MINERALS COUNCIL OF AUSTRALIA

RESPONSE TO DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS CONSULTATION PAPER:

'UPDATING THE FAIR WORK ACT 2009 TO PROVIDE STRONGER PROTECTIONS FOR WORKERS AGAINST DISCRIMINATION'

---

12 MAY 2023

TABLE OF CONTENTS

OVERVIEW

On 14 April 2023, the Department of Employment and Workplace Relations (**DEWR**) released its consultation paper on 'Updating the Fair Work Act 2009 to provide stronger protections for workers against discrimination' (**the Consultation Paper**).

The minerals industry recognises the profound physical, emotional and psychological impacts can arise because of discrimination, disrespectful behaviour and harassment, and is committed to eliminating this unacceptable behaviour.

The MCA supports the broad principles outlined in the paper to guide the development of the reforms.

The MCA notes that a consultation process has been conducted by the Australian Human Rights Commission on the establishment of a national Human Rights Act.[1] That process is likely to consider similar amendments to Commonwealth discrimination laws to those proposed for the *Fair Work Act* anti-discrimination framework. That process also intends to address the complex, differing and overlapping discrimination laws, both within existing federal laws and between federal, state and territory laws.

Further, the Parliamentary Joint Committee on Human Rights is also considering the following possible reforms:

- To review the scope and effectiveness of Australia's 2010 Human Rights Framework and the National Human Rights Action Plan;
- To consider whether the Framework should be re-established, as well as the components of the Framework, and any improvements that should be made;
- To consider developments since 2010 in Australian human rights laws (both at the Commonwealth and State and Territory levels) and relevant case law; and
- Other relevant matters.

This Committee inquiry was instigated by a referral from the Attorney-General and is due to report by 31 March 2024.

Recommendations

1. Any amendments to the *Fair Work Act* (**FW Act**) anti-discrimination framework must complement these other processes to modernise discrimination laws, and extreme care should be taken to avoid complexity and inconsistency.
2. Any changes to the 'adverse action' regime should preserve the existing legal test, as settled by the High Court in *Bendigo TAFE v Barclay* [2012] HCA 32, and subsequent High Court cases. This jurisprudence is well settled and understood, and delivers fairness.
3. Any positive duties, where appropriate, should avoid duplication or overlap with positive duties in the model WHS laws, and entail equivalent standards for achieving compliance, or include deemed compliance where there has been compliance with WHS laws.
4. Any representative actions be governed consistently with the *Federal Court of Australia Act*, which requires:
   - Seven or more persons to have a claim against the same respondent;
   - A person to have a sufficient interest to commence a proceeding on their own behalf against another person; and
   - The prevention of competing representative proceedings commenced by different representative groups.

[1] Australian Human Rights Commission, website, *A National Human Rights Act for Australia | Australian Human Rights Commission*, (viewed 6 April 2023).

OVERARCHING COMMENTS

The FW Act, and the various pieces of anti-discrimination legislation, are intended to fulfil different purposes. Whilst they coexist, and occasionally touch on related topics, they each have unique statutory contexts and purposes. As a result, there are significant differences which need to be taken into account when considering replicating obligations and concepts found within each scheme.

Critically, the FW Act contains the following features, which are not generally present in anti-discrimination legislation:

1. **Reverse onus:** The FW Act imposes a reverse onus of proof on persons who are alleged to have taken a particular action, to prove that it was not taken for a prohibited reason.
2. **Civil penalties:** Contraventions of the FW Act's general protections render a person liable for civil penalties. This is very rarely the case under Australian anti-discrimination legislation. This means it is more critical for individuals and organisations to have certainty with respect to the operation of the FW Act's general protections, given the serious consequences of contravening a civil penalty provision.
3. **No comparator element:** Most anti-discrimination legislation in Australia, and internationally, requires a claimant, among other things, to establish that they were treated 'less favourably' because of a protected attribute where they allege direct discrimination. The requirement to demonstrate 'less favourable' treatment requires the claimant to show that a hypothetical individual in materially similar circumstances who did not have the relevant protected attribute would have been treated in a more favourable manner. This is an important safeguard in ensuring that anti-discrimination legislation does not inadvertently protect undesirable behaviour. The FW Act's general protections do not contain a similar 'comparator' requirement. In some respects, this results in the FW Act regime enforcing a broader concept of direct discrimination than may be the case under anti-discrimination legislation.
4. **Industrial relations legislation:** The FW Act deals with a large variety of other (sometimes unrelated) matters. In making amendments to the aspects of the FW Act which are intended to deal specifically with discrimination, it will be important to ensure that those changes do not have unintended effects on other aspects of the FW Act.
   For example, Part 3-1 of the FW Act prohibits a wide range of behaviour, including – as identified in the Consultation Paper – certain forms of discrimination on the basis of protected attributes (section 351) and having engaged in certain industrial activities (sections 346 and 347). But Part 3-1 also prohibits other behaviour, including discrimination on the basis of industrial instrument coverage, coercion with respect to industrial activities, 'sham contracting', and misrepresenting workplace rights. In many cases, the operation of these prohibitions turns on elements and case law which are also relevant in the context of sections 351, 346 and 347. In making changes to those sections, it is therefore critical to carefully consider whether those changes may have the result of unreasonably extending the applications of the other prohibitions in Part 3-1.

The Consultation Paper appears to assume that simply replicating obligations found under anti-discrimination legislation in the FW Act is a good thing because it would contribute to simplicity, alignment, and consistency between the FW Act and anti-discrimination legislation.

But that will likely have the opposite effect. Any obligation replicated in the FW Act will sit in a different statutory context. Judicial interpretation of the obligation under the FW Act and anti-discrimination legislation may become inconsistent due to that different statutory context. Unless the change is very carefully drafted to ensure the obligation is truly replicated, obligations may be replicated in the FW Act without the relevant exceptions contained in the pre-existing anti-discrimination legislation carrying over.

The Consultation Paper also appears to assume that replicating an obligation across several pieces of legislation will have the result of helping those who benefit from anti-discrimination legislation. Again, the opposite may be true. Having a duplicity of near-identical causes of action available to potential claimants may only serve to confuse claimants and make effective justice for these individuals less accessible.

It is not clear how replicating anti-discrimination obligations in the FW Act will assist those whom the obligation is intended to benefit. If conduct is already unlawful under anti-discrimination legislation, it is unclear how replicating that obligation in the FW Act would assist victims of that conduct. In contrast, it is likely that any change to the FW Act's anti-discrimination prohibitions would result in real compliance burdens to businesses, without producing a corresponding reduction in unlawful behaviour.

IMPROVING CONSISTENCY AND CLARITY

Question 1: Indirect discrimination

The MCA agrees that the FW Act should be clarified to reflect the status quo. Presently, case law has found that indirect discrimination can constitute 'discrimination' for the purposes of section 342 of the FW Act. However, case law has also established that 'discriminatory' in the context of unlawful discriminatory enterprise agreement and modern award terms does not include terms which are indirectly discriminatory.[2]

It is important that, in clarifying that indirect discrimination amounts to 'discrimination' for the purposes of section 342, any change gives effect to the following considerations:

- Any definition of indirect discrimination should be carefully crafted in accordance with anti-discrimination law. In particular, the definition should specify that indirect discrimination is only established where the relevant condition, requirement or practice is not reasonable in the circumstances. This 'reasonableness' exception is uniformly included in the definition of indirect discrimination in anti-discrimination legislation in Australia.
- Any definition of indirect discrimination should not displace the requirement that the indirectly discriminatory conduct be taken for a prohibited reason.[3]
- Any clarified definition of discrimination should be expressed to apply for the purposes of section 342 of the FW Act only. This will ensure that the change does not disrupt existing case law with respect to other aspects of the FW Act. This is critical to ensure, for example, that the change does not have the unintended effect of rendering clauses in enterprise agreements or modern awards which are currently lawful, unlawful. Such a change has the potential to cause significant confusion and result in unnecessary disputation and uncertainty.

Questions 2-4: Re-defining 'disability', Clarifying the interaction between the inherent requirements exemption and reasonable adjustments, and attribute extensions

The MCA does not support these changes. For the reasons discussed above in the overarching comments, there are serious difficulties in replicating these aspect of anti-discrimination legislation in the FW Act context, due to:

- The civil penalty consequences which attach to contraventions of the FW Act's general protections;

[2] *Shop, Distributive and Allied Employees Association v National Retail Association* (No 2) [2012] FCA 480; *Application by Metropolitan Fire and Emergency Services Board* [2019] 106.
[3] See e.g. *Klein v Metropolitan Fire and Emergency Services Board* [2012] 208 FCR 178.

Tthe reverse onus of proof which applies in relation to breaches of the general protections;

- The broad definition of 'adverse action' in section 342 of the FW Act;
- The lack of a 'comparator' element in section 351 of the FW Act;
- The FW Act's lack of other equivalent exceptions to those which are in place under the *Disability Discrimination Act* (for example, the lack of an" "unjustifiable hardship" defence).

In any event, it is unclear what benefit duplicating these protections in the FWC Act would achieve. The vast majority of Australian employers covered by the FW Act already hold these obligations under other legislation.

Questions 5 and 6: Complaints processes

The MCA agrees that, to ensure consistency and equitable access to justice, all complaints of unlawful adverse action under the FW Act (i.e. both dismissal and non-dismissal related general protections disputes) should be handled in the first instance by the Fair the Commission via conciliation. Having a different process in place for non-dismissal and dismissal-related general protections disputes does not make policy sense, and it is undesirable for the dispute procedure to prematurely escalate matters to litigation in the courts in respect of non-dismissal complaints.

That said, as part of regularising this process, the requirement that the Fair Work Commission may only arbitrate such disputes where both parties agree should be retained.

The MCA agrees that it is reasonable that a filing fee continue to be applied to this process.

Question 7: Vicarious liability

The MCA does not support the introduction of vicarious liability provisions in respect of the FW Act's discrimination protections under section 351, or the general protections generally.

As the Consultation Paper identifies, vicarious liability provisions are in place under anti-discrimination legislation. The FW Act, except for the new sexual harassment prohibition, does not contain vicarious liability provisions.

There are compelling policy reasons to maintain this distinction between anti-discrimination legislation and the FW Act. As identified above, unlike anti-discrimination legislation, the FW Act's general protections carry civil penalty consequences. Nor does most anti-discrimination legislation contain a reverse onus of proof.

The FW Act currently contains an accessorial liability provision, which makes multiple parties liable for contraventions where they were 'involved in' those contraventions. As the Consultation Paper identifies this is a higher standard for liability. But this higher standard is appropriate in circumstances where a contravention carries civil penalty consequences and where a reverse onus of proof applies. Where a person has been involved in a contravention, it is appropriate for them to carry those civil penalty consequences. However, vicarious liability confers those consequences in a much broader range of situations, including where the employer was not involved.

The general protections relate to a broad range of behaviour, as identified above. Making organisations vicariously liable for all potential contraventions of these provisions would substantially increase the compliance burden on organisations.

Finally, serious thought needs to be given to the feasibility of implementing a vicarious liability regime in respect of the general protections. The present statutory scheme is carefully calibrated, with the target of each protection being carefully described. The table in section 342 makes clear that the adverse action with which the scheme is concerned, is not action at large, but only actions taken by specific parties against other carefully described parties. The scheme does not, for example, protect

an employee from adverse action taken by a fellow employee, even if it is taken in the course of the fellow employee's employment. What is the policy objective of making the employer liable for such conduct? The employer may know nothing of the conduct, nor have had any involvement.

There are other examples of how this proposal would be impractical. Section 351 is a prohibition which applies to 'employers'. Similarly, sections 340 (workplace rights), 351 (discrimination), 346 (industrial activities) prohibit 'adverse action' for various prohibited reasons. The definition of 'adverse action' in section 342 does not include conduct *between* employees of an employer.

As such, there are likely to be many unintended consequences in introducing vicarious liability provisions. Rather than achieving the Consultation Paper's stated policy objectives, given the narrow definition of 'adverse action' in section 342, there is a likelihood, for example, that vicarious liability provisions would result in unions being held to be responsible for the acts of their organisers in a much broader range of scenarios.

The absence of a vicarious liability provision has not prevented employees benefiting from the protection of section 351. Employers are routinely found liable under that section for decisions and acts made by their employees.

Question 8: The 'not unlawful' exemption

The MCA believes that the status quo with respect to the 'not unlawful' exception in section 351(2)(a) of the FW Act should be retained.

That said, the MCA agrees that the FW Act should be amended to ensure that organisations and individuals are able to better understand their rights and obligations under section 351 without having to resort to case law.

The MCA disagrees that the operation of the 'not unlawful' exception is as unclear as the Consultation Paper suggests. Recent case law has confirmed that the 'not unlawful' exception means that conduct will not contravene section 351 if that conduct would not also constitute a contravention of a state or territory anti-discrimination law which applies to the place in which the relevant conduct took place.[4]

Similarly, the MCA disagrees that this interpretation is inconsistent with the intention behind the 'not unlawful' exception. As the Federal Court has identified, this interpretation was intended to ensure that that section 351 continues to work harmoniously with state and territory anti-discrimination legislation.[5]

The current interpretation is a common-sense approach to the 'not unlawful' exception. It ensures that the FW Act sits harmoniously alongside other anti-discrimination regimes. Given the FW Act adopts different legal standards for determining when direct discrimination has occurred, this interpretation of the exception has the result of avoiding potentially confusing compliance issues by creating slightly different parallel anti-discrimination obligations. In effect, this interpretation reconciles the FW Act with other relevant anti-discrimination laws. It therefore contributes to simplicity in Australia's anti-discrimination regime.

If the more narrow interpretation of the 'not unlawful' exception suggested by the Consultation Paper is implemented, more careful consideration would need to be given to incorporating other aspects of anti-discrimination legislation into the FW Act. That more narrow exception would mean that the differences between the legal standards in, for example, the *Disability Discrimination Act* and the FW

[4] See *Quirk v Construction, Forestry, Maritime, Mining and Energy Union* [2021] FCA 1587, [286]-[287], *Rumble v the Partnership trading as HWL Ebsworth Lawyers* [2019] FCA 1409, [141]-[143] (not disturbed on appeal); *Fair Work Ombudsman v Foot and Thai Massage Pty Ltd* (in Liquidation) (No 4) [2021] FCA 1242, [751]-[764]; *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27, [61].
[5] *Fair Work Ombudsman v Foot and Thai Massage Pty Ltd* (in Liquidation) (No 4) [2021] FCA 1242, [751]-[764].

Act would need to be more carefully worked through, as they may result in expanding the protections in the FW Act, beyond those in the *Disability Discrimination Act* in an unintended way.

The more narrow interpretation would also create confusion for claimants. Claimants would need to be able to identify differences between the specific legal tests in play under the relevant state or territory anti-discrimination legislation and the FW Act, before making a decision as to which jurisdiction is more favourable to their claim. This kind of complexity operates to the detriment of claimants.

Question 9: Improving the coverage of section 351 and removing the unlawful termination provision

This change is unlikely to materially affect MCA members, with the exception of broadening protections the scope of section 351 of the Act to include prohibitions on taking adverse action against employees in NSW and SA because of their religion or political opinion. This is because, it is likely the Commonwealth will seek to retain the protection section 772 offers in this regard in an amended section 351, if that section is amended.

We are not aware of any MCA members that are not national system employers. Therefore extending s 351 to non-national system employers (to the extent the Commonwealth can do this constitutionally) is unlikely to affect them.

MODERNISING THE FAIR WORK ACT

Question 10: 'Family and domestic violence status' as a protected attribute

The MCA understands that 'family and domestic violence status' is currently only a protected attribute in the ACT's anti-discrimination regime.

The MCA agrees that individuals who are the victim of family and domestic violence should be protected under relevant legislation. This attribute should, however, be carefully worded so as to not inadvertently confer protection upon the perpetrators of family and domestic violence. As such, the MCA would suggest the formulation of this protected attribute in the *Discrimination Act 1991* (ACT) ('subjection to domestic or family violence') is preferable to 'family and domestic violence status'.

For consistency throughout the FW Act, 'family and domestic violence' should be clearly defined in accordance with its pre-existing definition in the FW Act.

Question 11: Multiple attribute discrimination

The MCA agrees that intersectional and multiple-attribute discrimination should also be considered as part of this process. If a gap exists in the FW Act which results in victims of multiple-attribute discrimination being disadvantaged in bringing their claims, the MCA agrees in principle such a gap should be filled.

However, more detail is required as to the problem the Consultation Paper identifies and the proposed solution before the MCA can comment more constructively on this issue. In this regard, the MCA notes that section 360 of the FW Act apparently deals with the problem identified by the Consultation Paper. That section confirms that the general protections can be contravened where at least one protected attribute is one of the reasons for a person taking a particular action.

ADVERSE ACTION – 'ENGAGING IN INDUSTRIAL ACTIVITY'

Question 12: Improvements to the general protections to clarify protections for industrial activity

The MCA requires significant further detail regarding any proposed change to sections 346 and 347 of the FW Act to determine whether it supports or opposes a particular change.

That said, the MCA would strongly oppose a change which would have the result of overturning or altering the ruling in *Barclay* in respect of when an employer takes adverse action 'because' of an activity protected by sections 346 and 347.

Barclay strikes an appropriate balance between protecting freedom of association for unions, employees and employers and ensuring that individuals and organisations are not given a broad or blanket 'immunity' in respect of misconduct, just because it may be tangentially related to an industrial activity.

As discussed earlier, it would be inappropriate to import other models of assessing whether an action was taken 'because' of a prohibited reason in the FW Act's general protections, due to the unique statutory context of the FW Act, including the presence of civil penalty consequences, the reverse onus of proof, and the lack of a requirement for a claimant to establish that a hypothetical comparator would have been treated more favourably.

This unique context makes the effect of altering the *Barclay* balance is more acute in the context of section 346. The scope of activities protected by section 347 very broad. For example, section 347(a)(b)(iii) protects persons in respect of encouraging or participating in a lawful activity organised or promoted by industrial association. The behaviour protected by section 347 need only relate to a lawful activity. There is no requirement that the activity, or the conduct of those participating in the activity, not be seriously offensive or free from psychosocial risk.

We do not understand any policy rationale for changes which protect seriously offensive conduct or conduct which causes psychosocial damage in the workplace. It would be a perverse outcome if such conduct was protected by the FW Act, but made unlawful by every State and Territory Workplace Health and Safety regime. It would provide a 'green light' for disrespectful workplace behaviour, bullying or victimisation, that would be completely contrary to the efforts of business, government and unions to promote greater respect at work in Australia.

It is also unclear whether the 'encouraging' or 'participating in' the activity (as opposed to activity itself) is also to be lawful. The protection in section 347 therefore potentially extends to a very broad range of anti-social and unacceptable instances of behaviour.

As a result, the *Barclay* test provides a critical protection against anti-social or unacceptable behaviour being given legal protection. That test needs to be retained, so as to not inadvertently provide immunity on misconduct which is tangentially related to such a broad range of activities.

The MCA has strongly supported recent legislative changes to provide for greater respect at work in Australian workplaces. It is disturbing that the proposal in the Consultation Paper runs counter to this entire agenda. Alternatives to the *Barclay* test risks giving a 'green light' to misconduct for anyone who purports to be pursuing 'industrial activity'. It is critical that employers not have their hands tied in their duties to keep their workplaces safe and free from bullying, discrimination, and victimisation by any workers, including union representatives. Exempting those involved in industrial activities from liability for their conduct, but not exempting others, also runs counter to the whole notion of freedom of association, which has underpinned the legislation for three decades.

During the *Barclay* case and subsequent proceedings, it was argued section 346 should be interpreted in a manner in which an individual will have taken action 'because' of a particular attribute if they are unable to demonstrate that their reason for taking the action was 'entirely disassociated'

from an activity protected by sections 346 and 347 or that the activity protected by those sections did not form part of their unconscious reasoning for taking the action.

The High Court rightly rejected that interpretation. In doing so, it pointed out the serious difficulties with such an approach, noting it would effectively confer immunity upon individuals who engaged in certain industrial activities, irrespective of the nature of their conduct. The High Court noted that this would confer an advantage on persons who happen to be engaged in industrial activities, which advantage would not be enjoyed by other workers.[6]

In rejecting the approach, French CJ and Crennan J observed:

> *"If accepted, such a position would destroy the balance between employers and employees central to the operation of s 361… That balance, once the reflex of criminal sanctions in the legislation, now reflects the serious nature of the civil penalty regime. Speaking more generally, that balance is a specific example of the balance of which Alfred Deakin spoke as being necessary for an effective conciliation and arbitration system."*[7]

The argument for Mr Barclay asserted that an 'entirely disassociated' requirement was necessary, because decision makers may have 'unconscious reasons' for their decisions, and that the protection in the legislation should extend to protection against unconscious prohibited reasons. The Court also rightly rejected this idea. Heydon J pointed out the absurdity of such an approach:[8]

> *"To search for the "reason" for a voluntary action is to search for the reasoning actually employed by the person who acted. Nothing in the Act expressly suggests that the courts are to search for "unconscious" elements in the impugned reasoning of persons … No requirement for such search can be implied. This is so if only because it would create an impossible burden on employers accused of contravening s 346 of the Act to search the minds of the employees whose conduct is said to have caused the contravention. How could an employer ever prove that there was no unconscious reason of a prohibited kind? An employer's inquiries of the relevant employees would provoke, at best, nothing but hilarity. The employees might retort that while they could say what reasons they were conscious of, they could say nothing about those they were not conscious of."*

Adopting alternative approaches to the *Barclay* test would invariably result in section 346 producing unintended and unjust outcomes. Consider the following hypothetical examples:

1. An employer signs a petition organised by its industrial association calling for a reduction in wages. Disgusted, an employee resigns because they disagree with the employer's position in calling for lower wages.
2. An employee participates in a lawful protest during protected industrial action. During the protest the employee engages in seriously offensive (but lawful) behaviour towards their co-workers. The co-workers complain to the employer. The employee is demoted because of their offensive behaviour.
3. In the course of fulfilling their duties as a union delegate, an employee sends an offensive email to a mailing list which only includes union members at the employer's workforce. The recipients complain to the employer. The employee is disciplined as a result of that breach of the employer's policy.
4. An employer is engaged in enterprise bargaining with a union. The employer signs a petition organised by its industrial association which says that it will not entertain any further wage increases during the current bargaining round. The union organises protected industrial action

[6] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, [60].
[7] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, [61].
[8] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, [146].

against that employer because the employer has effectively refused to entertain further wage increases.

In each of the above four scenarios, the union, employee or employer could have contravened section 346 if the *Barclay* test was removed. Each took adverse action against another person and their reason for the adverse action was not entirely disassociated from an industrial activity within the meaning of section 347. Conduct which would be an industrial activity protected by section 347 would have formed part of their unconscious reasoning for taking that action. Clearly, such outcomes are unjust and disruptive to a functioning industrial relations framework.

Finally, it is wrong to assert that *Barclay* permits discriminatory conduct, or allows an employer to simply 'slap an innocent label' on their reasoning to escape liability under section 346. When an employer gives evidence of their reasons for taking a particular action, a court is still required to consider whether that evidence is reliable and credible. A reverse onus also applies to the employer to prove that its conduct was not for the prohibited reason. The forensic examination of the employers' reasons is aided by the availability of discovery processes, subpoenas and the rules of evidence, including in particular the presumptions arising from the rule in *Jones v Dunkel.*

If an employer is clearly misrepresenting their reasoning for taking a particular action, it can be expected that a court would find that evidence was not credible or reliable and reject it. There is no reason in policy, and certainly none in the Consultation Paper, which suggests that the evidentiary onus on employers is somehow deficient in the case of the general protections but remains appropriate elsewhere. Claims under section 346 continue to prove difficult for employers to defend in practice and remain a favoured jurisdiction of unions and employee representative law firms.