1989) Gaudron J pointed out that, in its ordinary meaning, 'discrimination refers to the process of differentiating between persons or things possessing different properties' (168 CLR 461 at 570). Rees et al (2008: 70) have commented that

> 'When used in this manner the word "discrimination" is typically governed by the preposition 'between' … By way of contrast, the word 'discrimination' is used in a pejorative sense in anti-discrimination legislation and it is typically followed by a different preposition: it is usual to speak of discriminating *against* someone on a forbidden ground such as race or sex'.

Section 342(1) Item 1(d) refers to an employer who 'discriminates *between* the employee and other employees' (emphasis added), and so the word might have the ordinary meaning of an employer who differentiates between employees. That would give rise to some odd results: it would mean that merely treating an employee 'differently' from another employee would be adverse action, not only if the treatment was favourable but even if it was more favourable than the already favourable treatment of other employees.

The context in which 'discriminate' appears in s 342(1) Item 1(d) gives a strong indication that the word in fact has a pejorative meaning. First, the conduct being identified is described as *adverse* action. Secondly, the same word 'discriminate' is used in s 342(1) Item 2(b), where, in the equivalent provision for prospective employees it is, inexplicably, phrased differently — and pejoratively — to be discrimination 'against' a person.[21] Finally, each of the provisions that specify reasons for which adverse action will be unlawful — ss 340 (workplace right), 346 (industrial membership) and 351 (personal attribute) — provide that an employer must not take such action '*against* a person who is an employee … ' (emphasis added).

Having regard therefore to 'its context in the Act and the purpose or object underlying the Act' (s 15AB(1)(a) *Acts Interpretation Act 1901* (Cth)), it seems that 'discriminate' in s 342(1) Item 1(d), despite being discrimination 'between' employees, has the pejorative meaning, familiar from anti-discrimination law, of an employer discriminating 'against' an employee. The 'discrimination' in s 342(1) Item 1(d) seems to be treatment that adversely affects an employee relative to another employee, very like the concept of direct discrimination in anti-discrimination law. Standing against this interpretation is the word 'between'. But, as we noted above, to take its presence as meaning that mere differentiation could be adverse action would be a surprising result, at odds with the context and general intent of the 'adverse' action provisions.

A Comparison with Anti-Discrimination Law

At the threshold of anti-discrimination law's complexity in trying to anticipate the different ways people are treated unequally are alternative meanings of 'dis-

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criminate'. One is direct discrimination which is, very like the probable meaning of s 342(1) Item 1(d), to treat a person less favourably than another because of their personal attribute. The other is indirect discrimination, which is (to put it more simply than anti-discrimination legislation does) to require a person to comply with an unreasonable condition that most others without that person's particular attribute are able to comply.

Although discrimination under s 342(1) Item 1(d) looks like direct discrimination, there are differences, and they highlight the *FW Act*'s overly simple approach. One difference is that anti-discrimination law explicitly negates the possibility that 'discrimination' could mean mere differentiation, by providing that unlawful discrimination is necessarily conduct which causes detriment (eg s 15(2)(d) *Disability Discrimination Act 1992* (Cth)). We have suggested that the proper interpretation of the word 'discriminate' in context leads to the same position in s 342(1) Item 1(d), but the word 'between' is problematic and it should not be necessary to rely on the interpretation we have set out above to arrive at this understanding. In this respect the *FW Act* is less helpful than anti-discrimination law.

Another difference between s 342(1) Item 1(d) and anti-discrimination law is that by identifying conduct which occurs between an employee and 'other employees', the *FW Act* makes an actual comparison among a number (at least three) employees. This overly-simple provision will not operate when a workplace has only one or two employees, nor when all employees in a workplace are treated in the same (detrimental) way. Anti-discrimination law is drafted either to avoid the need for a comparison by allowing an employee simply to show that they suffered detriment (s 8(1)(a) *Discrimination Act 1991* (ACT); s 8(1) *Equal Opportunity Act 2010* (Vic)), or, more commonly, to enable a comparison to be made with a hypothetical employee and the way they would have been treated in substantially the same circumstances (eg s 6 *Disability Discrimination Act 1992* (Cth)).

It may be, however, that these limitations are of little concern because, in light of the breadth of coverage of the other types of adverse action in s 342(1) (the anti-victimisation provisions), an employee may not need to rely on 'discrimination' in s 342(1) Item 1(d).

As we described above, the other types of adverse action in s 342(1) have a long history in industrial law, and their meaning is well understood. The High Court, for example, has held that the phrase 'injure an employee in his or her employment', now found in s 342(1) Item 1(b), means 'injury of any compensable kind'. Similarly the concept 'altering the position of an employee to an employee's prejudice', now found in s 342(1) Item 1(c), is 'a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question' (*Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 4).

It is hard to see that s 342(1) Item 1(d) casts a wider net than the anti-victimisation provisions.[22] Subject to what we say next about 'indirect' discrimination, an employee would rarely have to resort to the prohibition in s 342(1) Item 1(d).

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'Indirect' Discrimination

As we said above, anti-discrimination law recognises two different ways in which a person can be discriminated against: directly, when conduct is 'because of' a prescribed reason, and indirectly, when a person is required to comply with an unreasonable condition with which most others without that person's particular attribute are able to comply. As we have just described, 'discriminate' in s 342(1) looks very like direct discrimination. Is it possible that 'discriminate' in s 342 — both Items (1)(d) and (2)(b) — could also be understood to mean indirect discrimination? If so, it would considerably broaden the reach of s 342(1).

In its early days in the 1970s, anti-discrimination law recognised that direct discrimination is not a sufficiently wide concept to encompass the many more subtle ways in which a person can be disadvantaged because of a personal attribute (see Rees, Lindsay and Rice 2008: 119–123). It is one thing for a female employee to be, say, refused a promotion because of her sex; it is another for her to be ostensibly eligible for promotion but in fact to be ineligible because the position has duties which she cannot carry out but most men can. The latter circumstance is as much 'discrimination' as the former, but less obvious and for that reason more insidious.

The particular way that Australian anti-discrimination law has attempted to deal with the idea of indirect discrimination is, unfortunately, very complicated. It usually prescribes in some detail the nature of the requirement or condition which is imposed, the circumstances in which it is imposed, and the way it must operate if it is to be considered as having discriminatory impact (Rees, Lindsay and Rice 2008: 123–144). A typical provision is s 6(1) of the *Disability Discrimination Act 1992* (Cth):

> … a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
>
> (b) because of the disability, the aggrieved person does not or would not comply, or is not able or would not be able to comply, with the requirement or condition; and
>
> (c) the requirement or condition has, or is likely to have, the effect of disadvantaging persons with the disability.[23]

There is nothing in the *FW Act* to warrant reading 'discriminate' in s 342(1) as having this complex and technical meaning, and it would be a big and probably unwarranted step to go from the simple use of the word 'discriminate' in s 342(1) to the terms of indirect discrimination in Australian anti-discrimination law. But that may not be necessary. A provision such as s 6(1) of the *Disability Discrimination Act* is merely illustrative of an idea, of a type of undesirable conduct and its effect. It is arguable that the word 'discriminate' itself imports coverage of what anti-discrimination law calls indirect discrimination, without having

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to spell it out in the cumbersome and prescriptive way that anti-discrimination law does.

There are three strong indications that the idea of discrimination in s 342(1) encompasses what anti-discrimination law calls indirect discrimination. The first is in the international treaty origins of the idea of discrimination in industrial law. Art 1(a) of the International Labour Organisation's *Discrimination (Employment and Occupation) Convention (No 111)* (C.111) provides that 'For the purpose of this Convention the term discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. This is a very broad idea of discrimination, not limited by, and quite possibly encompassing, the prescriptive categories of direct and indirect discrimination.

In *Flight Attendants' Association of Australia v Qantas Airways Limited - PR972225*, the Australian Industrial Relations Commission was asked to certify an agreement under what was then Part VIB of the *WR Act*. Section 170LU set out reasons why the Commission would be obliged to refuse to certify an agreement; specifically, s 170LU(5) gave effect to C.111 in saying that 'the Commission must refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee … because of, or for reasons including, race, colour, sex (etc)'.[24] The Commissioner considered this provision, stating that 'the discrimination referred to in section 170LU(5) includes indirect discrimination' ((2006) AIRC 282, [36]), a view which was noted but not contested on appeal (*Flight Attendants' Association of Australia v Qantas Airways Limited — PR973846*, (2006) AIRC 537, [11]).

Judicial Registrar Patch had come to the same view on a more considered basis when, in *Sapevski v Katies Fashions (Australia) Pty Ltd* ((1997) IRCA 219), he had to decide under what was then s 170DF of the *Industrial Relations Reform Act 1993* (Cth) whether employees' employment was terminated for reasons of their sex. Giving effect to Article 5 of C.158, s 170DF(1)(f) provided that

> An employer must not terminate an employee's employment for any one or more of the following reasons, or for reasons including any one or more of the following reasons: race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin …

The Judicial Registrar noted that 's 170DF(1) does not contain within it any distinction between "direct" and "indirect" discrimination such as that which is to be found in the NSW Anti Discrimination Act 1977' and said that '[t]he question therefore arises as to whether s 170DF(1) of the Act prohibits "indirect" discrimination — it being clear that it prohibits "direct" discrimination'. He took account of extensive international material which analysed 'discrimination' in ILO conventions, and decided that the effect of s 170DF(1) was to prohibit termination of employment by reason of the employee's sex 'regardless of whether the gender basis of the reason arises directly or indirectly'.

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The second indication that the idea of discrimination in s 342(1) encompasses indirect discrimination is similarly based on the terms of an international treaty, and as well on related Australian jurisprudence in anti-discrimination law. The same question we are asking here — whether the word 'discriminates' in an international treaty, enacted into Australian law, encompasses the idea of indirect discrimination — has been asked in relation to the *Racial Discrimination Act 1975* (Cth) (RDA).

Section 9(1) of the RDA defines discrimination in terms, taken from the *Convention for the Elimination of All Forms of Racial Discrimination,* which are very similar to those in Article 1 of C.111: 'distinction, exclusion, restriction or preference … which has the purpose or effect of nullifying or impairing etc'. Because of concerns that the word 'discrimination' may be limited in its scope, s 9(1A) was inserted to 'ensure that the RDA extends to indirect discrimination as distinct from direct discrimination' (Melham 1990). But in *Australian Medical Council v Wilson*, Sackville J was not sure the amendment was necessary. Citing commentary by Meron (1985), he said:

> The view that, in the absence of s.9(1A), the *Racial Discrimination Act* would not cover indirect discrimination is not necessarily supported by the terms of the Convention which the *Racial Discrimination Act* is intended to implement. The language of the Convention, particularly the preamble and arts. 2 and 5, suggests that it was intended to require state parties to address indirect discrimination and not merely what can be described as " 'direct' discrimination" … it is at least arguable that the definition of "racial discrimination" in art.1(1) of the Convention, which is incorporated into s.9(1), was intended to apply to indirect as well as to direct discrimination ((1996) FCA 1618, (1996) 68 FCR 46 at 74).

Finally, an argument that 'discrimination' in s 342(1) encompasses the idea of indirect discrimination is supported by the approach taken in Canadian jurisprudence. In Canada, anti-discrimination legislation does not prescribe narrow, technical categories (Smith 2009, 2010a). Instead, much like s 342(1) of the *FW Act*, it relies simply on the word 'discriminates', confident that the word will be understood sufficiently broadly to encompass what anti-discrimination law in Australia knows as 'direct' and 'indirect' discrimination.

If indeed the word 'discriminates' in s 342(1) Item 1(d) encompasses what anti-discrimination law calls indirect discrimination, then far from having very little work to do, as we suggested above when considering its operation as a direct discrimination provision, it considerably expands the idea of adverse action. We can illustrate this by reference to one of the leading Australian cases of indirect discrimination, *Australian Iron and Steel Pty Ltd v Banovic and Others* (1989) 168 CLR 165. AIS had, prior to 1980, discriminated between men and women when offering employment and so men had been employed for much longer than women had been. When a downturn occurred in 1982, AIS applied the 'last on first off' rule for selecting employees for redundancy. This was a neutral requirement on its face — it applied equally to all workers — but it was a rule which disproportionately affected women workers. The women complained

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of discrimination, and the High Court upheld their complaint, saying that the women had been the subject of indirect discrimination because, in the circumstances, they were less able than were men to comply with the 'last on first off' requirement.

If we look at *AIS v Banovic* under the *FW Act* adverse action provisions, it is clear that the women suffered adverse action under, say, s 342(1) Item (c), because their positions were altered to their prejudice. However the reason for the adverse action was the 'last on first off' selection method, not the women's sex, so they would have no claim for adverse action. But if 'discriminates' in s 342(1) Item (d) extends to indirect effect, the women could argue that the imposition of the requirement, with which they were less able than men to comply, was adverse action.

Sackville J did say the question of whether 'discrimination' covers indirect discrimination, at least as it arose under the *Racial Discrimination Act*, was open '[u]nless and until the High Court specifically considers the specific terms and legislative history'. That may be the case too with the scope of 'discriminates' in s 342(1) Item (d) of the *FW Act*.

4. Exceptions to Attribute-Based Adverse Action

We referred earlier, when discussing the complexity of anti-discrimination laws, to the difficulty of codifying standards of moral behaviour while making allowances for exceptions and exemptions.[25] In extensive legislative provisions and jurisprudence, anti-discrimination law excepts from its scope various types of conduct, in various circumstances, by various people and entities (See N. Rees, K. Lindsay and S. Rice 2008, Ch 7). Again with deceptively appealing simplicity, the *FW Act* purports to incorporate those exceptions for adverse action based on personal attributes, by providing in s 351(2)(a) that:

> … subsection (1) [adverse action because of an attribute] 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 …

The 'anti-discrimination law in force in the place where the action is taken' is all of the four federal anti-discrimination statutes, as well as the relevant provincial anti-discrimination law such as the *Anti-Discrimination Act 1991* (Qld) or the *Discrimination Act 1991* (ACT) (s 351(3) *FW Act*).[26]

But this neat device of cross-referring to anti-discrimination law is not merely simple, but overly-simple. Section 351(2)(a) does not cross-refer specifically to conduct that is, for example, exempt or excepted under anti-discrimination law. Rather, it cross-refers to conduct which is 'not unlawful', and that is a much larger category than the already large category of exceptions and exemptions.

Intention of the Provision

On its face, saying that the provisions for attribute-based adverse action do not apply to conduct that is 'not unlawful' under the local anti-discrimination law,

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could refer to conduct that is not covered at all by the local anti-discrimination law and so is 'not unlawful' because it has not been made unlawful. Gaze and Chapman (2009) consider this 'an unlikely result', and say that 'the intention [of s351(2)(a)] is fairly clear, to exclude action that is protected by an exception or exemption under a relevant anti-discrimination law.' We disagree.

Consider a situation where an employer in NSW engages in 'adverse action' under the *FW Act* because of an employee's religion. That conduct is 'not unlawful' in NSW because religion is not a prescribed attribute for unlawful discrimination under the *Anti-Discrimination Act* 1977 (NSW) or the federal anti-discrimination statutes. Because the conduct is, within the terms of s 351(2)(a), 'not unlawful under any anti-discrimination law in force' in NSW, the prohibition in s 351(1) does not apply. The same will be true for any of the attributes that are in s 351(1) but are not protected as an attribute in a State or Territory.[27] Far from being an 'unlikely result', it seems clearly arguable that the exception in s 351(2)(a) covers conduct that is 'not unlawful' under local anti-discrimination law because it has not been made unlawful.

Asserting, in the face of its broad terms, that the intention of s 351(2)(a) is to cross-reference only to exceptions and exemptions (Gaze and Chapman 2009), or limiting examples of its operation to 'an affirmative action program, or a temporary exemption' (Stewart 2009: 253), fails to identify the true and troubling breadth of the meaning of 'not unlawful', and highlights the over-simplified approach of the *FW Act*.

Scope of the Provision

Conduct that is 'not unlawful' in anti-discrimination legislation is much more than excepted or exempt conduct, and more even than affirmative action programs. At one end of a continuum, conduct is 'not unlawful' if it does not engage the legislation; at the other, conduct is 'not unlawful' if, even though it does engage the legislation and is not excepted, it invokes a prescribed defence. Along the way, conduct might be unlawful because it is excepted, is done by an exempt body or person, or is a special measure (eg, an affirmative action program). These various ways in which conduct can be unlawful under anti-discrimination legislation — and not merely by way of excepted conduct — have been drawn in to the *FW Act* by the simple cross-referral in s 351(2)(a).

In cross-referring to exemptions and exceptions the *FW Act* has unwittingly stumbled into the most incoherent corner of Australia's anti-discrimination laws. Australia's federal, state and territory anti-discrimination laws are so diverse and inconsistent in their provisions for exceptions, for no obvious reason in principle, that there is no national coherency, and it is often hard to say definitively whether discriminatory conduct is unlawful throughout Australia. Examples of the unwelcome diversity include an exemption for bodies established for religious purposes (see for example s 56 *Anti-Discrimination Act* 1977 (NSW) and more narrowly s 82 *Equal Opportunity Act 2010* (Vic)), and an exception for conduct to meet health and safety requirements (eg s 57C *Discrimination Act 1991* (ACT); s 108 *Anti-Discrimination Act 1991* (Qld); s 86 *Equal Opportunity Act 2010* (Vic)).

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Importing this collection of types of 'not unlawful' conduct into the *FW Act* jurisdiction has significant implications of cost and delay. An employer, in order to establish that the conduct alleged against them was not unlawful under State or Territory anti-discrimination law, will have to run, in a federal court, a case under State or Territory law to find out whether and how the State or Territory law applies to the facts.[28]

A further consequence of the *FW Act*'s cross-reference to 'not unlawful' conduct is that the decisions under the *FW Act* will not form a consistent and predictable body of law, or at least not for a long time. Because conduct which is 'not unlawful' in one jurisdiction may be unlawful in another, whether conduct is unlawful adverse action under the *FW Act* will depend on which part of Australia it happened in. To give effect to the *FW Act* a court will have to consider and give effect to different State and Territory legislation depending on the facts, and may deal with similar facts differently.

Inherent Requirements

As well as the 'not unlawful' exception for attribute-based adverse action, s 351(2)(b) of the *FW Act* makes an exception for attribute-based adverse action which is 'taken because of the inherent requirements of the particular position concerned'. The existence of the inherent requirements of a job is a recognised exception in anti-discrimination law, but is often accompanied by a further provision that obliges an employer to act reasonably to enable the inherent requirements to be carried out (eg s 45(a)(ii) *Anti-Discrimination Act 1998* (Tas)) or to make reasonable adjustments (s 21A(1)(b) *Disability Discrimination Act 1992* (Cth)). There is no such obligation in the *FW Act*, where conduct is excepted from the adverse action provisions simply because of the inherent requirements of a job, even when no reasonable efforts have been made to mitigate those requirements.

This bald 'inherent requirements' defence in the *FW Act* follows the same provision in the *WR Act* s 659(3), and replicates in Art 1(2) of C.111 .[29] It offers a lower level of protection than do anti-discrimination laws, and is at odds with the obligation under Art 27(i) of the *Convention on the Rights of Persons with Disabilities* to '[e]nsure that reasonable accommodation is provided to persons with disabilities in the workplace'.[30]

It can be argued, but it is unclear, that an obligation to make reasonable adjustments is implicit in the idea of 'inherent requirements' (*Purvis v NSW* (2003) HCA 62, [100]–[107] per McHugh and Kirby JJ). To avoid doubt, anti-discrimination law explicitly obliges an employer to make such adjustments,[31] and it is a weakness in the protection offered by the *FW Act* that it does not do the same.

5. Attributes

Section 351(1) prescribes a list of personal attributes as reasons for which adverse action in s 342 is unlawful: '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'. Although this list is almost identical to that in the *WR Act*,[32] it was not simply copied and pasted

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from one statute to the next: the attribute of carer's responsibilities has been added, and we can reasonably assume that if the drafters of the *FW Act* thought about adding carer's responsibilities as an attribute, then they thought about and rejected adding other personal attributes that exist in anti-discrimination law in Australia, such as physical features (s 6(j) *Equal Opportunity Act* 2010 (Vic)),[33] transsexuality and transgender status (eg Part 3A *Anti-Discrimination Act 1977* (NSW), and see Rees, Lindsay and Rice 2008: [5.6.12]), having a medical record (eg s 16(r) *Anti-Discrimination Act 1998* (Tas)), having a criminal record (eg s 7(1)(o) *Discrimination Act 1991* (ACT)), being in a marriage-like relationship (eg ss 4 and 6 *Sex Discrimination Act 1984* (Cth)), being a sex worker (eg s 7(1) *Anti-Discrimination Act 1991* (Qld)), and being (or not being) a parent (eg s 19(1)(g) *Anti-Discrimination Act* (NT)).

As well as omissions such as these, the *FW Act*'s list of attributes contains anomalies when compared with the attributes commonly provided for in anti-discrimination law. The term 'physical and mental disability', for example, was long ago superseded in anti-discrimination law by a more sophisticated definition of disability that encompasses people with a developmental disability, acquired brain injury, or a behavioural disability (eg s 4 *Disability Discrimination Act 1992*(Cth)), and anti-discrimination law extends to cover not only treatment of a person because of a disability that the person has, but treatment of a person because of a disability that they had, or may have, or are believed to have; the *FW Act* does not make any provision for these dimensions of disability.

The range of personal attributes for which adverse action is unlawful is therefore significantly less comprehensive under the *FW Act* than is provided for in anti-discrimination law. Some employees will have to go to anti-discrimination law for a remedy if the impugned conduct was because of a personal attribute that is not in the limited list in the *FW Act*.

Conclusion

There are many other important observations to be made about technical differences between anti-discrimination law and the new general protection against attribute-based discrimination in the *FW Act*. They have to do with, for example, time limits for complaining of unlawful adverse action (see s 366 *FW Act* in relation to claims relating to dismissals, and s 372 for all other claims), costs (s 570 *FW Act)*, and orders that can be made (s 545 *FW Act*).[34] A significant and attractive difference is the availability under the *FW Act* of an injunction or interim injunction from the federal courts to prevent potential adverse action (s 545 *FW Act*).

Our focus, however, has been on the general protection against attribute-based conduct.[35] Superficially, the attribute-based protection in the *FW Act* looks as if it owes something to, and will draw something from, Australia's extensive anti-discrimination laws. This appears to be so because of the list of personal 'attributes' in s 351 as reasons for unlawful conduct, the misleading heading to that provision, 'Discrimination', and the use of the word 'discriminate' in the adverse action provision, s 342. In fact, the combined effect of ss 342 and 351 is to create a new and distinctive attribute-based protection.

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That new protection is an attractive option for employees who would otherwise have had to turn to anti-discrimination law, principally because of the direct causation coupled with a reverse onus. Its scope is much the same as what is known in anti-discrimination law as direct discrimination, subject to having to clarify the meaning, in its context, of discrimination 'between' employees. There is an argument as well that the idea of discrimination in the *FW Act* encompasses the much broader idea known in anti-discrimination law as indirect discrimination.

If an employee or prospective employee complains of direct, attribute-based conduct, then the *FW Act*, with its straightforward causation and reverse onus of proof, is an attractive alternative to the complexity of proving discrimination under anti-discrimination law in Australia. There are, however, limits to its usefulness: *FW Act* proceedings will be drawn into the complexity of Australia's anti-discrimination law because of the overly-simple cross-reference to conduct which is 'not unlawful'; the 'inherent requirements' defence is very broad, and the list of personal attributes is limited.

Although the attribute-based protection in the *FW Act* is not a discrimination law as we know it, it is an important, if compromised, addition to the remedies available to Australian workers.

Notes

1. Julia Gillard was the Australian Federal Minister who introduced the *Fair Work Act*. Previous versions of this article were presented by Simon Rice to a symposium 'The Fair Work Act: Promises, Potential Protections and Pitfalls' hosted jointly by the University of Western Sydney and the University of New South Wales, at the University of New South Wales, 21 August 2009, to a public forum convened by the ANU College of Law, the Australian Labour Law Association, and the Industrial Relations Society of the ACT at the ANU College of Law, 8 December 2009, and by Cameron Roles to the 'Early and Mid-Career Research Workshop in Labour Law' at the ANU College of Law, 18 and 19 February 2010. We thank participants in those events for their valuable comments. We also thank Professor Andrew Stewart for comments on an earlier draft of this work.
2. The Commonwealth first introduced laws prohibiting unfair and unlawful termination of employment in 1993 — see Part 5IA, Division 3 *Industrial Relations Reform Act 1993* (Cth).
3. When we refer to 'anti-discrimination law', we refer to the four Commonwealth anti-discrimination statutes, and the anti-discrimination statute in each State and Territory.
4. This tribunal was originally known as the Commonwealth Court of Conciliation and Arbitration. It has had various name changes over the years, and is now known as Fair Work Australia.
5. Under the Australian *Constitution*, Commonwealth awards could only apply to the parties to an interstate industrial dispute, and could not operate as a common rule: see *Australian Boot Trade Employees' Association v Whybrow and Co* (1910) 11 CLR 311.

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6. The application of Commonwealth awards to non-unionists was confirmed in *Metal Trades Employers Association v Amalgamated Engineering Union* (1936) 54 CLR 387.
7. Since the 1990s the Commonwealth has increasingly relied on the Corporations Power (Constitution, s 51(xx)), rather than the conciliation and arbitration power under s 51(xxxv), to enact Commonwealth labour law. This decline in the influence of conciliation and arbitration is reflected in the fact that the *FW Act* does not rely on s 51(xxxv) for its Constitutional validity.
8. The protection under the *Commonwealth Conciliation and Arbitration Act* was based on s 35 of the Industrial Arbitration Act 1901 (NSW). For a history of the NSW provisions and their influence over the Commonwealth law see the judgment of Finklestein J in *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union and Another* (2001) 184 ALR 641 at 686–8.
9. For an account of these amendments, see Greater Dandenong City Council v Australian Municipal, Clerical and Services Union and Another (2001) 184 ALR 641 at 689–90.
10. Note that the prohibitions with respect to freedom of association also applied to contractors: s 336. For an excellent discussion of trade union security more generally, see P. Weeks 1995.
11. For a detailed account of the development of freedom of association provisions at the Commonwealth level, see LexisNexis, (2010: Division 16).
12. The provisions were amended several times between 1996 and 2007: see Fenwick and Howe 2009: 164.
13. Renumbered to s 659(2)(f) but otherwise unchanged in the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth).
14. Despite this consolidation, the old unlawful termination provisions continue to operate in their own right in some circumstances (s 723 *FW Act*). Because Labor while in opposition had made a commitment not to diminish the protections offered by laws with respect to unlawful termination of employment, and there are employees such as State public sector employees who will not have access to the adverse action provisions, it was necessary to continue the operation of the unlawful termination provisions at least for those employees. As a result of the referrals of power by five out of the six States, the continuing unlawful termination provisions apply to employees covered by State legislation, and to some private sector employees in the one State which has not referred power, Western Australia. For a discussion of Labor's election policies, see Stewart and Forsyth 2009: 1.
15. The heading is not taken to be part of the *FW Act* and so does not bear on how the section is to be understood: s 13 *Acts Interpretation Act 1901* (Cth).
16. Exceptions are in the ACT (s 8(1), *Discrimination Act 1991*), and in s 8(1) of the yet-to-commence *Equal Opportunity Act 2010* (Vic), where the anti-discrimination law works the same way as the adverse action provisions and it is enough to show the reason for 'unfavourable' treatment: but see the discussion under 'Proving "because"' below.

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17. This need for a comparator also impaired the effectiveness of the equal pay provisions, first introduced in the *Industrial Relations Reform Act* 1993 (Cth) — see (ss 170BA–BI). Smith and Stewart (2010) suggest that the current equal pay provisions of the FW Act may however be more effective than their predecessors in achieving equal pay for work of equal value.
18. *Shamoon v Chief Constable of the Royal Ulster Constabulary* (2003) UKHL 11; (2003) 2 All ER 26, per Lord Scott of Foscote at [109]–[110].
19. Under the *WR Act* the reverse onus of proof was contained in section 298V. Following the Work Choices amendments, the provision was contained in section 809. The reverse onus was not available in applications for an interim injunction in *WR Act* s 809(2); the *FW Act* s 361(2) continues this approach.
20. The Australian Industrial Relations Commission tried to grapple with the lack of a definition of 'discriminates' in section 150A(2)(b) of the now repealed *Industrial Relations Act 1988* (Cth), and appeared to proceed on the basis that it covered both direct and indirect discrimination — for the Commission's definitions, see *Safety-net Adjustments — October 1995,* (1995) 61 IR 236 at 247–248.
21. See *Flight Attendants' Association of Australia v Qantas Airways Limited — PR972225* (2006) AIRC 282 where it was submitted at [17.2] that the phrase 'discriminates against' in what was then s 170LU(5) of the *WR Act* be understood according to the provision on which it was based, Art. 1 of the International Labour Organisation's Convention 111 *Discrimination (Employment and Occupation)*: 'distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.
22. Andrew Stewart has pointed out to us that one circumstance where s 342(1) Item 1(d) may catch conduct not caught otherwise by s 342(1) is where an employer causes disadvantage to an employee without altering the employee's position, for example by conferring a benefit on other employees but not on the employee in question.
23. And see, dealing with different versions of the formulation for indirect discrimination, *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *New South Wales v Amery* (2006) 230 CLR 174.
24. And see now s 153 *FW Act*.
25. The terms 'exemption' and 'exception' are used to similar effect in different legislation. For example, the considerations that are called 'Exemptions' in the *Sex Discrimination Act* are called 'Exceptions' throughout the NSW Act, and Part 5 of the *Equal Opportunity Act 2010* (Vic) is titled 'General Exceptions to and Exemptions from the Prohibition of Discrimination', as is Part 4 of the *Equal Opportunity Act 1995* (Vic).
26. We refer to 'anti-discrimination law in force in the place where the action is taken' as 'the local anti-discrimination law'; the *FW Act* does not override federal State and Territory anti-discrimination laws: s 27.

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27. Examples include 'political opinion' which is not protected as an attribute in NSW or South Australia, and 'social origin' which is not protected as an attribute in any jurisdiction.
28. For example in *Walsh v St Vincent de Paul Society Queensland No.2,* (2008) QADT 32, it was only after the employer ran a case relying on a prescribed defence, and lost, that it was apparent that the conduct complained of was in fact unlawful (or, not 'not unlawful') under the local anti-discrimination legislation. Facing the same claim under the *FW Act*, the operation of s 351(2)(a) would require the employer to run their defence under the Queensland *Anti-Discrimination Act* in a federal court, and have the federal court decide whether the defence was made out under the Queensland law, before the court could decide whether it had jurisdiction to make a decision about unlawful adverse action under the *FW Act*.
29. A similar reservation is expressed differently in Art 2(5) of C.158, referring to 'limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned'.
30. Lawson traces this obligation from the UN General Assembly's 1982 'World Program of Action concerning Disabled Persons', through the 1993 'Standard Rules on the Equalisation of Opportunities for Person's With Disabilities', the General Comment 5 of the Committee on Economic, Social and Cultural Rights, and the jurisprudence of the UN Human Rights Committee (Lawson 2008: 23–24).
31. For a discussion of the relationship between the inherent requirement defence and the obligation on an employer to take reasonable steps, see *X v Commonwealth* (1999) 200 CLR 177, referring to since-repealed provisions of the *Disability Discrimination Act* which are in very similar terms in most anti-discrimination legislation.
32. The list was introduced in s 170DF(1)(f) *Industrial Relations Reform Act* 1993 and replicated in s 170CK(2)(f) *WR Act*, incorporating attributes listed in C.111 and C.158 (see *Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416, 512–518 per Brennan CJ, Toohey, Gaudron, McHugh, Gummow JJ) and adding some that are commonly found in Australian anti-discrimination law.
33. Eg s 6(j) *Equal Opportunity Act* 2010 (Vic).
34. Penalties may also be ordered — see ss 539 and 546, and may be paid to an individual in appropriate circumstances — see s 546(3)(c).
35. For details of the enforcement provisions and the attractiveness of these over traditional anti-discrimination law, see Smith 2010a.

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Authorial Details

» **Simon Rice** OAM is an Associate Professor at the ANU College of Law, The Australian National University. He has worked and researched extensively in anti-discrimination, human rights and access to justice issues. His OAM was awarded for legal services to the economically and socially disadvantaged. His email address is simon.rice@anu .edu.au .

» **Cameron Roles** is a Lecturer in Law at the ANU College of Law, The Australian National University. He has worked in private practice and for a Commonwealth government agency as an employment lawyer, and currently teaches and researches in workplace law, public sector employment law and OHS law. His email address is cameron.roles@anu.edu.au .

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