

Adverse Action Provisions under the Fair Work Act

Various parts of the *Fair Work Act* came into effect on 1 July 2009. Among them are the provisions enacting the new 'adverse action' jurisdiction of Fair Work Australia (FWA).

The 'adverse action' provisions under the new industrial relations legislation will compel employers to be more cautious when making decisions that affect employees.

In general terms, the right to protection from 'adverse action' prevents one person discriminating against or victimising another because the second person has exercised or is entitled to exercise a 'workplace right'.

Protected parties include not only employees, but prospective employees and contractors, prospective contractors, unions and employers.

'Workplace rights' are widely defined to include, for example, the right to initiate or participate in proceedings under a 'workplace law'. 'Workplace laws' include all federal and State legislation regulating the relationships between employers and employees including the Fair Work Act itself and the Independent Contractors Act.

The provisions generally replace those in the former legislation that prevent 'unlawful' termination of employment however, have significant implications for employers given the very broad definition of a 'workplace right'.

A claim may be brought against an employer in circumstances where a workplace right was just a reason for the action rather than the sole or dominant reason and the onus will rest with the employer to demonstrate its action was not for a prohibited reason.

The remedies under the Act are also broad which include injunctive orders, uncapped compensation entitlements and penalties of up to \$33,000 per contravention.

The provisions create additional possibilities for litigation. Critical to avoiding or minimising claims will be a thorough understanding of the industrial environment applicable to your workers (including potential workers).

Employers ought to consider implementing and applying policies and procedures associated with recruitment, equal opportunity, discrimination (including sexual harassment) and related dispute resolution processes. Employers should also consider documenting and creating a paper trail setting out the rationale for any decision or action that might result in an adverse action claim, before a firm decision is made.

For more information about this article or to discuss your workplace policies and procedures further, please contact Andrew Bland at abland@blandslaw.com.au