Productivity Commission Review of the Workplace Relations Framework

September 2015

Reply Submissions of the Victorian Employers Chamber of Commerce and Industry

Victorian Employers Chamber of Commerce and Industry

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About the Victorian Employers Chamber of Commerce and Industry

Who We Are

The Victorian Employers' Chamber of Commerce and Industry ("VECCI") is Victoria's leading and most influential employer group, servicing over 15,000 Victorian businesses every year. An independent, non-government body, VECCI was started by the business community to represent business. Our membership base is diverse, with involvement from all levels and sectors of industry including manufacturing; health and community; retail and distribution; resources and utilities; food and agribusiness; IT&T and media; managed services; education, business services, hospitality, infrastructure, construction and property; transport and logistics; retail and tourism.

VECCI's varied membership encompasses businesses from very small to very large, and includes that of the recently reinstituted Melbourne Chamber of Commerce, an entity which represents the interests of nearly 100 of Victoria's largest businesses and organisations and hundreds of thousands of employees nationally. VECCI also works in partnership with the Victoria Tourism Industry Council (VTIC), which represents the interests of over 700 members from the accommodation, attractions, destinations, events, tour and transport, and tourism services and hospitality sectors.

VECCI is a member of Australia's largest and most representative business advocate, the Australian Chamber of Commerce and Industry ("ACCI") which develops and advocates policies that are in the best interests of Australian business, the economy and the wider community.

What We Do

VECCI are involved in every facet of industry and commerce across the State. Our role is to represent the interests of business at a State level as well as nationally. We act as a sounding board for government decision-making and as an instrument of strong advocacy. Our focus is clear – to lead business into the future, actively represent the needs of employers in a complex regulatory climate, and provide real business value.

The VECCI Workplace Relations Helpline provides VECCI members with relevant, up-to-date, independent and accurate advice on a range of workplace relations issues, including expert assistance with and interpretation of industrial instruments such as modern awards, performance management of employees and redundancies and employee entitlements.

The VECCI Workplace Relations Consulting team offers members professional, detailed advice and assistance. The VECCI Workplace Relations Consulting team – comprised of Industrial Relations, Occupational Health and Safety and Equality/Equal Opportunity specialists – offers a complete service for members and regularly appears on behalf of members at courts and tribunals dealing with the spectrum of members' workplace relations issues, disputes and challenges under the Fair Work system.

Victorian Employers Chamber of Commerce and Industry

1 The Draft Report & the Key Points

The Productivity Commission ("PC") released its draft report of the Workplace Relations Framework on 4 August 2015 ("Draft Report").

VECCI's submission to the Productivity Commission Inquiry into the Workplace Relations Framework argued the key outcomes of the inquiry must be the creation of a simpler, fairer and more efficient Workplace Relations Framework that spurs economic growth, increased productivity and improved business competitiveness.

VECCI agrees several major deficiencies of the system need addressing, and welcomes the key theme of the Draft Report – *too much weight to procedure and too little to substance*.

VECCI welcomes a number of the draft report's recommendations including:

- aligning penalty rates on Sundays in hospitality, entertainment, retail, restaurants and cafes with Saturday rates;
- recognising the difficulties faced by business and costly consequences of the States gazetting additional public holidays;
- an emphasis on substance rather than process in unfair dismissal processes;
- greater discretion for 'on the papers' assessments of unfair dismissal claims, which would limit the time and effort spent by employers in defending unmeritorious claims;
- recognising the enterprise agreement approval process is overly rigid and requires reform; and
- addressing 'strike first, talk later' tactics that subject business to costly disruptions.

The Draft Report falls short in removing costly and lengthy general protections claims, though it does propose reforms to limit the ability of frivolous and vexatious claims to proceed.

However, the Draft Report also misses the opportunity to recommend crucial changes to restrict access to unfair dismissal claims, including for high income earners, genuine redundancy situations and for small business.

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2 Core Concern: Modern Awards & Public Holiday Framework

2.1 Modern Awards

VECCI urged the PC to encourage reform of penalty rate structures to enable more employment and increased productivity, and to "***reconsider the award system*** *in order to be a modern workplace relations framework that is simpler to understand, encourages compliance and affords genuine flexibility to employers in a modern and dynamic economy."*

The Draft Report recognises some of the issues facing the award system, such as:

- the rigidity of the award wage rate system;
- the complexity of the award structure, including their language and presentation; and
- the potential for award conditions to unnecessarily restrict operations and infringe employer's prerogative to manage effectively.

The PC seeks to address these concerns largely through the recommendations for the proposed Minimum Standards Division of the Fair Work Commission ("FWC") to review and vary awards as necessary, utilising robust analysis and empirical data; and to set Sunday penalty rates for relevant consumer-oriented industries at the Saturday rate.

VECCI welcomes the above changes, particularly the 'focussing' of the award review process and the fresh approach to the variation of awards, unencumbered by legal precedent and focussed on the analysed impact of varying the awards. We are hopeful such an approach could strenuously analyse the utility and adverse impacts of clauses such as minimum engagement periods, and overly restrictive part-time arrangement clauses in the award system – which our membership strongly believes has a stifling effect on employment levels and prolongs underemployment.

Furthermore, we consider such an approach should also reinforce the place of modern awards in the system – as a *safety net*; whereby additional benefits and/or obligations should be properly sought at an enterprise level through individual or collective agreements. The process of continuously attempting to raise the safety net in large groups of awards by seeking additional forms of leave and further obligations regarding parental leave[1] in 'test cases' is an incredibly time-consuming and resource-intensive process.

2.2 Public Holidays

VECCI stressed the cost and impact on business of the public holiday framework across Australia must be standardised.

To this end, we welcome the recommendations in the Draft Report to limit the payment of public holidays. We also welcome the acknowledgement of the consequences of a State government designating additional public holidays and the issues created by this – VECCI calculated the cost of paying Victoria's employees not to come to work due to the recently-gazetted Grand Final Day eve holiday in Victoria will be $543 million dollars.[2]

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[1] See, for example, VECCI submissions, page 29.

[2] Victorian Employers' Chamber of Commerce and Industry, '*Victorian small business to be hit hard by new public holidays*' (17 February 2015) <http://www.vecci.org.au/policy-and-advocacy/news/media-releases/2015/02/17/victorian-small-business-be-hit-hard-new-public-h#sthash.kU8Gb4Xs.dpuf>

We consider such a huge cost emphasises the need for close analysis of these costs and benefits before any declaration by a State or territory.

In VECCI's view the solution to the automatic and significant costs currently generated by the state based declarations would be better approached as a standardised national number of days that is legislated within the NES i.e. that there are 10 public holidays per year which are nominated as public holidays **for the purposes of attracting penalty rates** where applicable under awards and employment agreements.

3 Agreement Making

3.1 Individual Agreements

VECCI urged the PC to consider the reinstatement of individual statutory arrangements in the 'kit bag' of agreement-making options for employers and employees. VECCI also noted the consensus of disenchantment regarding the current individual agreement-making option under the Fair Work system – the IFA. We welcome the PC's acknowledgement "*[e]mployers and employees are not realising the potential value of individual flexibility in the workplace because of the various shortcomings of IFA's"*.[3]

The Draft Report acknowledges the potential benefits of individual agreements, and the requirement for safeguards regarding their potential drawbacks. It notes however that – at their peak – AWA's covered 3.1% of employees according to ABS data, with most covering small and medium-sized businesses. In contrast, the Report cites "*the likelihood of making an IFA increases with employer size*".[4] Despite noting many participants stated an ongoing need for statutory individual agreements, the Draft Report does not come to a conclusion regarding the utility and benefits of their return to the system.

VECCI urges the PC to consider what part they could play within the overall framework and with appropriate safeguards, and whether there is any credence to the legislative object "*such agreements can **never** be part of a fair workplace relations system"*.[5] VECCI considers effectively funnelling all parties into either an award safety-net system (with its implicit rigidity, see above) or a collective agreement option (with its increased red tape, see below) is not a 'fair workplace relations system'.

VECCI agrees that individual agreements "*are not a panacea for all ills of the WR system"*.[6] However, the capacity to genuinely reach such agreements with individual employees, subject to a NDT and for a longer period than the current option of 4 weeks, must be a *component* of the agreement-making framework.

In the alternative, VECCI submitted the IFA framework requires amendment to provide the flexibility necessary for an effective and modern workplace relations system. We therefore support the Draft Report recommendations regarding:

- replacing the 'BOOT' with a NDT;
- more detailed guidance for employees and employers on satisfying the NDT; and
- the development of an information package by the FWO to be distributed, particularly to small business.

However, VECCI would urge a longer 'default' period to be applicable, of 26 weeks, with the ability to mutually agree for a period of up to one year as currently proposed.

3.2 Collective Agreements

3.2.1 Permitted matters

We note the Draft Report's concerns regarding the inclusion of non-permitted matters in enterprise agreements, and the likely unintended consequences. Primarily, this would occur due to *more* complex and

[3] Draft Report, 602.
[4] Ibid, 602.
[5] *Fair Work Act 2009* (Cth), s 3(c).
[6] Draft Reports, 594.

lengthy litigation at the approval phase if the FWC was required to apply the at times clunky 'matters pertaining' jurisprudence to many/all clauses of (sometimes) lengthy agreements.[7]

We agree with the above sentiment, however this is only because the Act currently allows for such a convoluted approach to subsist, due to:

- the deliberate return to the 'matters pertaining' formulation of 'permitted matters' in the drafting of the Act is complicated by the addition of s 172(1)(b), whereby the High Court's *Electrolux* decision dealt with *matters pertaining to the employment relationship*;
- the fact the Explanatory Memorandum regarding s 172(1)(a) is incredibly vague in stating terms would not be permitted matters if they contained a *'general prohibition'* (c.f. *any* prohibition) on the engagement of a labour hire employees, contractors or casuals;
- despite the above, the Act does not contain any requirement for the FWC to reject the approval of an agreement for containing non-permitted matters, so long as they are not *unlawful terms*;[8]
- additionally, s 253 renders non-permitted matters of an enterprise agreement 'dead' in a legal sense, but this is dependent on having certainty of what 'permitted matters' are or aren't.

We urge the PC to reconsider this hotly disputed area of the Act. We consider there must be a simpler formulation for enterprises and their employees to have certainty on what matters would be legally enforceable; and to bargain for this content in good faith.

Similarly, it is in the best interests of a competitive and productive economy that enterprises should be free to structure their workforce - including the use of contract labour, independent contractors and casuals – as in order to proactively plan for and/or quickly adapt to changes in an increasingly globalised marketplace.

3.2.2 Enterprise Agreement Approval

VECCI welcomes the PC's view regarding the convoluted and arcane processes associated with the approval of an enterprise agreement, with the broad theme of '*make procedure a servant, not a king'* corresponding with our submissions regarding the pedantic approval steps for an enterprise agreement.

We also note a recent case which again illustrates the unfortunate nature of 'form over substance' in this area of the Act, whereby an agreement approval was denied due to the reference in the NERR to 'Fair Work Australia' rather than the 'Fair Work Commission'.[9] This was despite both the unions involved supporting the approval of the agreement.[10] The decision was overturned by a Full Bench on appeal,[11] however this only occurred after a fairly complicated argument regarding the application of the *Acts Interpretation Act 1901* was made by the employer and accepted by the Full Bench.

Although a sensible outcome on appeal, the likely cost involved and two-month delay between the initial dismissal of the approval application and the successful appeal illustrates the pitfalls that "*place technical purity above fundamental soundness"*.[12] We also note many small to medium enterprises would not have the resources (both time and cost) to proceed with an appeal, and being mired in technicality is not conducive to a "*simple, flexible and fair framework that enables bargaining in good faith…for enterprise agreements that deliver productivity benefits"*.[13]

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[7] Draft Report, 565.
[8] *Fair Work Act 2009* (Cth), s 186(4).
[9] *Serco Australia Pty Ltd* [2015] FWC 4643 (10 July 2015).
[10] Ibid, [6]-[7].
[11] *Serco Australia Pty Ltd v United Voice and the Union of Christmas Island Workers* [2015] FWCFB 5618 (2 September 2015).
[12] Draft Report, page 552.
[13] *Fair Work Act 2009*, s 171(a).

VECCI strongly supports the recommendations concerning the approval of enterprise agreements, in order to eliminate the issues and 'snakes and ladders' repercussions of approving an enterprise agreement genuinely agreed to by employees and employer.

VECCI also welcomes the recommendation to require enterprise agreement flexibility terms to include *all* the matters listed in the model flexibility term, along with *additional* matters agreed to by the parties. This would curtail the ability of unions to push for flexibility clauses providing only for 'flexibility' regarding single-day annual leave, tea breaks or uniform requirements. This ought to have the effect of at least allowing for IFA's to be used more widely and in a more meaningful manner.

VECCI also welcomes the recommendations concerning:

- a maximum five year term for enterprise agreements;
- replacing the BOOT with a No Disadvantage Test; and
- allowing the NORR to impose a reasonable period for bargaining representatives to be nominated.

As outlined in the Public Hearing, the component of the recommendation imposing a minimum threshold of representation in order for an employee bargaining representation to be nominated is supported in principle, however only to the extent the percentage remains at a relatively low threshold. VECCI's experience in bargaining with smaller to medium enterprises illustrates the involvement of employee bargaining representatives has a positive effect on encouraging collaborative outcomes and 'buy in' from the workforce. Additionally, it often has the effect of providing a 'voice at the table' to large sections of the workforce which are not union members, and the discipline on unions as outlined in the Draft Report.[14] VECCI would not support a threshold which results in a chilling effect on this involvement.

3.3 The Enterprise Contract

VECCI considers the proposed enterprise contract model is an improvement on the current system of under-utilised and ineffectual IFA's, and to this extent we are supportive of the concept particularly as relates to the realities of small to medium enterprise who will not, for various reasons, have enterprise collective agreements. We do not however consider that it is an effective replacement for the individual statutory agreement, which is sorely needed within the framework.

We consider that the ability to offer terms and conditions to a *prospective* employee is an important development, something that is severely lacking in the current framework. We press our earlier submissions in respect of the need for an individual arrangement, with appropriate protections, that provides certainty and clarity within the employment relationship. While the enterprise contract contains some of these elements, it is still open to an election at the end of a relatively short timeframe and unable to give surety to longer term planning for an enterprise.

[14] Draft Report, 578.

4 Industrial Action

4.1 *Strike First, Talk Later* loophole

VECCI welcomes the recommendation that a PAB order can only be issued if satisfied bargaining has commenced either by mutual consent or via a majority support determination. We strongly agree with the Draft Report's conclusion "*the WR framework should not encourage employees to use industrial action if the employees can obtain the outcome they seek through an available alternative*".

4.2 Industrial Action when Pursuing Permitted Matters

The Draft Report, under the section "*other Conditions that must be met for action to be protected…*" includes "*the action must be in support of claims regarding 'permitted matters'*".[15] However, as recently as February of this year, a Full Bench of the FWC expressed the view:

> *"There is no legislative warrant for the adoption of a decision rule such that if an applicant is, or has been, pursuing a substantive claim which is not about a permitted matter it is not genuinely trying to reach an agreement within the meaning of s443(1)(b)"*[16]

The above decision effectively overturns a line of Full Bench decisions to the effect a PAB could not be issued if the applicant was pursuing non-permitted matters. In other words, the current framework allows for a party to be granted an order and (a later date, if approved by the employees) take *protected* industrial action in pursuit of claims regarding "dead words" in a legal sense. A modern framework, whilst respectful of employees' right to take industrial action, should not permit this action to be taken in pursuit of what are ultimately legally unenforceable matters.

We urge the PC to recommend industrial action *in support* of non-permitted matters should not be 'protected', and this could be enforced through a specific reference to non-permitted matters in the criteria for the FWC approving a PAB order.[17] Put simply, employees should not be able to take industrial action in pursuit of a legally void matter.

4.3 Suspension or Termination of Industrial Action

4.3.1 'Significant Harm' Test

VECCI considers the 'significant harm' test for s 423 and 426 of the Act has artificially been set far too high for the provisions to have any useful effect and agrees with the views summarised by AMMA and CCIWA as summarised in Box 19.7 of the Draft Report.

4.3.2 Disputes which Threaten Health and Safety

VECCI does not consider the FWC intervening more commonly in s 424 applications which threaten or endanger life, personal safety, health or welfare is problematic, and strongly believes these matters should have primacy over the bargaining interests of the parties.

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[15] Draft Report, 654.
[16] *Esso v AWMU, CEPU & AWU* [2015] FWCFB 210 (10 February 2015).
[17] *Fair Work Act 2009* (Cth), s 443.

The below table summarises the s 424 applications granted, and the reasons for doing so, as extracted from the casenote in the weekly published FWC Bulletin (not including applications granted due to impacts on *economy*[18]).

CASE NAME	CITATION	DATE	NATURE OF RISK/ THREAT
Ambulance Victoria v Liquor, Hospitality and Miscellaneous Union	[2009] FWA 44	3 August 2009	*probable that proposed industrial action would have increased ambulance response times, both in areas affected by strike and generally because assets would be redeployed to cover banned branches – **delayed ambulance responses would threaten welfare of those awaiting them and might threaten life of person needing urgent medical attention***
Autoliv Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union	PR990574	9 November 2009	Granted ex-tempore; details of threat/risk not disclosed.
University of South Australia v National Tertiary Education Industry Union	[2009] FWA 1535	4 December 2009	*satisfied bans endangering welfare of graduating students by undermining their ability to graduate and seek employment*
Tyco Australia P/L t/as Wormald v CEPU	[2010] FWA 8050	21 October 2010	*union provided notice of ban on call outs - employer installs and services fire safety systems - **employer sought suspension of proposed protected industrial action on grounds it would endanger public safety – call outs involve diagnosing and repairing errors and require expertise in fire safety systems***
Pelican Point Power Ltd	[2010] FWA 8666	10 November 2010	*compelling evidence that action may threaten electricity supplies in South Australia – **likelihood of power outages – possible safety issues (such as road traffic controls and health services)***
Victorian Hospitals' Industrial Association v Australian Nursing Federation	[2011] FWAFB 8165	15 December 2011	*protected action has included, inter alia, closure of 1 in 3 operational beds, cancellation of 1 in 3 operating sessions, bans on completion of paperwork and overtime - there is substantial evidence of serious impact on public health services and on safety, health and welfare of some patients – **satisfied in all the circumstances that protected action being engaged in threatening or would threaten to endanger personal safety or health, or welfare of people in need of public health services in Victoria***
State of Victoria v CPSU, the Community and Public Sector Union	[2011] FWA 9245	23 December 2011	***protected industrial action has potential to create great stress within the child protection population and put children at risk***
APA Group P/L v Transport Workers' Union of Australia	[2012] FWA 1298	21 February 2012	*nature and context of work requires some reasonable and guaranteed emergency response facility – **nature of natural gas networks and work of employees are exceptional***

[18] *Sucrogen Australia Pty Ltd v AWU & ors* [2010] FWA 6192 (27 August 2010); *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWFB 7444 (31 October 2011).

CASE NAME	CITATION	DATE	NATURE OF RISK/ THREAT
Parks Victoria v Australian Municipal, Administrative, Clerical and Services Union; CPSU, the Community and Public Sector Union; The Australian Workers' Union	[2012] FWA 5890	11 July 2012	***nature of action is to cease emergency response services*** *– satisfied that action threatens to endanger life, personal safety or health, the welfare of population or part of it*
G4S Custodial Services P/L v Transport Workers Union of Australia	[2012] FWA 7465	31 August 2012	***whether of reduced security staffing at Perth District Court and Central Law Courts buildings threatens to endanger personal safety or health and welfare of persons within court precinct - no evidence of action taken to mitigate potential risk – in view of this protected industrial action would threaten to endanger the personal safety, health or welfare of a part of the population***
Lloyd Helicopters Pty Ltd T/A CHC Helicopters (Australia) v Australian Licenced Aircraft Engineers Association (ALAEA); and "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)	PR531814	27 November 2012	Consent order to suspend for 73 days.
Monash University v National Tertiary Education Industry Union	[2013] FWC 5124	28 July 2013	*after 15 July 2013 class of students at risk was 13,000 students who did not receive all of their marks on official release date – no evidence of any student who has actually suffered harm contended – Monash not required to demonstrate actual harm has occurred – however, given ban has been in place for more than a month absence of particular examples of harm says something about magnitude of risk notwithstanding defects in exemptions scheme* ***– satisfied that inadequacies in exemptions scheme meant there was a threat of endangerment to student welfare during at least part of period to 15 July 2013 – also a threat of endangerment to student health in that early period***
Swinburne University v NTEU	PR539591	30 July 2013	
Commissioner for Public Employment v Australian Education Union – Northern Territory Branch	[2013] FWC 9479	3 December 2013	*industrial action included not entering classroom attendance in electronic roll – applicant sought to suspend action on the grounds that it is threatening or would threaten to endanger life – NTEU and Victorian Hospitals Industrial Association considered –* ***Commission considered indefinite nature of action combined with measures to withhold manually collected roll information created a level of risk – satisfied action is threatening or would threaten health and safety of students***

CASE NAME	CITATION	DATE	NATURE OF RISK/ THREAT
G4S Custodial Services P/L v The Community and Public Sector Union	[2014] FWC 5496	18 August 2014	*application to terminate protected industrial action being taken at Port Phillip Prison –* ***proposed industrial action would result in lengthy lockdowns for prisoners – Commission satisfied protected industrial action would endanger life, personal safety or health, or welfare of part of the population***
Royal Flying Doctor Service of Australia (South Eastern Section) v Australian Federation of Air Pilots	[2014] FWC 6839	30 September 2014	*proposed action included bans on working on days off (Ban 1) and accepting work-related telephone calls or instructions outside formal duty periods (Ban 2) – RFDS submitted these actions would affect members of population in need of emergency flights - Commission considered Bans 1 and 2 could adversely affect quality and timeliness of treatment for patients, especially in emergency situations – in all circumstances,* ***Commission satisfied these actions could threaten to endanger personal safety, health or welfare of people in need of RFDS's services***
Ausgrid & Ors v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Anor	[2015] FWC 1400	27 February 2015	***Commission satisfied protected industrial action would threaten to endanger personal safety or health, or welfare of certain persons in that part of population in the coverage of Ausgrid and Endeavour Energy networks – orders suspending protected industrial action issued.***

We do not consider the above line of cases necessitates reform to allow industrial action to continue for 'acceptably low risks' to health and safety. The example referenced in the Draft Report regarding teachers in the Northern Territory (*Commissioner for Public Employment v Australian Education Union – Northern Territory Branch* [2013] FWC 9479) appears to be an anomaly, not indicative of a wider issue with the 'bar' being set 'too low'. Seventeen successful applications in almost over six years similarly does not demonstrate an issue with the current framework.

Furthermore, our analysis shows a further 19 cases[19] where a suspension or termination was *refused*, including the two recent decisions concerning industrial action in the public transport sector in Melbourne,[20] despite concerns regarding the risks to health and safety of the public. No amendment to s 424 is required.

4.3.3 Proportionality & Timing of Industrial Action

VECCI urges the PC to recommend reforms to the current framework regarding the suspension or termination of industrial action in circumstances where such action - which threatens health, safety, welfare, the economy, or the public at large – is not taken as a 'last resort', or alternatively is taken as a 'first resort'. Enterprises and the public should not be subjected to harmful industrial action before extensive efforts to reach agreement have been taken. This could be achieved by requiring the FWC to consider the progress of negotiations and/or degree of the action threatened when exercising its powers to terminate or suspend industrial action. We also believe that the impact on the enterprise should be able to be considered by FWC as part of this, and as a separate matter to that of broader economic harm.

[19] **Attachment 3**.
[20] *Metro Trains Pty Ltd* [2015] FWC 6037 (2 September 2015) & *KDR Victoria Pty Ltd T/A Yarra Trams* [2015] FWC 6282 (9 September 2015).

4.4 Penalties for Unlawful Industrial Action

VECCI argued for amendment to the Act to prevent or further discourage unprotected industrial action and lawlessness from occurring in the future, as it has no place in a modern, regulated workplace relations system. We therefore support the PC's recommendation to increase the maximum penalties for unlawful industrial action to better reflect the cost of these actions can inflict on the community at large.

5 Unfair Dismissal

5.1 Access to the System – Small Business

We echo the Draft Report's sentiments regarding the uncertainty and difficulty of the Small Business Fair Dismissal Code. However, the removal of the Code in its entirety would leave small businesses largely exposed to the vagaries of the s 387 criteria and the application of these discretionary considerations - whilst still being subject to time consuming and costly merits hearings.

We urge the PC to consider whether the protection afforded by the unfair dismissal regime is justified, given the compliance costs of defending claims, and the minimal prospect of reinstatement (given in most cases it would not be 'appropriate' to reinstate an employee into a small business from which they have been dismissed). We further note and support the PC's recommendations in respect of removing this as the primary remedy.

Prior to any termination, the prospects of transferring or moving the reinstated employee to another branch or team with different supervisors/managers (as in medium to large businesses) are not available. Therefore, the system becomes one where small business operators with minimal knowledge of workplace relations and/or human resources are either left with an unwanted employee, financially penalised via compensation orders; victorious in defending the claim but at large cost and time; or paying 'go away' money at the outset.

If small business was excluded from this jurisdiction, employees of small business would still have various forums and methods to contest their dismissal on any unlawful grounds, including through general protections claims and/or discrimination claims at the relevant state and federal institutions. VECCI reiterates its position that small business should be exempted.

Failing the above, a review of the Code itself and refining or redrafting via consultation with the small business community may allow for improvement of the Code and ironing out some of the significant issues identified by the parties. Small business cannot and should not be held to the same bar as larger enterprises.

5.2 Access to the System – High Income

We also urge the PC to consider recommending the codification of the 'high income threshold' tests, as outlined in our submissions,[21] and removing the automatic access to unfair dismissal for high-income earners if they are covered by a modern award.

5.3 Improvements to Case Management

VECCI welcomes the recommendations to improve case management for those who have legitimate and warranted access to the unfair dismissal system, such as the FWC to consider and deal with UFD applications 'on the papers', which we called for in our submissions. Issues of jurisdiction – such as minimum employment period, genuine redundancy, out of time applications – should be dealt with 'on the papers' with minimal administrative and time burdens.

We consider our further proposal to improve the efficacy of the provisions and costs associated with hearings for employers (and time spent out of their business) to require the FWC to take into account "*the cost that would be caused to the business of the employer concerned by requiring the employer to attend a hearing",* which existed in the pre-Workchoices *Workplace Relations Act 1996* as s 648(1), and this obligation would

[21] Page 80-82.

apply to the process to be applied for each unfair dismissal claim brought before the FWC.

5.4 Substance over Form & Reinstatement as the Primary Remedy

We also welcome the sentiment regarding the overly burdensome reliance on substance rather than form. Employees dismissed for a valid reason (e.g. safety breaches) should not have the significant benefit of reinstatement due to procedural flaws, nor receive compensation in these circumstances.

Furthermore, the criteria applied regarding the so-called 'procedural' considerations of s 387(b) to (h) of the Act are currently applied in anything but a uniform manner in decisions of the FWC. Reinstatement or costly compensation to an employee - who has been dismissed for a valid reason - should not occur based on a subjective judgement *after the fact* of a process an employer undertakes, and without 'being in the shoes' of that employer.

We also welcome the recommendation to remove the primacy of 'reinstatement' as the remedy in the unfair dismissal regime.

6 General Protections

VECCI has reiterated its concerns in respect of General Protections and Adverse Actions claims. We acknowledge the PC recommendations in the unfair dismissal regime to curb the flow of unmeritorious claims through measures such as paper based assessments, modifications to the filing fees and other improvements to promote an emphasis on substance over form.

6.1 'Complaint' Workplace Right

Our concerns with the broadened 'complaints' component introduced by the Act, and it is our view it must be wound back entirely.

We note the draft recommendations at 6.1; 6.3; 6.4 and 6.5 and support all of these as sound initiatives which would act to reduce the general incidence of speculative claims. We also believe there is merit in addressing concerns relating to the filing fees via the mechanism considered (a modest increase so as to not impact on access to justice), particularly in respect of matters proceeding to court as a second tier level. Cases of genuine hardship should continue to have the opportunity to seek a waiver of these fees.

In respect of the first part of recommendation 6.2, we believe that s 341(c)(ii) must be modified to *remove* the complaint or inquiry element, other than what previously applied under the Workplace Relations Act in respect of complaints to a competent body or authority.

In respect of the remaining recommendation at 6.2, should our broader recommendation not be accepted, we strongly support that the Fair Work Commission should be required to make decisions in respect of the action proceeding. This may have an impact on some of the current speculative claims activity whereby, in our view, complaints are being generated in order to manufacture a claim.

6.2 Analysis of Court Decisions re 'Complaints'

In considering and pressing our position on the matter, VECCI has conducted analysis of using the following search paradigm and parameters:

- Search undertaken using http://www.austlii.edu.au/LawCite/ to identify all matters relating to the complaint or inquiry aspect via searching for s 341(c)(ii).

This resulted in 142 cases. We note that many cases related to more than one element of alleged breach and/or merely referenced s 341(c)(ii), without it being a basis for the claim. For the purposes of this analysis, cases were categorised as follows:

Category No.	Category	Amount of claims
1	Cases where the matter was was lodged in whole or in part with reference to 341 (c) (ii) and dismissed by the courts	32
2	Cases where the matter was found to be outside jurisdiction	7
3	Cases where the claimant was successful, the matter was one that was lodged either in whole or in part under 341 (c) (ii) and would have (in our view) had jurisdiction under the former legislation, or other legislation	9
4	Cases where the claimant was successful in their claim and would not have had standing under the previous or other legislation	1
5	Cases relating to appeals, costs, directions, interlocutory proceedings or injunctions where s341 was not dealt with in the case (i.e. cases on evidence or submissions to amend pleadings)	47
6	Cases where s341 was mentioned in full, but a breach of (c)(ii) wasn't a claim made by the applicant	46
7	Other	0

Attachment 1 contains the entire data set considered along with brief comments on our summary of the matter.

We have focussed our attention on the matters categorised above under points 1,2,3 and 4 in order to advance the consideration of what is both the impact and the benefit of the legislation in its existing form, as relates to s 341(c)(ii). On the above categorisations, 39 matters (categories 1 and 2) were heard and dismissed, either by reason of merits or jurisdiction.

The nine cases categorised at '3' were found in favour of the claimant. We stress that in our view, the factual basis of these claims would also be covered under s 341 (a) and/or (b), and indeed in a number of these of cases this limb was successfully argued. For example, workers across Australia are protected under various respective OHS Acts and are therefore entitled to the benefit of those statutes in the context of s 340 and s 341 of the Fair Work Act. For completeness, these are:

- **Queensland – *Work Health and Safety Act 2011***
  - Sections 104 – 109. Note s106 sets out what is a 'prohibited reason' under the act.
- **Tasmania – *Work Health and Safety Act 2012***
  - Sections 104 – 109. Section 106 in this act sets out 'prohibited reasons'.
- **South Australia – *Work Health and Safety Act 2012***
  - Sections 104 – 110. Section 106 sets out 'prohibited reasons.'
- **Western Australia – *Occupational Health and Safety Act 1984***
  - Section 56. Subsection (d) sets out complaints in relation to health and safety.
- **Victoria – *Occupational Health and Safety Act 2004***
  - Section 76. Prohibition on discrimination
- **Northern Territory – *Work Health and Safety (National Uniform Legislation) Act* (in place 2014).** The act is currently transitioning.
  - Sections 104 – 109. Section 106 sets out 'prohibited reason' under the act
- **ACT – *Work Health and Safety Act 2011***
  - Sections 104 – 109. Section 106 sets out 'prohibited reasons.'

The remaining protections that are relevant to the consideration of these successful cases at '3' are s 323 of the Act, which relates to pay and conditions; a complaint to a relevant authority; and dismissal relating to temporary illness or injury.

The PC is cognisant of the inherent costs in running matters, both via the Fair Work Commission and the court system. We highlight the number of cases that have progressed to the courts under this 'new' expanded complaints avenue and been ultimately found to be dismissed. This is of course at significant time and effort from the employer to discharge the reverse onus of proof.

6.3 Legitimate Protection?

In our view, this flow of claims - while we commend the outcomes as sound – serves no purpose other than a wasted exercise by the courts and a money-making opportunity for claimants. We have come to this view by considering the question of '*what does the legislation achieve*' and '*what is it trying to protect*'.

Using the search parameters described, over the six years that the Act has been operating, we found only one case that would not have had any other previous coverage AND that was successful.[22] This related to a finding of adverse action in respect of the claimant seeking legal advice in respect of her contractual entitlements. While it could be argued that any added protection is valuable, we do not share this view given the opposing flow of claims and outcomes. The scales have tipped too far, and to continue to subject employers to the broad and nebulous 'complaints' jurisdiction is unacceptable.

While the PC's recommendation 6.2 would likely serve to see the removal of claims such as that under *Walsh v Greater Metropolitan Cemeteries Trust (No. 2)*[23], this will not go far enough. In *Walsh*, a legitimate complaint under the current construction of s 341(c)(ii) was that another manager's daughter worked for a business that had a contract to supply a certain product to the employer and that it was inappropriate as a matter of probity. The suggested recommendation of the PC will address these types of matters and we note through interactions with our members, we also see frequent claims such as this in the conciliation stages, where the complaint is only indirectly related to the employee. However these do not represent the majority of cases.

Outside of the above situations, remains the larger stream of cases whereby there **is** some complaint made to the employer that is on the face of it, in good faith, and in relation to the employee's employment. Realistically a high number of the 39 matters under categories 1 and 2 that were considered and dismissed may have held these characteristics at first glance. The construction of this section of the Act, which would not be addressed by the recommendations in their current form, effectively allows any employee who has made a complaint at some stage to proceed to court.

As a sample of the matters that would continue have coverage, we having findings and reasoning such as:

Richards v Le Cordon Bleu Australia Pty Ltd and Richards v Le Cordon Bleu[24]

> [90] Counsel for Mr Short submit that Ambulance Victoria contravened s 340(1) of the Act when it terminated Mr Short's employment. They contend that the objective evidence supports the conclusion that part of the reason was Mr Short's persistence in exercising his workplace rights. Nothing could be further from the truth. Mr Short was terminated for the reasons contained in the letter of 18 July 2011 which is set out at [86] above. The Court accepts the evidence of those who took part in the decision to the effect that one reason and one reason only actuated them in

[22] Murrihy v Betezy.com.au Pty Ltd [2013] FCA 908 (10 September 2013)
[23] Walsh v Greater Metropolitan Cemeteries Trust (No 2) [2014] FCA 456 (9 May 2014)
[24] Richards v Le Cordon Bleu Australia Pty Ltd and Richards v Le Cordon Bleu [2013] FCCA 566 (18 October 2013)

terminating Mr Short. The reason was his "unprovoked and unreasonable personal attack" on Mr Standfield, in circumstances where he had previously received a warning in respect of his behaviour towards staff performing supervisory or managerial roles.

Rowland v Alfred Health[25]

[79] The reality that Mr Rowland was not selected or ultimately made redundant did not occur as a consequence of complaints made by Mr Rowland about Professor Esmore between early 2007 and 2009. By August 2011, matters had moved on and Professor Esmore had been effectively sidelined. Mr Rowland sowed the seeds of his own redundancy by perceiving that the selection process was targeted at him. That that outcome eventuated does not prove that Alfred Health conspired against him to achieve it.

Titan v Weatherford CSG Drilling Pty Ltd[26]

[66] Likewise, I do not accept as credible complaints by the applicant that staff at the respondent have engaged in some form of conspiracy to suppress any complaint by the applicant of bullying on its worksite, which he contends were directed to him. Not only am I satisfied that the respondent didn't take adverse action against the applicant in contravention of the Fair Work Act, but the respondent was within its rights in terminating the applicant. The applicant was employed six weeks earlier. He was just into his six month probationary period of employment.

Miller v Executive Edge Travel & Events Pty Ltd[27]

[117] For the reasons set out above, the Court accepts the evidence of the respondent that the one and the only reason for the termination of the applicant's employment was her poor performance.

Kweifio-Okai v Australian College of Natural Medicine (No 2)[28]

[25] Ms Barker expressly deposed that her decision had not been made because of any complaint made by the applicant. She was unaware of most of the communications which the applicant contended contained complaints relating to his employment. To the extent that she was aware of the contents of some of these communications they played no part in her decision.

Heathcote v University of Sydney[29]

[101] Dr Spence stated further that there was simply not enough evidence that a contamination of bias had occurred and survived right throughout the process. I accept his evidence. In my opinion the University engaged in a sound procedure of checks and balances to the recommendations made determining Dr Heathcote's redundancy

Perez v Northern Territory Department of Correctional Services[30]

[266] Mr Perez was employed on a one year temporary contract as a prison officer in training. He did not complete his training successfully, as he did not satisfy the necessary prerequisites to be granted a Certificate III in Correctional Practice.

[25] Rowland v Alfred Health [2014] FCA 2 (15 January 2014)
[26] Titan v Weatherford CSG Drilling Pty Ltd [2014] FCCA 2342 (8 October 2014)
[27] Miller v Executive Edge Travel & Events Pty Ltd [2014] FCCA 1895 (8 September 2014)

[28] Kweifio-Okai v Australian College of Natural Medicine (No 2) [2014] FCA 1124 (21 October 2014)
[29] Heathcote v University of Sydney [2014] FCCA 613 (14 November 2014)
[30] Perez v Northern Territory Department of Correctional Services [2015] FCCA 1384 (29 May 2015)

> [267] The main reason Mr Perez was unable to obtain the prerequisite certificate was because he was either unable or unwilling to enter the main prison facility, at the ASCC, and perform the duties of a correctional services officer. In these circumstances, Mr Yan had no alternative other than to elect not to extend Mr Perez's contract of employment as a correctional officer.

In our view, given the jurisdiction as it stands would continue to see complaints such as this (as opposed to the one successful claim that we have identified over the six years benefiting from the expanded protections), we do not see a sound basis for this limb of the general protections remaining intact.

Failing amendment of the section and in the alternative, the Fair Work Commission should be given the authority and requirement to dismiss matters where they believe there is 'no reasonable prospect of success'. While this would be an improvement to the current process, this is not our preferred position as in practice, the determination of this in some or many matters may not occur without access to extensive evidence and in effect may merely shift the jurisdiction.

6.4 Speculative Demands Fuelled by the General Protections Provisions

We highlighted in the public hearings the practice of direct claims to employers outside the system, and using the broad parameters of the adverse action provisions to generate payments - in effect, demanding payment to *not* lodge a claim. Obviously, these will not show up in any official interactions or FWC reporting parameters and therefore represents another 'subset' of activity. The PC expressed an interest in receiving a de-identified example of this, which is now provided at **Attachment 2**.

The letter has been fully de-identified by VECCI in an effort to protect any potential identification of the member who received this (including by the sender) and we have noted where any deletions have been made. In order to be able to comprehensively de identify the-correspondence (which also included the letterhead and identifying elements of the sender), we have electronically edited the document and scanned an attachment to remove any embedded characteristics. This edit was undertaken by VECCI's General Manager of Workplace Relations and notations have been placed for all deletions as to the nature of the content redacted. Should the PC wish to confidentially view or verify an original redacted document for any reason, this can be arranged.

This letter provides an example of, in our view, the practice of claims effectively being 'set up' by drawing on the provisions of the General Protections, and more recently, the anti-bullying legislation. We believe the correspondence speaks for itself and that the PC will be able to draw its own conclusions. We will add that unfortunately these attempts are often successful as the current alternative for employers is to run a costly defence through the courts, where the opportunity to recoup costs is limited.

We finally reiterate our observations in our original submission, the experience of our members in this jurisdiction, including as illustrated by our member survey and witness statements. As our member Olwen Gladwell noted in their witness statement:

> "*the actual case should never have been accepted. It was obvious reading his initial claim that he didn't have a case. However because he had paid his money to lodge a General Protections Claim he was entitled to be heard. For us to be told at every avenue that we should be looking at how much we would be willing to pay him was insulting. The Commission should be dealing with cases where these is some merit to the case. It is obvious the General Provisions in the Fair Work Act 2009 (Cth) in this case was used to extort money from us".*

Unfortunately this sums up the general experience of employers in dealing with the general protections. Time, money and effort pitted against a perfect storm of low entry fees, broad provisions and (effectively) a no-cost jurisdiction, where 'go-away money' has become a cost of doing business.
We believe the issue is properly addressed by the removal of s 341 (c)(ii).

FAIR WORK ACT 2009 - SECT 341
Meaning of workplace right

(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.~~

7 The Fair Work Commission

We welcome the proposed changes to the functions and governance of the Fair Work Commission and the appointment process of members.

We continue our support for the AMMA proposal for an appellate body, independent of the FWC, as a better mechanism for oversight and consistency of decisions. The PC's proposed changes are a long series of contingent events to get to a certain outcome – consistency and improvement of decision making.

On the other hand, establishing an independent body is a targeted and more immediate solution to the issues that have been raised by various parties. The PC's proposed changes – whilst welcomed – will require a fairly long 'bedding in' period and glacial change, when it is clear parties are crying out for a more immediate solution to significant issues such as the inconsistency of decisions.

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8 Long Service Leave

8.1 Portability of Long Service Leave

VECCI wishes to comment specifically on the issue of portable long service leave. We support the PCs views in respect of the benefits outweighing the cost and complexity of change in this area. We do not support the expansion of leave entitlements generally at a national level as a response to the issue of portability, including through any annual leave increase, which would also increase costs to business without any demonstrable benefit.

VECCI has submitted to the recent Inquiry into Portable Long Service leave[31] and our key concerns in relation to extending the portability of long service leave entitlements, namely:

- It would increase the cost of labour without delivering any corresponding increase in productivity;
- It would result in additional indirect administration costs for employers;
- It would discourage employment, particularly among older Victorians. There is a potential that portable long service leave schemes will create apprehension about employing people reaching their 7 or 10 year career tenure (depending on their qualifications);
- It would create implementation difficulties; and
- It may reduce the benefit it currently confers, that is, the benefit of a long serving employee.

Results from a recent VECCI-Bank of Melbourne Survey of Business Trends and Prospects show that Victorian employers do not have the capacity to absorb the costs associated with the extension of portable long service leave entitlements. Five hundred VECCI members were asked what they would do if they had to contribute 2.7 per cent of their total gross wage bill to a central scheme that would pay long service leave once it was accrued. Almost 60 per cent of respondents indicated they would seek to reduce employee wages, benefits or hours. This highlights the detrimental impact an expansion in portable long service leave entitlements would have on Victorian jobs.

We also believe further complexity created within the state systems creates an unacceptable disadvantage for employers within particular jurisdictions, similar to the issues outlined in respect of public holidays.

[31] Inquiry into Portability of Long Service Leave Entitlements http://www.parliament.vic.gov.au/eejsc/article/2561 accessed 18 September 2015.

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ATTACHMENT 1 – Data Set of General Protections 'Complaints' Cases

ATTACHMENT 1					
Case Name	**Citation(s)**	**Body**	**Date**	**Comments**	**CATEGORY**
Hodkinson v Commonwealth	[2011] FMCA 171; (2011) 248 FLR 409;(2011) 207 IR 129	Federal Magistrates Court of Australia	31-Mar-11	An employee was dismissed in her probationary period for poor performance. Before the termination, the employee had 'complained' to HR that management had failed to take in to account her ongoing (non-workplace) back injury and return to work program when assessing her performance. The employee alleged, among other things, that she was unlawfully dismissed for making that complaint. Decision: The employee's claim was dismissed. The Court questioned whether the conversation with HR was actually a 'complaint', instead suggesting it might be more appropriately characterised as a 'submission' in response to managements recommendation to terminate. Nonetheless, the Court found that even if this conversation did amount to a complaint, this did not form any part of the employer's basis for dismissing her. Rather, the dismissal was purely performance-related.	1
Ramos v Good Samaritan Industries	[2013] FCA 30	Federal Court of Australia	30-Jan-13	An employee retail manager made a written complaint to HR alleging he was mistreated and shown a "total lack of respect" by two senior managers in a meeting that discussed the employee's failure to meet budget targets. The matter was investigated and no action was taken. Subsequently, the employee was performance managed for failing to meet budget targets. He also received two complaints from junior staff alleging that he, among other things, used profane language and shouted at staff. The employee was stood down on full pay whilst the complaints were investigated and was subsequently given a final warning. The employee resigned and claimed that the performance management, disciplinary action and ultimate 'constructive dismissal' was all a result of his original complaint to HR. Decision: Finding for the employer, and upholding the decision at first instance, the Court held that that performance management arising out of legitimate concerns and motivated by good management outcomes does not amount to adverse action.	1

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Rowland v Alfred Health	[2014] FCA 2	Federal Court of Australia	15-Jan-14	A surgeon at the Alfred Hospital was made redundant following a restructure of the Cardiothoracic Unit. The surgeon alleged he was unlawfully dismissed for making a complaint about his employment. Over the 10 years of employment, the surgeon had made 6 complaints to the hospital about the competence of the Director of the Cardiothoracic Unit. Decision: Dismissing the surgeon's claim, the Court held that all complaints made where the exercise of a "workplace right" within the definition of s 341(1)(c)(ii) but there was no adverse action - the substantial and operative reason for the restructure did not include the fact that the employee had made a number of workplace complaints.The Court held that the surgeon "sowed the seeds of his own redundancy by perceiving that the selection process was targeted at him. That the outcome eventuated does not prove that Alfred Health conspired against him to achieve it."	1
Stevenson v Airservices Australia	[2012] FMCA 55; (2012) 218 IR 210	Federal Magistrates Court of Australia	1-Feb-12	An employee made various complaints to his employer, including an allegation that a particular manager was bullying and harassing him. The employer appointed an external mediator to resolve the issues between the employee and the manager, but before mediation took place, the employee was dismissed on performance grounds. The employee alleged that his employer had taken adverse action against him by terminating his employment for reasons related to him having made complaints, whilst the employer claimed the employee was terminated because he had failed to build and sustain relationships with key stakeholders. Decision: Dismissing the employee's case, the Court held that the fact that the employee had made complaints did not preclude assessment of his performance in his role, and his being dismissed from his employment on performance grounds. The Court was satisfied that the employee's complaints formed no part in the employer's reasons for dismissing him.	1
Kweifio-Okai v Australian College of Natural Medicine (No 2)	[2014] FCA 1124	Federal Court of Australia	21-Oct-14	An employee at a training college was suspended on full pay pending the outcome of an investigation in to allegations of misconduct. Some, but not all, of the allegations were found to have been established. The adverse findings included a failure to observe a lawful and reasonable direction given to him by his supervisor, inappropriate and unprofessional behaviour and instructing an employee not to comply with a management direction.The employee refused to attend a meeting to discuss the outcome and allow him to respond. The employer subsequently elected not to renew his fixed-term contract of employment. The employee claimed he was treated adversely (suspension pending investigation and non-renewal of contract) because of complaints that he had made about academic standards and procedures within the College during the course of the misconduct investigation. The employer maintained that the adverse action had not been taken "because" of the making of the complaints but rather because of the conduct of the employee.Decision: Dismissing the employee's claim, the Court accepted the employer's evidence that the reason for the employee's termination was due to misconduct.	1
Maslen v Core Drilling Services Pty Ltd	[2013] FCCA 460	Federal Circuit Court of Australia	24-Jun-13	An employee was terminated within his probationary period for performance reasons. The employee alleged, among other things, that he was dismissed for making a complaint about the non-payment of wages for attending two days of induction and for advising his employer that he may need leave to attend Army Reserve training some time in the near future (even though he was not at member of the Reserve at that time). Decision: Dismissing the employee's claim, the Court accepted the employer's reasons for termination (performance) and this discharged the onus of proof under s 361.	1

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Heathcote v University of Sydney	[2014] FCCA 613	Federal Circuit Court of Australia	14-Nov-14	Employee lodged complaint in 2004 about bullying, harassment and misconduct that he claimed he had experienced. Complaint was investigated and dismissed by the university. In 2012 the university went through a redundancy process, in which the employee was made redundant. The employee lodged an adverse action claim, one element of which was that he had been made redundant for making the 2004 complaint in relation to his employment. The FCCA found that the employee had not been made redundant for a prohibited reason.	1
Miller v Executive Edge Travel & Events Pty Ltd	[2014] FCCA 1895	Federal Circuit Court of Australia	8-Sep-14	Employee informed a director that she wanted to make a complaint to the other directors after a meeting to discuss concerns/problems went badly. The employee was terminated at a later meeting by that director, for performance based issues.The employee did not tell the director about the nature of the complaint that she wished to make. The FCCA was satisfied that the complaint would have been 'in relation to' the applicant's employment, however the applicant failed to establish a causal connection between the complaint and the decision to terminate.	1
King v Direct Freight (Aust) Pty Ltd	[2014] FCCA 524	Federal Circuit Court of Australia	24-Mar-14	Employee put in an adverse action claim on 8 different grounds, including making a workplace complaint. The complaint from the employee was in relation to receiving 'aggressive or offensive language' and 'the legality of ropes used by the employer.' The FCCA found that the reasons for the termination were due to the employee engaging in serious misconduct, and not for the reason for complaint itself. The employee's application was dismissed.	1
Dickson v Downer EDI Works Pty Ltd	[2014] FCA 1134	Federal Court of Australia	24-Oct-14	The employee alleged that he made 9 complaints between December 2013 and 16 April 2014. Five complaints amounted to an exercise of 'workplace rights.' The complaints were each preceded by bullying and harassment behaviour directed at him by various managers over a significant period of time. The employee had been directed not to copy complaints about management to his work crew/colleagues, and not to speak with others about the investigation details. The FCA found that the employee had not been treated adversely for making the complaint. Rather, the reason for his termination was due to his repeated breaches of instruction in the deliberate distribution of the complaint to his subordinates.	1

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Kweifio-Okai v Australian College of Natural Medicine	[2014] FCA 746	Federal Court of Australia	15-Jul-14	Employee lodged an interlocutory application that required the applicant to hold his role open whilst case was being heard. The employee made a complaint about prescribed standards imposed under the Tertiary Education Quality and Standards Agency Act 2011. He claimed he was not re-engaged as a fixed-term contract employee as he had exercised his workplace right to make a complaint. He was unable to show a casual connection between the complaint and the action being taken. The FCA was not persuaded by the applicant's prospects of success and the interlocutory relief was refused.	1
Morrow v Tattsbet Ltd	[2014] FCCA 1327	Federal Circuit Court of Australia	4-Jul-14	Main argument in this case was whether or not Morrow was engaged as an independent contractor or an employee. Part of her adverse action claim was around making a complaint in relation to receiving superannuation. The employer argued that they terminated the employee due to her unprofessional conduct and loss of trust and confidence due to the 'surreptitious' way she investigated the superannuation issue. The FCCA found that (on the evidence given) the employee never made a complaint or an inquiry to the employer around her superannuation. No evidence around her exercising her workplace right to make a complaint or inquiry.	1
Vukovic v Myer Pty Ltd	[2014] FCCA 985	Federal Circuit Court of Australia	2-Jun-14	Employee alleged adverse action had been taken against him due to his anxiety condition (disability) and his intention to seek workers compensation. He also alleged he had disclosed his right to make a complaint to the AHRC under both. The FCCA accepted that the employee had not disclosed his medical condition or his intention to make a complaint regarding a workplace right. Employer successfully argued that the employee had been terminated due to his performance.	1
Rahman v Commonwealth of Australia as Represented by the Australian Taxation Office	[2014] FCCA 6	Federal Circuit Court of Australia	28-Feb-14	Employee alleged a number of adverse action grounds, including that he was not promoted because he put in a complaint in relation to racial comments made by another ATO employee. Employee was unable to prove that he had been treated adversely on the basis of his complaint.	1

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Short v Ambulance Victoria	[2014] FCA 3	Federal Court of Australia	15-Jan-14	The employee expressed an interest in acting in a higher duties capacity in August 2010. From 16 June – 26 July, the employee was on personal leave. He made complaints against his team manager alleging bullying/inappropriate behaviour on 18 and 21 June 2010. On 8 July, the employee was notified that he would not be suitable to perform the higher duties role because of the short timeframe between when he was due back from leave and when the role was to commence. The employee claimed that by refusing to allow him to act in the higher duties role combined with him having made a 'complaint or inquiry', Ambulance Vic had engaged in adverse action. The FCA found that 'an expectation to be interviewed' and 'disappointment of an expectation' was not adverse action.	1
Power v Robot Trading Co Pty Ltd TA Robot Building Supplies	[2013] FCCA 21	Federal Circuit Court of Australia	16-Apr-13	Employee alleged that she was forced to resign as a result of making complaints about the conduct of her supervisor.The employer investigated the matters, and had a meeting with the employee and her father as part of this process. The employee was told that the supervisor denied the allegations and had raised counter-complaints. The employee's father concluded the interview and left the meeting with the employee.The FCCA found that it was 'clear that the failure' to dismiss or transfer the supervisor was the reason for resignation. The application was subsequently dismissed.	1
Begley v Austin Health	[2013] FMCA 68	Federal Magistrates Court of Australia	7-Mar-13	The employee raised a complaint that she was wrongly classified under the relevant Enterprise Agreement, and for that reason she was subject to a sham redundancy. The employer argued that her position had been genuinely made redundant for financial reasons. The FMCA found that the employee had not been treated adversely, as the classification issues and complaint had no part in the redundancy decisions.	1
Tsilibakis v Transfield Services (Australia) Pty Ltd	[2015] FCA 740	Federal Court of Australia	21-Jul-15	The employee alleged that he had been terminated and treated adversely because he had made a number of complaints, including: • a complaint of bullying and harassment against his immediate supervisor; • complaint about an e-mail that offended him; and • a complaint which demonstrated his dissatisfaction with an investigation. The employer purported that they made the employee redundant, and that the position had not been selected on the basis of the complaints, but rather a desire to achieve cost savings. Further, the FCA found that the employee had not been treated adversely in not being afforded the opportunity to work out notice or being given garden leave due to the nature of the relationship between the employee and the business. The applicant's claims were dismissed.	1

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Perez v Northern Territory Department of Correctional Services	[2015] FCCA 1384	Federal Circuit Court of Australia	29-May-15	Employee was engaged on a fixed term basis. He made 9 claims of adverse action in contravention of s340(1). This included multiple complaints of harassment. The FCCA found that the employee had been terminated due to his failure to complete training successfully, which left the employer with 'no alternative' other than to not extend the employee's contract of employment.	1
Regulski v Victoria	[2015] FCA 206	Federal Court of Australia	13-Mar-15	An employee alleged that a manager abused him because he exercised a workplace right to refuse to participate in a night club inspection because he believes that the tactics were illegal. This was not held to be a complaint and rather 'a comment or observation.'He also made a complaint in relation to bullying and conduct by his manager, and submitted that he was treated adversely due to this. However the investigation conducted by the business found that the manager who dealt with this had breached the code of conduct and this matter was subsequently dealt with.The application was dismissed as there was no casual connection between the complaints and his resignation.	1
Bartolo v Doutta Galla Aged Services Ltd (No 2)	[2015] FCCA 345	Federal Circuit Court of Australia	19-Feb-15	The case largely concerned investigations and legal professional privilege. An e-mail was sent to 'all staff' which made allegations against the applicant (an employee). The e-mail was purported to have been sent by the Footscray facility manager. The applicant claimed that the following complaints fell within the definition of a complaint/inquiry in relation to this employment: • a request by him to STOPline to conduct a forensic investigation into the source of the 16 August 2012 email • A complaint made by him to the police • A complaint made to the CEO about further dissemination of the august 2012 email • A statement filed by him on 9 September 2012 The employer purported that the reasons for termination included misconduct, performance, failure to obey lawful and reasonable instructions, bullying behaviour and the recommendation of the board. The employer was not held to have breached the adverse action act.	1
Dos Santos v Decjuba Enterprise Pty Ltd	[2015] FCCA 192	Federal Circuit Court of Australia	30-Jan-15	The employee made a complaint in relation to being bullied by her manager, working in a threatening environment, a lack of support from the head office and alleged threats made to the employee by the manager. The employee alleged that she was terminated because of exercising her workplace rights or alternatively that she was absence due to illness/injury and therefore the termination was in breach of the act. The business argued that the termination was due to the employee's poor performance and behaviour in the workplace. There was no dispute in this case about whether or not her complaints constituted a workplace right as the employer conceded these points. However due to the evidence, the application was dismissed.	1

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Curatolo v Skye Children's Co-Operative Ltd	[2015] FCA 14	Federal Court of Australia	27-Jan-15	The employee purported that she had been terminated for a number of different reasons, including that she had contacted the union by telephone to arrange for a meeting about concerns she had in the workplace. The concerns primarily related to the director's position being vacant. The employer stated that the employee had been terminated following investigations of misconduct, which included allegations around hitting and verbally abusing children under the business's care. The FCA found that the employee's allegations were not made out, and she had been terminated due to the misconduct she had engaged it.	1
Maritime Union of Australia v DP World Melbourne Ltd	[2014] FCA 1321	Federal Court of Australia	10-Dec-14	Employee alleged that he was terminated in order to prevent him from acting as a representative of employees in enterprise agreement negotiations, and to prevent him from making complaints/inquiries in relation to employment. The employer was able to successfully argue that the employee had been dismissed due to his misconduct, which included gross misconduct in approaching an employee in a loud, aggressive manner and telling her she was a "f***ing lagger."	1
Titan v Weatherford CSG Drilling Pty Ltd	[2014] FCCA 2342	Federal Circuit Court of Australia	8-Oct-14	Employee alleged that he was terminated in order to prevent him putting in a complaint against his superior who bullied/physically harassed him, and because he exercised his workplace right to take personal leave. Employer argued that they terminated the employee because the employee's performance was inadequate. Employer had received four verbal complaints about the employee's attitude as well as poor performance and rudeness. Application dismissed as the FCCA accepted the employer argument based on the evidence presented.	1
Mendonca v Chan & Naylor (Parramatta) Pty Ltd	[2014] FCCA 1042	Federal Circuit Court of Australia	2-Jun-14	Employee alleged number of claims including making complaints to the Fair Work Ombudsman, WorkCover (in relation to bullying), discrimination based on gender. Limited obiter in relation to the complaints in this case. The FCCA found that the employee was terminated for serious misconduct.	1
McIlroy v Thiess Pty Ltd	[2013] FCCA 1899	Federal Circuit Court of Australia	28-Nov-13	McIlroy claimed his employment was terminated for exercising/proposing to exercise workplace rights including making a complaint about harassment and bullying around another employee. The employer argued that the employee had been terminated for unprofessional conduct. The FCCA found that there was no causal link between the complaint made and the reasons for dismissal.	1
Richards v Le Cordon Bleu Australia Pty Ltd and Richards v Le Cordon Bleu	[2013] FCCA 566	Federal Circuit Court of Australia	18-Oct-13	Employee contended that business terminated him for making a complaint in relation to his employment. The business stated that he was dismissed because of a failure to come to meetings and discuss problems, and failure to give advance warning of inability to attend. The FWC concluded on the evidence that the employee was not dismissed for exercising a workplace complaint.	1

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Phillips v Visser	[2010] FMCA 684	Federal Magistrates Court of Australia	13-Aug-10	Employee believed she was treated adversely (either resigned or terminated) for putting in an inquiry to the ATO about tax calculations (s341(1)(c)(ii)). Her direct manager found that the way they calculated tax was correct. The employee issued incorrect payslips after direction from the manager to amend. This caused mass confusion within the workplace. The application dismissed as the employee unable show that any adverse action took place a result of her taking a workplace right in making a complaint/inquiry.	1
Dubow v Aboriginal and Torres Strait Islander Legal Service	[2013] FCCA 1357	Federal Circuit Court of Australia	24-Apr-13	The employee made a complaint about the manner in which she was disciplined, the basis for discipline and the penalty that was imposed, all of which were found to be complaints in respect of employment which fall within the scope of section 341(1)(c)(ii).	1
Walsh v Greater Metropolitan Cemeteries Trust (No 2)	[2014] FCA 456	Federal Court of Australia	9-May-14	Another good example of the courts adopting a 'broad view' on s 341(1)(c)(ii), especially in relation to employee's making complaints about other employee's working conditions rather than their own. The employee was dismissed in her probationary period for reasons of poor performance, according to the employer. However, the employee alleged the actual reason was for making complaints in relation to her employment. The employee manager had complained that another manager's daughter worked for a business that had a contract to supply a certain product to the employer. She complained that as a matter of probity, it was not appropriate for that other manager to be dealing with her daughter in relation to that contract. Decision: Upheld employee's claim. An employee can make a complaint about misconduct that had an effect on another employee, but not on the employee making the complaint directly. That may be sufficient to demonstrate the exercise of a "workplace right" by that employee. Thus, the Court found that the complaint did not need to be directly related to the employment; an indirect relationship was enough. Nevertheless, the reason for dismissal was poor performance	1
Annear v Spotless Facility Services Pty Ltd	[2015] FCCA 1335	Federal Circuit Court of Australia	6-Jul-15	The employee alleged that she had been treated adversely for making a complaint to the FWO by the employer: • changing her from night shift to day shift; and/or • terminating her employment The FCCA found that the employment relationship had been terminated due to performance issues. They further found that the roster changes had not been changed or altered on an adverse action basis.	1

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Nulty v Blue Star Group Pty Ltd	[2011] FWAFB 975; (2011) 203 IR 1	Fair Work Australia	16-Feb-11	One of the first cases under the Fair Work regime to adopt the 'narrow view' on s 341(1)(c)(ii).The Full Bench said in obiter that s 341(1)(c)(ii) was not enlivened 'whenever an employee makes a complaint to a responsible senior manager as a mere incident of the employment relationship'. The phase 'is able' in s 341(1)(c)(ii) means an employee's complaint must originate from or be an incident of the contract of employment or statutory framework surrounding the employment.This narrow view was followed by a single magistrate of the Federal Magistrates' Court (now the Federal Circuit Court) in Harrison v In Control Pty Ltd (2013). Appeal dismissed.	2
Harrison v In Control Pty Ltd	[2013] 273 FLR; [2013] FMCA 149	Federal Magistrates' Court	8-Mar-13	Throughout the period of employment, the employee had expressed strong disagreement with the director of the company about his manner and style of managing. At a meeting to discuss these concerns, the employee accused the Director of lacking the leadership skills to effectively run the business. The employee was subsequently terminated. The employee argued that by complaining about the matters raised at the meeting, he was exercising his workplace right to make a complaint or inquiry relating to his employment. Decision: Matter dismissed. Following the narrow view. An employee's complaint must originate from or be an incident of the contract of employment or statutory framework surrounding the employment.	2
Shea v TRUenergy Services Pty Ltd (No 6)	[2014] FCA 271	Federal Court of Australia	25-Mar-14	Example of the courts adopting the 'narrow view' on s 341(1)(c)(ii). An employee accused her colleague of sexual harassment. The claim was investigated by an external party and dismissed. The employee complained about the investigation and its findings. The employee was subsequently made redundant. She alleged the redundancy was not genuine and that she was unlawfully terminated for making the complaints. Decision: Employee's claim dismissed. Her complaint about deficiencies in the investigation was not a genuine grievance communicated in good faith (but rather, an attempt to pressure the employer to agree to a generous severance payment). The court held that for there to be a breach of s 341(1)(c)(ii) the employee's complaint or grievance must be genuinely held. Further: "the making of false, baseless, unreasonable or contrived accusations of grave misconduct against fellow employees" would not be protected. It was also determined that an employee's complaint or inquiry must have some basis in an actual right or entitlement, such as those provided by a contract or employment, award or legislation.	2

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Daw v Schneider Electric (Australia) Pty Ltd	[2013] FCCA 1341; (2013) 280 FLR 361	Federal Circuit Court of Australia	17-Sep-13	An employee has a 'workplace right' if, among other things, he is able to:• make a complaint or inquiry to a person or body with capacity to seek compliance with a workplace law or instrument, or• make a complaint or inquiry in relation to his or her employment.The Court in this case held a workplace law must be a statute law (including delegated legislation). It does not generally include rights arising under contracts of employment or other common law rights.The employee was an engineer. He refused to complete work because by doing so he would breach the Professional Engineers Act 2002 (Qld), since his supervisors were not qualified in the way required by that Act. The employee was dismissed after refusing to work without adequate supervision. He brought an adverse action claim against his employer on the basis that he had a workplace right not to work if, by doing so, he would be breaking the law.The employee was unsuccessful in his claim. The Federal Circuit Court held that the Professional Engineers Act 2002 (Qld) was not a workplace law and, accordingly, the employee was not exercising a workplace right.	2
Stanton v Bryan F McConville & Brenda E McConville t/a Master Coaching Albury	[2015] FCCA 1864	Federal Circuit Court of Australia	10-Jul-15	The employee alleged she had been terminated or treated adversely by the employer after making a complaint in relation to her pay rate and tax rate. The employee had been engaged as a casual. The employer stated that the employee had not been terminated, and that they did not have the work for her. The claim was dismissed as the employee could not show that she had been dismissed from employment.	2
Faulkner v BIS Industries Ltd	[2012] FMCA 592	Federal Magistrates Court of Australia	6-Jul-12	The applicant was an independent contractor who attempted to lodge a claim under s341(1)(c)(i) when he was refused on site after failing to comply with OHS procedures. The application was dismissed as a complaint raised in relation to the Independent Contractors Act would fall within the scope of 341(1)(b), and not (c).	2
Vij v Cordina Chicken Farms Pty Ltd	[2012] FMCA 483; (2012) 265 FLR 365;(2012) 222 IR 91	Federal Magistrates Court of Australia	15-Jun-12	The applicant (a labour hire employee) alleged that his employment was terminated after he tried to educate other employees and management about their workplace rights. Part of the application alleged that he had raised a complaint with the FWO, and that he was moved to perform more difficult work after advising the respondent of this. This was not examined in depth in the decision. The application was ultimately dismissed because the applicant was not a 'prospective employee'.	2
Construction, Forestry, Mining & Energy Union v Pilbara Iron Co (Services) Pty Ltd (No 3)	[2012] FCA 697	Federal Court of Australia	29-Jun-12	A good example of the courts adopting a 'broad view' on s 341(1)(c)(ii), especially in relation to employee's making complaints about other employee's working conditions rather than their own. The fact that the employee had raised concerns or complaints about safety issues within the workplace was found to be the exercise of workplace right. The complaints did not relate to the employee's own personal working conditions, safety or environment, but were complaints made out of concern for the safety of employees at that workplace generally.	3

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National Tertiary Education Union v Royal Melbourne Institute of Technology	[2013] FCA 451; (2013) 234 IR 139	Federal Court of Australia	16-May-13	A professor ('employee') at RMIT was made redundant after a restructure of her role. She alleged the redundancy was not genuine and that she was unlawfully terminated for making numerous complaints about the bullying behaviour and poor management practices of her superior. The complaints were made to WorkSafe , a number of internal RMIT parties and to the National Tertiary Education Union (NTEU). The complaints were conceded to be "workplace rights" by RMIT in court. Decision: Finding in favour of employee, the court held that the redundancy was a "sham" and the employee was dismissed for exercising her workplace right to make a complaint about her employment.	3
Devonshire v Magellan Powertronics Pty Ltd	[2013] FMCA 207; (2013) 275 FLR 273;(2013) 231 IR 198	Federal Magistrates Court of Australia	11-Apr-13	Another good example of the courts adopting a 'broad view' on s 341(1)(c)(ii) – the protection does not require a formal mechanism or provision for an employee's complaint or inquiry to constitute a workplace right. The employee was terminated after making an inquiry about her salary package, including the non-payment of an agreed vehicle allowance. Decision: Finding in favour of the employee, the Court held that asking about her pay was exercising a workplace right within the meaning of s 341(1)(c).	3
Burke v Serco Pty Ltd	[2012] FMCA 1134	Federal Magistrates Court of Australia	29-Nov-12	Employee complained that he was terminated after making a complaint about the employer exposing him to unsafe work environment/practices. Employee raised complaints about smoking in the workplace, which the FMCA stated fell within the definition of s341(1)(c)(ii) as it was a workplace health and safety issue. The FMCA found that the employer had engaged in adverse action, as they had not provided a reason for termination to the employee.	3
Brown v Premier Pet T/A Bay Fish	[2012] FMCA 1089	Federal Magistrates Court of Australia	6-Nov-12	Employee alleged that he was terminated for making a complaint in relation to his hours to Fair Work Australia, and/or his refusal to work unreasonable additional hours. The FMCA did not find that he had been treated adversely in making the complaint, however he had been treated adversely when he was terminated.	3
Kennewell v MG & CG Atkins trading as Cardinia Waste & Recyclers	[2015] FCA 716	Federal Court of Australia	16-Jul-15	The employee made complaints around his pay rates and employment status. The employer denied that they had any knowledge of the complaints/inquiries regarding the above, and that they had made the decision based on other grounds. The employer stated they terminated him on the basis of serious misconduct and unsatisfactory performance of duty. The FCA considered that the employee had never been reprimanded or given a formal warning in respect to any of the matters he was terminated for. They therefore considered that the employer had engaged in adverse action.	3

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Penglase v Allied Express Transport Pty Ltd	[2015] FCCA 804	Federal Circuit Court of Australia	20-Apr-15	Situation was more around fitness for work. Employee took time off from 19 – 23 November. Upon her return on 27 November, she was asked to do a FFW assessment. On 5 December the employer sent a letter around the lapse of her entitlements and the fact that she was not fit to return to her role. They gave her an option to choose an alternative role by 7 December 2012. The employee put in a complaint that she felt bullied and forced to resign on 7 December 2012. In consideration of the claim, the FCCA found that the employee's role had been altered due to her illness or injury, and this was the reason for the adverse treatment. There wasn't further evidence led as to the complaint.	3
Scullin v Coffey Projects (Australia) Pty Ltd	[2015] FCCA 1514	Federal Circuit Court of Australia	4-Jun-15	Employee put in a request to take parental leave after his wife gave birth. The case largely concerned around parental leave for fathers. Part of the applicant's claim was that he had been treated adversely for lodging a complaint around his annual leave entitlement - however there was no evidence that the applicant made a complaint or enquiry in relation to this. The employer was found to have engaged in adverse action 'mistakenly' in applying a workplace policy that only made parental leave available to the primary care giver.	3
Reurich v Commercial Projectz Pty Ltd	[2012] FMCA 991	Federal Magistrates Court of Australia	18-Oct-12	Employee was issued with a formal warning letter which stated that he may be terminated if his performance did not improve. He was terminated shortly after a suspension in November 2011. He then put in an argument to say that he was terminated for putting in a workplace complaint in relation to: 1. Making a complaint in regards to the conduct of his project manager (yelling at him, waving arms and thumping the table); 2. The project allowing employees on site without a "white card" (construction site); 3. Suspension and termination due to making the complaints The employer was held to have engaged in s340 adverse action as it was unable to disprove it at [36].	3
Murrihy v Betezy com au Pty Ltd	[2013] FCA 908; (2013) 238 IR 307	Federal Court of Australia	10-Sep-13	Another example of the courts adopting a 'broad view' on s 341(1)(c)(ii) – the protection is not just confined to complaints/inquires directed to the employer, but could cover inquiries directed to lawyers.An employee was entitled to a commission on certain revenues under an agreement with her employer. The employer did not pay this commission. When the employee sought legal advice on this potential breach of contract, she was threatened with dismissal, suspended without pay and had her access from the employer's computer system was terminated. The employee alleged this was adverse action because, among other things, she was entitled to make an inquiry about her employment with her lawyer. Decision: Finding in favour of the employee, the Court held that seeking legal advice about rights to pay constituted a complaint or inquiry in relation to employment. The Court stated: "That such an [unrepresented] employee should be able to have recourse to his or her solicitor, without the fear of repercussions in the nature of 'adverse action' taken by the employer, would be well within the purposes of [section 341(1)(c)(ii)] as they may be perceived in the legislative context ... ."	4

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Shea v Energy Australia Services Pty Ltd (No 7)	[2014] FCA 1091	Federal Court of Australia	13-Oct-14	After winning the first case, the employer, Energy Australia, brought an action for indemnity costs against the employee. The Court ordered the employee pay some of the employer's costs.	5
Shea v EnergyAustralia Services Pty Ltd	[2014] FCAFC 167	Federal Court of Australia	8-Dec-14	The earlier two cases were appealed and although neither was overturned, the Full Federal Court cautioned against courts adopting the narrow view on 341(1)(c)(ii) and constraining the ability of employees to make employment complaints by assessing the genuineness or bona fides of such a complaint. The Court said that "considerable care" needed to be exercised before implying a constraint on an employee's rights under s 341(1)(c)(ii). "To too readily imply into the language of ss340 and 341 the necessity for a complaint to be a "genuine" complaint, necessarily would be productive of argument about whether a "complaint" is bona fide and may serve to discourage those who may well have mixed motives for making a complaint." "The expression or drafting of a "complaint" should not require the sophistication or knowledge of an experienced industrial lawyer or legal advice regarding whether it should in fact be made."	5
Construction, Forestry, Mining and Electrical Union v Leighton Contractors Pty Ltd	[2012] FMCA 487; (2012) 225 IR 197	Federal Magistrates Court of Australia	25-Jul-12	Not relevant – injunction to restrain employer	5
Cavar v Nursing Australia	[2012] FCA 338	Federal Court of Australia	4-Apr-12	Not relevant – application for leave to appeal on no case to answer – no identification of adverse action being taken	5
Tattsbet Ltd v Morrow	[2015] FCAFC 62	Federal Court of Australia	11-May-15	This was an appeal from a single judgement of the Federal Circuit Court concerning a general protections application under s 341(1)(c)(ii) and a question as to whether the worker was an independent contractor or employee. The worker was engaged as an 'independent contractor' by Tattsbet to operate a TAB. After making an enquiry about her entitlement to superannuation, her contract was terminated. At first instance in Morrow v Tattsbet [2014] FCCA 1327, the primary judge held that she was an employee. However, this was overturned on appeal. The worker was a contractor. But this did not preclude her from claiming a breach of the general protections, most of which apparently apply to contractors as well as employees. The matter was remitted to the Federal Circuit Court for further consideration.	5
Dahler v Australian Capital Territory	[2014] FCA 946	Federal Court of Australia	2-Sep-14	Not relevant – application for leave of appeal (after interlocutory decision) on bias grounds	5
Construction, Forestry, Mining & Energy Union v Rio Tinto Coal Australia Pty Ltd	[2014] FCA 462	Federal Court of Australia	9-May-14	Not relevant – interlocutory application. Dispute in relation to different redundancy payments being paid to union/non-union employees.	5

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Bency George v Northern Health	[2011] FMCA 445	Federal Magistrates Court of Australia	6-Jun-11	Not relevant – adjournment	5
RailPro Services Pty Ltd v Flavel	[2015] FCA 504	Federal Court of Australia	22-May-15	Not relevant – appeal on finding of fact. Dealt with s351 adverse action on basis of disability or exercise of right under OHS to protect his health and safety.	5
Evans v Trilab Pty Ltd	[2014] FCCA 2464	Federal Circuit Court of Australia	30-Oct-14	This case concerned a 'no case to answer' argument. An employee questioned soil/rock testing methods used, concerned that they weren't in line with Australian standards. The chairman of the board met with the employee and directed him to use the dry testing method, and to stop telling other staff that they were using the incorrect method. The employee was terminated 4 days later as he refused to adopt the dry testing method, that he had not completed a proficiency test as requested. In the court, the business asserted that the employee had been terminated for performance methods. The FCCA held that an employee's questioning of testing methods was capable of being characterised as a workplace complaint or inquiry. In doing so, he reviewed a number of authorities [18] – [64]. The FCCA determined that the employer had not shown 'no reasonable prospect of success'. The matter was left open to be determined at a further hearing.	5
Halls v KR & MA McCardle & Sons Pty Ltd	[2014] FCCA 316	Federal Circuit Court of Australia	25-Feb-14	Not relevant – dealt with incorrect application and extension of time	5
Reeve v Ramsay Health Care Australia Pty Ltd	[2013] FCA 499	Federal Court of Australia	24-May-13	Not relevant – appeal from an interlocutory judgement	5
CEPU v Australian Postal Corporation	[2010] FMCA 461; (2010) 197 IR 85	Federal Magistrates Court of Australia	23-Jun-10	Not relevant – application to transfer to a federal court	5
Sagona v R & C Piccoli Investments Pty Ltd (No 2)	[2014] FCCA 2925	Federal Circuit Court of Australia	16-Dec-14	Not relevant – costs determination around 'unreasonable' conciliation refusal and settlement refusal.	5
Dalglish v MDRN Pty Ltd (No 2)	[2014] FCCA 1969	Federal Circuit Court of Australia	29-Aug-14	Not relevant – breach of contract	5

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Taj v Western Health (No 2)	[2014] FCA 339	Federal Court of Australia	19-Mar-14	Not relevant – interlocutory application, costs, vexatious claim	5
United Motor Search Pty Ltd v Hanson Construction Materials Pty Ltd	[2013] FCA 1104	Federal Court of Australia	24-Oct-13	Not relevant – interlocutory injunction	5
Co-operative Bulk Handling Ltd v Maritime Union of Australia	[2013] FCA 940	Federal Court of Australia	2-Jul-13	Not relevant – injunctive relief application for industrial action	5
Fox v Stowe Australia Pty Ltd	[2012] FMCA 976; (2012) 271 FLR 372	Federal Magistrates Court of Australia	26-Oct-12	Not relevant – relief sort, forms to be filed, pleadings need to be clearly alleged and particularised	5
Chyb v Commonwealth Scientific and Industrial Research Organisation	[2012] FCA 872	Federal Court of Australia	17-Aug-12	Not relevant – application to make amendments to discovery and affidavit material	5
Brennan v Plumbing Services Australia Pty Ltd	[2012] FMCA 3	Federal Magistrates Court of Australia	9-Mar-12	Not relevant – non payment/underpayments claim brought under s340.	5
Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union v Visy Packaging Pty Ltd	[2011] FCA 1001	Federal Court of Australia	12-Aug-11	Not relevant – interlocutory relief relating to 340(1)(a) and (b) discrimination under OHS legislation	5
Construction, Forestry, Mining and Energy Union v Pilbara Iron Co (Services) Pty Ltd	[2010] FCA 822	Federal Court of Australia	5-Aug-10	Not relevant – industrial agreement construction	5
Construction, Forestry, Mining and Energy Union v CUB Pty Ltd	[2015] FCA 692	Federal Court of Australia	2-Jul-15	Not relevant – injunction under s545 of the FWA in relation to misleading ballots for enterprise agreement	5
Built Qld Pty Ltd v Construction, Forestry, Mining And Energy Union	[2015] FCCA 1612	Federal Circuit Court of Australia	10-Jun-15	Not relevant – interlocutory application in relation to enterprise agreement	5

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Murray v The Peninsula School	[2015] FCA 447	Federal Court of Australia	12-May-15	Not relevant – injunction application to restrain employer from dismissing employee	5
Leske v Trinity Lutheran College Mildura	[2015] FCCA 572	Federal Circuit Court of Australia	19-Mar-15	Not relevant – application for proceedings to be dismissed under federal court circuit rules	5
Roberts v A1 Scaffold Group Pty Ltd	[2015] FCCA 422	Federal Circuit Court of Australia	27-Feb-15	Not relevant – application for a default judgement	5
Ermel v Duluxgroup (Australia) Pty Ltd	[2014] FCA 1399	Federal Court of Australia	16-Dec-14	Not relevant.	5
Rahman v Commonwealth of Australia as Represented by the Australian Taxation Office	[2014] FCA 1356	Federal Court of Australia	11-Dec-14	Already been summarised - appeal of decision, appeal dismissed	5
United Voice v MDBR123 Pty Ltd	[2014] FCA 1344	Federal Court of Australia	11-Dec-14	Not relevant – amendment of pleadings application	5
Chesnokova v The University of Adelaide	[2014] FCA 1436	Federal Court of Australia	8-Dec-14	Not relevant – interlocutory injunction to prevent employee from being terminated	5
Crawford v Steadmark Pty Ltd	[2014] FCCA 2916	Federal Circuit Court of Australia	4-Dec-14	Not relevant - interlocutory claim on reasonable prospects of success.	5
Potts v Kings Warehousing Administration Pty Ltd	[2014] FCCA 2671	Federal Circuit Court of Australia	19-Nov-14	Not relevant – extension of time application	5
Bland v Australian Portable Camps Services Pty Ltd	[2014] FCCA 2397	Federal Circuit Court of Australia	24-Oct-14	Not relevant – admissibility of evidence, length of trial	5

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United Voice v GEO Group Australia Pty Ltd	[2014] FCA 928	Federal Court of Australia	26-Aug-14	Not relevant – interlocutory injunction seeking reinstatement of suspending employee. Industrial action.	5
National Tertiary Industry Union v University Of Technology Sydney	[2014] FCCA 1243	Federal Circuit Court of Australia	17-Jun-14	Not relevant - The employee submitted that he was terminated as a result of various industrial relations activities, as well as a complaint he made against his former supervisor (the latter being a workplace right). Matter concerned more interlocutory grounds rather than complaint.	5
Construction, Forestry, Mining and Energy Union v Orica Australia Pty Ltd	[2014] FCA 592	Federal Court of Australia	5-Jun-14	Not relevant – discovery application	5
Sumontha v Action Workforce Australia Pty Ltd	[2014] FCCA 725	Federal Circuit Court of Australia	29-Apr-14	Not relevant – jurisdiction under s370 of the fair work act, direction orders made.	5
Department of Immigration v Brahatheesan	[2014] FCCA 440	Federal Circuit Court of Australia	12-Mar-14	Not relevant - Employee made a number of discrimination claims based on workplace rights against 9 respondents. One of these was a complaint to the Fair Work Ombudsman in relation to entitlement to carers leave. Matter was allocated for a further directions hearing.	5
Slade v North Coast Multi Trade Pty Ltd	[2014] FCCA 1164	Federal Circuit Court of Australia	26-Feb-14	Not relevant – unfair dismissal and extension of time application	5
Cavendish v Bazza's Bakeries Pty Ltd trading as Bazza's Bakehouse	[2014] FCCA 239	Federal Circuit Court of Australia	18-Feb-14	Not relevant – default judgement application	5
Boobera Lagoon Technology LLC v Zomojo Pty Ltd	[2013] FCA 1107	Federal Court of Australia	18-Oct-13	Not relevant – mandatory interlocutory injunction to keep employee in employment until trial	5
Jefferson v Uniting Church in Australia Property Trust (Q) and Pousette v Uniting Church in Australia Property Trust (Q)	[2013] FCCA 1294	Federal Circuit Court of Australia	8-Aug-13	Not relevant – objections to evidence	5
Construction, Forestry, Mining and Energy Union v Mirage Industries Pty Ltd	[2012] FCA 490	Federal Court of Australia	10-May-12	Not relevant – interlocutory injunction, whether scheduled ballot for employees should be restrained	5

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Beattie v Price Sierakowski Pty Ltd	[2011] FMCA 431	Federal Magistrates Court of Australia	9-Jun-11	Not relevant – costs – wether applicant acted unreasonably or vexatiously	5
Qantas Airways Ltd v Australian Licensed Aircraft Engineers Association	[2011] FCA 401	Federal Court of Australia	15-Apr-11	Not relevant – extension of time to apply for leave, and leave of appeal	5
Board of Bendigo Regional Institute of Technical and Further Education v Barclay	[2012] HCA 32; (2012) 248 CLR 500; (2012) 290 ALR 647; (2012) 86 ALJR 1044; (2012) 220 IR 445	High Court	7-Sep-12	Not relevant. Dealt with possible breach of s 346 (industrial activity).	6
Jones v Queensland Tertiary Admissions Centre Ltd (No 2)	[2010] FCA 399; (2010) 186 FCR 22; (2010) 196 IR 241	Federal Court of Australia	29-Apr-10	Not relevant. Dealt with possible breach of s 346 (industrial activity).	6
Australian Licenced Aircraft Engineers Association v International Aviation Service Assistance Pty Ltd	[2011] FCA 333; (2011) 193 FCR 526; (2011) 205 IR 392	Federal Court of Australia	8-Apr-11	Not relevant. Dealt with possible breach of s 346 (industrial activity).	6
Khiani v Australian Bureau of Statistics	[2011] FCAFC 109	Federal Court of Australia	24-Aug-11	Not relevant. Dealt with possible breach of s 352 (temporary absence due to illness/injury).	6
Liquor, Hospitality and Miscellaneous Union v Arnotts Biscuits Ltd	[2010] FCA 770; (2010) 188 FCR 221;(2010) 198 IR 143; 62 AILR 101-201	Federal Court of Australia	23-Jul-10	Not relevant. Dealt with possible breach of s 340 (workplace right) and s 343 (coercion).	6

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Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd	[2013] HCA 36; (2013) 248 CLR 619;(2013) 300 ALR 460; (2013) 87 ALJR 1009	High Court of Australia	14-Aug-13	Not relevant. Dealt with possible breach of s 470(1) (payments not to be made relating to certain periods of industrial action).	6
Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)	[2013] FCA 446; (2013) 232 IR 290	Federal Court of Australia	17-May-13	Not relevant. Dealt with breach of s 343 (coercion).	6
Construction, Forestry, Mining and Energy Union (CFMEU) v Victoria	[2013] FCA 445; (2013) 302 ALR 1	Federal Court of Australia	17-May-13	Not relevant. Dealt with breach of s 340(1)(a)(i) – adverse action and an entitlement under an EA.	6
Stephens v Australian Postal Corporation	[2011] FMCA 448; (2011) 207 IR 405	Federal Magistrates Court of Australia	8-Jul-11	Not relevant. Dealt with breach of s 351 (discrimination).	6
Stephens v Australian Postal Corporation	[2013] FCCA 1988	Federal Circuit Court of Australia	27-Nov-13	Appeal from above case. Not relevant. Dealt with breach of s 351 (discrimination).	6
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union	[2013] FCAFC 132; (2013) 219 FCR 245	Federal Court of Australia	13-Dec-13	Not relevant. Dealt with breach of s 347 (industrial activity).	6
Hill v Compass Ten Pty Ltd	[2012] FCA 761; (2012) 205 FCR 94; (2012) 223 IR 341	Federal Court of Australia	17-Jul-12	Not relevant. An employee at a residential care centre alleged he was dismissed for making inquiries to a third party (a NSW state government department) about inadequate staffing at the centre. The court dismissed the employee's general protections claim because he did not have a s 369 certificate issued by the FWC ('certificate of dispute not resolved').	6
Cugura v Frankston City Council	[2012] FMCA 340	Federal Magistrates Court of Australia	24-Apr-12	Not relevant. Dealt with possible breach of s 351 (disability).	6

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Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd	[2015] FCAFC 25	Federal Court of Australia	6-Mar-15	Not relevant. Dealt with breach of s 347 (industrial activity).	6
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd	[2012] FCA 563	Federal Court of Australia	25-May-12	Not relevant. Dealt with breach of s 347 (industrial activity).	6
BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union	[2013] FCA 1291	Federal Court of Australia	2-Dec-13	Not relevant. Dealt with breaches of s 345, 349 and 417.	6
United Firefighters Union of Australia v Easy	[2013] FCA 763	Federal Court of Australia	2-Aug-13	Not relevant – industrial action	6
Fair Work Ombudsman v WKO Pty Ltd	[2012] FCA 1129	Federal Court of Australia	17-Oct-12	Not relevant – discrimination on basis of parental leave, entitlements to parental leave	6
Barnett v Territory Insurance Office	[2011] FCA 968	Federal Court of Australia	24-Aug-11	Not relevant – dealt with workplace instruments under 341(1)(b)	6
Fair Work Ombudsman v Maritime Union of Australia	[2014] FCA 440	Federal Court of Australia	6-May-14	Not relevant – industrial action	6
Australian and International Pilots Association v Qantas Airways Ltd	[2014] FCA 32	Federal Court of Australia	6-Feb-14	Not relevant – implied contractual terms	6
Construction, Forestry, Mining & Energy Union v Endeavour Coal Pty Ltd	[2013] FCCA 473	Federal Circuit Court of Australia	27-Jun-13	Not relevant – discrimination based on personal leave	6
Fair Work Ombudsman v AJR Nominees Pty Ltd	[2013] FCA 467	Federal Court of Australia	17-May-13	Not relevant – discrimination based on personal leave	6
Laing O'Rourke Australia Pty Ltd v Construction, Forestry, Mining and Energy Union	[2013] FCA 133	Federal Court of Australia	25-Feb-13	Not relevant – interlocutory application around coercion and intimidation of employees and subcontractors by union	6

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Australian Licenced Aircraft Engineers Association v Sunstate Airlines (Qld) Pty Ltd	[2012] FCA 1222; (2012) 208 FCR 386; (2012) 228 IR 72	Federal Court of Australia	6-Nov-12	Not relevant – industrial issues	6
Stanley v Father Michael Court	[2014] FCCA 156	Federal Circuit Court of Australia	14-Feb-14	Not relevant – termination in relation to exercise of workplace right under s340(1)(a) and (b)	6
Wolfe v ANZ Banking Group Ltd	[2013] FMCA 65	Federal Magistrates Court of Australia	7-Feb-13	Not relevant – discrimination on basis of workplace right to take annual leave, long service leave, family responsibility	6
Wintle v RUC Cementation Mining Contractors Pty Ltd (No 2)	[2012] FMCA 459	Federal Magistrates Court of Australia	8-Jun-12	Not relevant – no reasonable prospects of success case based on s344, s345, s351	6
Cavar v Nursing Australia	[2011] FMCA 929	Federal Magistrates Court of Australia	28-Nov-11	Not relevant – employee alleged discrimination under s351. Some obiter about her complaints about failure to investigate incidents, but not under workplace right complaint provision.	6
Ermel v Duluxgroup (Australia) Pty Ltd (No 2)	[2015] FCA 17	Federal Court of Australia	28-Jan-15	Not relevant. Dealt with termination for taking sick leave.	6
Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 4)	[2013] FCA 762	Federal Court of Australia	2-Aug-13	Not relevant – industrial action	6
Austin v Honeywell Ltd	[2013] FCCA 662; (2013) 277 FLR 372	Federal Circuit Court of Australia	28-Jun-13	Not relevant –dealt with exercise of workplace rights under 340(1)(b)	6
Construction Forestry Mining and Energy Union v Endeavour Coal Pty Ltd	[2015] FCAFC 76	Federal Court of Australia	3-Jun-15	Not relevant – dealt with breach of s340(1)(a)	6

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Cai v Tiy Loy & Co Ltd	[2015] FCCA 715	Federal Circuit Court of Australia	27-Mar-15	Not relevant – s340 discrimination claim on basis of entitlement under compensation act.	6
Transport Workers' Union of Australia v Atkins	[2014] FCCA 1553	Federal Circuit Court of Australia	18-Aug-14	Not relevant – refusal of carer's leave and dismissal	6
Stephens v Australian Postal Corporation	[2014] FCA 732	Federal Court of Australia	10-Jul-14	Not relevant – discrimination on basis of physical disability	6
Construction, Forestry, Mining and Energy Union v Corinthian Industries (Australia) Pty Ltd	[2014] FCA 239	Federal Court of Australia	18-Mar-14	Not relevant – industrial action and discrimination	6
Evangeline v Department of Human Services	[2013] FCCA 807	Federal Circuit Court of Australia	28-Jun-13	Not relevant – sex/mental disability discrimination	6
Halls v Woolworths Ltd	[2015] SAIRC 19	South Australian Industrial Relations Court	18-Jun-15	Not relevant – applications for relief, whether or not applicant had multiple causes of action	6
Dahler v Australian Capital Territory (No 2)	[2015] FCCA 845	Federal Circuit Court of Australia	5-Jun-15	Not relevant – discrimination on basis of family/caring responsibilities	6
Anderson v Detmold Packaging Pty Ltd	[2015] FCCA 479	Federal Circuit Court of Australia	5-Mar-15	Not relevant – s340(a)(ii)	6
Namroud v LSR Autobody Pty Ltd	[2015] FCCA 342	Federal Circuit Court of Australia	20-Feb-15	Not relevant – physical disability discrimination claim	6

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Lei v Chance Trading Pty Ltd	[2015] FCCA 441	Federal Circuit Court of Australia	9-Feb-15	Not relevant – discrimination on basis of pregnancy	6
Construction, Forestry, Mining & Energy Union v	[2013] FCCA 703	Federal Circuit Court of Australia	27-Jun-13	Not relevant – discrimination on basis of workplace right to personal leave and carer's leave	6
Chrysovergi v Hellenic Museum	[2012] FMCA 248	Federal Magistrates Court of Australia	4-Apr-12	Not Relevant. Application relied on breaches of ss 340, 341, 342, 343, 352 of the *Fair Work Act*, but largely seems concerned with being terminated due to lodging a WorkCover claim.	6
Manchin v Miners Tipper Services Pty Ltd	[2011] FMCA 485	Federal Magistrates Court of Australia	21-Feb-11	Not relevant – s341(1)(a) Employee alleged he was discriminated against on basis of 'understanding his rights' and 'taking up these rights from time to time.'	6

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ATTACHMENT 2 – De-identified Example of Speculative Demand Letter re General Protections


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ATTACHMENT 3 – Section 424 Decisions Refused

Nyrstar Port Pirie P/L and Construction, Forestry, Mining and Energy Union & Ors
B2009/10992 [2009] FWA 1148
O'Callaghan SDP Adelaide 16 November 2009

ENTERPRISE BARGAINING – suspension of protected industrial action – termination of protected industrial action – whether significant economic harm – whether endangering life or economy – whether protracted period of protected action – ss423, 424 Fair Work Act 2009 – s423 application for suspension or termination of protected action due to significant economic harm – s424 application for suspension or termination of protected action due to endangering life or economy – s423 – s423 provides strictly limited capacity to suspend or terminate protected action – action may lead to plant closing and not re-opening in foreseeable future – action threatening to cause imminent significant economic harm due to low stockpiles – s423(6) pivotal – potential tension between s423(6) and other provisions of s423 – not satisfied industrial action has commenced – hence not satisfied, under s423(6), that protected action *has been engaged in for a protracted period of time* – hence s423 application dismissed – s424 – no suggestion action likely to endanger life or economy – s424 application refused – FWA available to further assist parties if they wish.

Appeal by National Tertiary Education Industry Union against decision [2009] FWA 1535 and order of O'Callaghan SDP – Re: University of South Australia
C2009/11280 [2010] FWAFB 1014
Boulton J, SDP Ives DP Gay C Sydney 14 April 2010

INDUSTRIAL ACTION – suspension of protected industrial action – proper construction of s424 – ss120, 424, 604 Fair Work Act 2009 – appeal – Full Bench – decision at first instance suspended all industrial action at university – appeal by NTEU – appeal raises important issues regarding proper construction of s424 – leave to appeal granted – NTEU asserted that FWA only has power to suspend or terminate *particular* industrial action that endangers welfare of population and so on under s424 – asserted that FWA does not have power to suspend or terminate *all* industrial action that is being engaged in – assertion rejected – 'suspension' of protected industrial action to be construed as suspension of protection or immunity which attaches to protected industrial action under Act – reference in s424 to 'suspending or terminating protected industrial action for a proposed enterprise agreement' would seem to apply to protected industrial action authorised by ballot and not particular industrial action which is being taken (as part of what might be a series of actions authorised by ballot and which is having requisite harmful effect) – this reading and approach adopted at first instance consistent with wider scheme of Act – no appealable error – appeal dismissed.

Minda Incorporated v Liquor, Hospitality and Miscellaneous Union
B2010/2860 [2010] FWA 3217
Hampton C Adelaide 27 April 2010

INDUSTRIAL ACTION – order against industrial action – whether protected action – whether action endangers life, personal safety, health or welfare – application granted in part – ss409, 414, 418, 424 Fair Work Act 2009 – protected action ballot previously issued – application for order to stop industrial action on 2 grounds: (1. that action is not protected by the ballot and/or inadequate notices given under s414 regarding such action [*Telstra v CEPU*]; and (2. that action endangers life, personal safety or health of part of the population as per s424 – s424 application refused as not satisfied statutory requirements met – s418 requirements met and order issued.

Minda Incorporated v Liquor, Hospitality and Miscellaneous Union
B2010/255 [2010] FWA 3753
Hampton C Adelaide 14 May 2010

INDUSTRIAL ACTION – order against industrial action – notice of industrial action withdrawn after application filed – whether action threatened, pending or probable – s424 Fair Work Act 2009 – application for order to stop proposed protected industrial action – union *withdrew* notice of industrial action after this application filed – as notice of action withdrawn not satisfied action threatened, pending or probable – however if union engaged in pattern of behaviour of serving and then withdrawing notices that could indicate union not bargaining in good faith – in present circumstances, order against industrial action refused.

Tyco Australia P/L t/as Wormald v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia- Electrical, Energy and Services Division – Queensland Divisional Branch
B2010/3668 [2011] FWAFB 1598
Boulton J Ives DP Gooley C Sydney 24 March 2011

INDUSTRIAL ACTION – suspension of protected industrial action -endangering public safety - fire safety - s424 Fair Work Act 2009 - appeal - Full Bench - union previously provided notice of ban on call outs and indefinite ban on paperwork in fire fighting industry - Spencer C later suspended protected industrial action for 6 weeks - union appealed against suspension - in addition, employer applied for order terminating or suspending protected industrial action under s424 on grounds that bans endanger life, personal safety or health, or welfare of part of population – present decision only concerns employer's application for termination or suspension - appeal to be dealt with separately - call outs involve diagnosing and repairing errors and require expertise in fire safety systems – nature of bans on safety considered – not satisfied requirements of s424 met - application for suspension or termination of protected industrial action dismissed.

Transit Australia P/L v Transport Workers' Union of Australia
B2011/2900 [2010] FWA 3410
Asbury C Brisbane 31 May 2011

INDUSTRIAL ACTION – termination of protected industrial action – life, personal safety or health, or welfare of the population or part of it - application for order to terminate protected industrial action – bus drivers negotiating for collective agreement– negotiations over 12 month period, characterised by vigorous bargaining, with strongly held views on both sides about respective positions – industrial action has previously occurred and is threatened, impending or probable – claimed public transport an essential service, public including school children will be deprived of access to transportation and safely issues will arise as people seek different transportation options – children travelling to and from school are overwhelmingly carried by another company under separate contract – company can inform public of pending disruption to services – more than inconvenience required if industrial action is to be terminated – inconvenience must be balanced against right to advance claims by industrial action – cannot accept action will impact crime statistics – loss of wages of drivers engaging in action is not relevant – not relevant that company has arranged for AEC to conduct ballot on agreement proposal which union has rejected – not satisfied proposed action would threaten to endanger life, personal safety or health, or welfare of the population or part of it – application dismissed.

St John Ambulance Australia (NT) Inc v United Voice
B2011/3111 [2011] FWA 4782
Lawler VP Melbourne 21 July 2011

INDUSTRIAL ACTION – suspension of protected industrial action – s.424 Fair Work Act 2009 – repatriation ban on transferring patients – consideration of the word „welfare" – whether welfare of a part of the population must be endangered in a significant way – the ability to terminate or suspend industrial action does not extend to action that is „merely causing an inconvenience" – previous authority continues to apply – threat needs to be material or substantial, beyond mere inconvenience – no evidence provided from affected hospitals – no evidence of applicant's capacity or attempts to utilise temporary substitute labour force – respondent and its members have a right to place pressure on applicant – not satisfied repatriation ban endangering welfare – jurisdictional prerequisite not made out – application dismissed.

G4S Custodial Services P/L v Health Services Union of Australia (Vic No. 2 Branch)
B2011/3321 [2011] FWA 5902
Bissett C Melbourne 1 September 2011

INDUSTRIAL ACTION – suspension of protected industrial action – s.424 Fair Work Act 2009 – application for suspension of notified protected industrial action to enable negotiations to continue –interim order previously issued suspending action – suspension should not be granted merely because of inconvenience to employer [*University of South Australia*] – determination of whether action threatens to endanger based on probability not mere possibility [*Ambulance Victoria*] – no bans with respect to emergency response – not satisfied any bans notified will threaten to endanger life, personal safety, health or welfare – application dismissed – interim order ceases to operate on date of decision.

Toyota Motor Corporation Australia Ltd v "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers" Union (AMWU) & Ors
B2011/3370 [2011] FWA 6268
Roe C Melbourne 12 September 2011

INDUSTRIAL ACTION – order against industrial action - suspension of protected action – significant damage – s.424 Fair Work Act 2009 – applicant sought 2 month suspension of industrial action on basis that it was causing significant damage to Australian economy or part of it – power to suspend or terminate protected industrial action under s.424 intended to be used in exceptional circumstances – evidence presented to suggest possible harm to applicant, harm to suppliers of applicant and harm to automotive manufacturing sector of economy – precondition of s.424(1)(b) that industrial action is threatened, impending or probable was met – insufficient evidence that action threatens to endanger life, personal safety or health or welfare of population – accept evidence of economist that automotive industry represents around 0.5% of the national economy – satisfied industrial action would cause economic harm to applicant and suppliers and employees of suppliers - however not satisfied harm was significant to extent it would threaten viability of applicant or its suppliers let alone viability of automotive industry sector – evidence suggested there may be some delays in delivery of parts and vehicles but no evidence of significant damage to automotive industry – application dismissed.

The GEO Group Australia P/L v United Voice
B2011/4059 [2011] FWA 9025
Harrison C Sydney 22 December 2011

INDUSTRIAL ACTION – suspension of protected industrial action – termination of protected industrial action – s.424 Fair Work Act 2009 – proposed action involves ban on escorting prison inmates offsite – employer claims it is unable to provide alternative personnel and unable to minimise risks – union argues its actions do not place personnel or public at risk – probabilities approach to be adopted, not possibilities – not satisfied there is potential for real and actual harm – union has made responsible undertakings – not satisfied ban on non-urgent medical and funeral escorts will threaten to endanger life, personal safety, health or welfare of part of population – application dismissed.

The GEO Group Australia P/L v United Voice
B2011/4059 [2011] FWA 9025
Harrison C Sydney 22 December 2011

INDUSTRIAL ACTION – suspension of protected industrial action – termination of protected industrial action – s.424 Fair Work Act 2009 – proposed action involves ban on escorting prison inmates offsite – employer claims it is unable to provide alternative personnel and unable to minimise risks – union argues its actions do not place personnel or public at risk – probabilities approach to be adopted, not possibilities – not satisfied there is potential for real and actual harm – union has made responsible undertakings – not satisfied ban on non-urgent medical and funeral escorts will threaten to endanger life, personal safety, health or welfare of part of population – application dismissed.

Austin Health and Health Services Union
B2012/1457 [2012] FWA 7098
Gregory C Melbourne 31 August 2012

INDUSTRIAL ACTION – suspension of protected industrial action – health, welfare of safety of population – s.424 Fair Work Act 2009 - application to suspend industrial action – ban on commissioning new machines which will improve patient care from July 2013 – complex and staged acceptance and commissioning process – delay in one step can cause consequential delays later – installation a significant undertaking – application unusual – seeks to suspend action presently being engaged in on basis of future threat to population – unusualness of present circumstances does not prevent order being made but do make it harder to obtain relief sought – must be satisfied action would threaten health or welfare of part of population – insufficient that it might have that effect – industrial action might cause delay which results in requisite threat however external factors may also cause delays – not presently satisfied that relevant bans will probably pose relevant threat – application dismissed.

State of Victoria – Department of Human Services v Health Services Union
B2012/1630 [2012] FWA 8356
Gregory C Melbourne 28 September 2012

INDUSTRIAL ACTION – order against industrial action – suspension of protected action – threat to personal safety, health or welfare – s.424 Fair Work Act 2009 – applicant sought two month suspension of industrial action on basis that it was threatening to endanger personal safety, health or welfare – namely threatening residents and staff delivering disability support services – not satisfied industrial action threatens to endanger personal safety, health or welfare to the part of the population identified – application dismissed.

State of Victoria – Department of Human Services v Health Services Union
B2012/1630 [2012] FWA 8376
Gregory C Melbourne 4 October 2012

INDUSTRIAL ACTION – suspension of protected industrial action – order against industrial action – threat to personal safety, health or welfare – s.424 Fair Work Act 2009 – applicant sought two month suspension of industrial action on basis it was threatening to endanger personal safety, health or welfare – namely threatening residents and staff delivering disability support services – two bans in particular were considered – not satisfied the impact of either ban meets test required for an order – when the matter was heard the ban had been in place for 39 days – satisfied there had been no manifestation of threat applicant alleged – application dismissed.

Oliveri Transport Services P/L v Transport Workers' Union of Australia
B2013/65 [2013] FWC 2187
Cambridge C Sydney 11 April 2013

INDUSTRIAL ACTION – suspension of protected industrial action – termination of protected industrial action – ss.424, 425 Fair Work Act 2009 - application to suspend or terminate protected industrial action – action to be taken 13-14 April 2013 – initial action in March did not occur – new notice provided by TWU about action to be taken – public interest element considered – sufficient notice provided to applicant – relevant legislative tests not met – application dismissed.

Mater Misericordiae Health Services Brisbane Limited v Queensland Nurses' Union of Employees
C2014/3542 and B2014/607 [2014] FWC 2019
Simpson C Brisbane 26 March 2014

INDUSTRIAL ACTION – order against industrial action – termination of protected industrial action – ss.418, 424 Fair Work Act 2009 – applicant made two applications seeking orders to stop industrial action that was threatened, impending or probable and to terminate protected industrial action that was endangering life etc. – s.414 notice must be sufficient to put employer in a position to make reasonable preparations to deal with effect of industrial action – nature of certain industrial action in notice was contingent upon judgement of particular individual – nature of action imprecise and applicant unable to make reasonable preparations to deal with action – order issued in relation to application under s.418 – must consider whether impact of protected industrial action endangered life, personal safety or health, or welfare of population – evidence provided about impact of bed closures in other emergency departments, however no evidence provided concerning circumstances at applicant's premises – insufficient evidence to decide s.424 matter.

G4S Custodial Services P/L v CPSU, the Community and Public Sector Union
B2014/998 [2014] FWC 5171
Smith DP Canberra 1 August 2014

INDUSTRIAL ACTION – termination of protected industrial action – s.424 Fair Work Act 2009 – application to terminate protected industrial action occurring at Port Phillip Prison – interim order made at hearing – respondent argued industrial action was creating a cumulative effect of increased stress and risk at the prison – lockdowns not unknown and respondent has them regularly for its purposes – hard to distinguish cumulative effects of the lockdowns – considered GEO Group Australia – cumulative effect and randomness of lockdowns requires consideration – reason for providing notice of intended industrial action was so that employers 'are at least able to take appropriate defensive action' [Davids Distribution] – difficult to prepare for industrial action in prison system – industrial action must be focussed on seeking to persuade other bargainers to different point of view – impact of any industrial action in this area of the economy cannot automatically attract the jurisdictional prerequisite – Commission cannot yet conclude that cumulative effect of industrial action attracts jurisdictional foundation for order to be made – efforts of union and its members to mitigate impact has not gone unnoticed - application dismissed – interim order set aside.

Metro Trains Melbourne P/L
B2015/1245 **[2015] FWC 6037**
Gregory C **Melbourne** **2 September 2015**

INDUSTRIAL ACTION – termination of protected industrial action – s.424 Fair Work Act 2009 – applicant and Australian Rail, Tram and Bus Union (RTBU) engaged in protracted negotiations around establishment of new enterprise agreement – employees to be covered by agreement voted in favour of engaging in protected industrial action – RTBU gave notice of intention to commence protected industrial action – applicant applied to Commission for an order terminating protected industrial action, on basis that it threatened to endanger the welfare of a part of the population – *Coal & Allied* considered – Commission found that much of the evidence relied on by applicant was speculative in nature, and that much could be done to mitigate the effects of the action – Commission not satisfied it was required to suspend or terminate the protected industrial action – application dismissed.

KDR Victoria P/L t/a Yarra Trams
B2015/1224 [2015] FWC 6282
Lee C Melbourne 9 September 2015

INDUSTRIAL ACTION – termination of protected industrial action – s.424 Fair Work Act 2009 – application for an order to terminate protected industrial action being taken by the Australian Rail, Tram and Bus Industry Union (the union) and its members employed as tram drivers – applicant submitted that proposed stoppage threatened or would threaten to endanger the personal safety, health or welfare of the part of the population of Melbourne who rely on trams to attend medical appointments and similar – evidence given that The Epworth, Royal Melbourne, Royal Children's and Alfred hospitals are not easily accessed by other means of public transport, and that transport for school children would be disrupted – evidence given regarding the number of replacement buses required to mitigate the effects of the stoppage – Commission held that while there would be disruptions to the tram service and inconvenience to members of the public, that there would be a range of options for passengers to make alternative arrangements using combinations of replacement buses, trains and other modes of transport – no sufficient basis on which to establish that the collective welfare is in danger or peril – weight of numbers of people affected not a sufficient basis on which to conclude that a section of the population would have their welfare impacted upon – application dismissed.