Ai GROUP SUBMISSION

Department of Employment and Workplace Relations

Initial submission in response to consultation paper on updating the *Fair Work Act 2009* to provide stronger protections for workers against discrimination

15 May 2023

Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission in response to the Department of Employment and Workplace Relations (**DEWR**) consultation paper on *Updating the* Fair Work Act 2009 *to provide stronger protections for workers against discrimination* (**Discrimination Consultation Paper**).

At a conceptual level, Ai Group is concerned that the proposals outlined in the Discrimination Consultation Paper appear to conceive the *Fair Work Act 2009* (Cth) (**FW Act**) as being a potential vehicle for the "levelling up" of employee protections against discrimination, in circumstances where there is no proposal to otherwise reduce the complexity and significant compliance burden for employers that already exists under overlapping anti-discrimination laws at the Commonwealth, State and Territory level.

Ai Group's views on the issues raised in the Discrimination Consultation Paper are set out below.

Notwithstanding our overarching concern regarding the proposals, we reiterate that we have sought to constructively engage with the various questions raised by DEWR, and welcome further opportunities to consult with DEWR in relation to the issues in additional sessions planned for the coming weeks.

The Government's guiding principles

The Discrimination Consultation Paper sets out four principles used in guiding the identification of options for reforms to the FW Act anti-discrimination framework (**Guiding Principles**).

The Guiding Principles are:

- Alignment and consistency with key features of anti-discrimination law, including terminology and definitions (the **First Principle**)
- Protected attributes in the FW Act are consistent with community expectations and best practice language (the **Second Principle**)
- Exemptions from anti-discrimination provisions are clear and relevant (the **Third Principle**)
- Protections for national and non-national system employees are consistent and fair (the **Fourth Principle**).

DEWR has requested that parties consider the Guiding Principles when providing feedback.

For reasons we explain below, Ai Group is concerned the Guiding Principles are likely to result in the identification of options for reform that impose additional regulation in respect of discrimination, adverse action and harassment in a work setting and lead to further regulatory burden for employers.

First Principle

The First Principle speaks to "alignment and consistency" with key features of anti-discrimination law. Page 5 of the Discrimination Consultation Paper states that *"(t)he Department of Employment and Workplace Relations has identified a number of ways the FW Act's anti-discrimination framework could be further aligned with* ***Commonwealth anti-discrimination laws*** *to improve consistency and clarity at a* ***federal*** *level…*" (**emphasis** added).

The reform that is truly needed is a **consolidation** and **removal** of regulatory duplication – ***not*** "alignment" and "consistency". '*Levelling up*' regulation to increase obligations on employers in the name of '*consistency'* while still maintaining multiple legal frameworks and complaints avenues perpetuates unnecessary complexity for both employers and employees.

The First Principle also belies the full breadth of consolidation that is required to reduce complexity and over-regulation of discrimination, harassment and adverse action at work. The scope for proposed alignment and consistency appears to be limited to the four anti-discrimination laws at Commonwealth level that are referred to in the Discrimination Consultation Paper namely the:

- *Racial Discrimination Act 1975* (Cth) (**RD Act**)
- *Sex Discrimination Act 1984* (Cth) (**SD Act**)
- *Disability Discrimination Act 1992* (Cth) (**DD Act**)
- *Age Discrimination Act 2004* (Cth) (**AD Act**)

together with the *Australian Human Rights Commission Act 1986* (Cth).

It is not only the Commonwealth laws that operate in addition to the FW Act that contribute to the complexity, inconsistency and over-regulation of workplace discrimination. Anti-discrimination law exists at the Commonwealth, State and Territory levels. In total, 14 pieces of principal legislation prohibit discrimination on multiple grounds in various areas of employment (including the five Commonwealth anti-discrimination laws, and the FW Act, referred to above).

At a State and Territory level, these include:

1. *Anti-Discrimination Act 1977* (NSW)
2. *Equal Opportunity Act 2010* (VIC)
3. *Anti-Discrimination Act 1991* (QLD)
4. *Equal Opportunity Act 1984* (WA)
5. *Equal Opportunity Act 1984* (SA)
6. *Anti-Discrimination Act 1998* (TAS)
7. *Discrimination Act 1991* (ACT)
8. *Anti-Discrimination Act* (NT)

Measures to achieve alignment and consistency ought to properly take into account the full complement of laws that account for existing complexity and difficulties, rather than a myopic

approach limited to Commonwealth laws and "*improv(ing) consistency and clarity at a federal level*" (Discrimination Consultation Paper, page 5) which is unlikely to be able to achieve this.

Second Principle

The list of protected attributes in the FW Act is expansive and indeed, was amended in only December last year to include three new protected attributes:

- breastfeeding,
- gender identity, and
- intersex status

in addition to:

- race,
- colour,
- sex,
- sexual orientation,
- age,
- physical or mental disability,
- marital status,
- family or carer's responsibilities,
- pregnancy,
- religion,
- political opinion,
- national extraction, and
- social origin.

The introduction in 2009 of Part 3-1 – General Protections in the FW Act had the effect of expanding the anti-discrimination protections beyond those that have been in federal workplace relations legislation for many years (for example, the requirement that industrial instruments not include discriminatory provisions and the requirement that employees not be terminated for a discriminatory reason).

It is clear from the wording in subsection 351(2) of the FW Act, that the list of attributes from which an employee or prospective employee is protected from discrimination is not intended to expand anti-discrimination protections beyond what is in place under anti-discrimination laws in the State or Territory where the action is taken.

Ai Group opposes any further increased regulation on duty-holders given the current over-regulated and complex web of Commonwealth, State and Territory discrimination laws and broad general protections in the FW Act.

Third Principle

Ai Group does not support the removal of any exemptions that may lead to further increased regulation of duty holders in what is already an over-regulated area of law in Australia.

Fourth Principle

Ai Group agrees that the existing framework of Commonwealth, State and Territory anti-discrimination legislation is a complex web. Differences between jurisdictions contributes to the compliance burden for duty holders.

Given the over-regulation that already exists it is important that any move toward consistency has the effect of reducing, not increasing, regulation.

Ai Group opposes any approach to proposed '*consistency'* that adopts an unjustified '*levelling up*' approach that further increases the existing burden on duty holders.

Options for reform – Anti-discrimination measures

Ai Group does not support further regulation on employers under the FW Act's anti-discrimination and adverse action framework, likely to result from an "alignment" process. If any reform is contemplated it must be directed at:

- removing the current unfairness for employers,
- alleviating the number and/or duplication of obligations on employers, and
- easing the regulatory burden on duty-holders and employers.

Given the expansive nature of the general protections (including discrimination) and sexual harassment provisions in the FW Act, an appropriate mechanism to address this is through the insertion of a new provision in the FW Act that has the effect of ousting the operation of State and Territory laws dealing with the same grounds as those contained in the FW Act, rather than operating concurrently. This will avoid facilitating *'forum shopping*' by applicants (which we discuss in more detail in response to Question 13) and reduce the burden on employers.

Improving consistency and clarity

Indirect discrimination

It is useful to briefly outline the existing position regarding the extent to which section 351 of the FW Act prohibits indirect discrimination, before turning to answer Question 1.

Whilst section 336 of the FW Act states that the objects of Part 3-1 – General Protections include "*to provide protection from workplace discrimination*", section 351 of the FW Act does not expressly

prohibit "discrimination" but instead, makes it unlawful for an employer to take "adverse action" against employees and prospective employees "because of" the reasons set out in that section.

"Adverse action" is defined (in terms that include references to conduct by an employer that "discriminates between" and "discriminates against" employees and prospective employees, respectively) however the term "discriminates" is not.

As the Discrimination Consultation Paper identifies, this is a point of difference between the FW Act and each of the four primary Commonwealth anti-discrimination laws, which define conduct that is direct discrimination.

A further point of difference is in relation to indirect discrimination, which is a concept emanating from anti-discrimination law and is not expressly dealt with in the FW Act. It has been said that:

> "(a)lthough some judges have found that 'discrimination' in the FWA includes indirect discrimination, it cannot be said that this is apparent from the statute. Nor is there any indication in the Explanatory Memorandum or Second Reading speech to suggest this was Parliament's intention" (footnote omitted)[1]

The Discrimination Consultation Paper relies upon the decision of the Federal Court of Australia in *Klein v Metropolitan Fire and Emergency Services Board* (2012) 208 FCR 178 (***Klein***) in support of the proposition that "*it has been generally settled by case law that indirect discrimination is included in section 351*" but goes on to state that "*employers can be in doubt as to exactly what is required from them to comply with anti-discrimination provisions*".

It is important to consider carefully the precise extent to which sections 351 and 342 of the FW Act may in fact be taken to prohibit indirect discrimination, particularly as that concept is defined under Commonwealth anti-discrimination laws. Relevantly, Gordon J stated in *Klein* (at [102]):

> 102 The MFESB's submission proceeds upon a fundamental misconception of what may constitute indirect discrimination. It is now recognised that **an employer's particular reason for choosing a "facially neutral" criterion may in fact be its adverse impact on a protected group.** In another words, although the **employer chose a seemingly innocent or innocuous criterion**, the employer **did so for a prohibited reason or basis**. There is nothing in the language of Pt 3-1 of the FW Act that would support limiting "discrimination" for the purposes of Item 1(d) of the definition of 'adverse action' in s 342 so as to exclude "facially neutral" or indirect discrimination **of that kind.** As Mason J said in General Motors-Holden's Pty Ltd v Bowling (1976) 51 ALJR 235 at 241; 12 ALR 605 at 617 in relation to the predecessor of s 361 of the FW Act:
>
> > " … the plain purpose of the provision [is to throw] on to the defendant the onus of proving that which lies peculiarly within his own knowledge."
> >
> > See also Barclay at [50]. (**emphasis** added)

It is apparent from the above that Gordon J's conclusion in *Klein* related to circumstances where an employer chooses a "facially neutral" criterion ***for a prohibited reason or basis***. Notably, Gordon J

[1] Dominique Allen, *Adverse Effects: Can the FW Act Address Workplace Discrimination for Employees with a Disability* (2018) 41 (3) UNSWLJ 846 (**Allen**), at page 867.

concluded that the definition of "adverse action" in section 342 of the FW Act should not be limited to exclude "*indirect discrimination **of that kind***". The words "of that kind" are an important limitation.

Whilst the precise wording of indirect discrimination provisions in the various Commonwealth anti-discrimination laws varies, a common feature is the focus on the *effect* of the imposition of a term, condition or requirement imposed on a person with a protected attribute by (in the current context) their employer in comparison to the *intention* of the employer when imposing the term, condition or requirement.

In comparison, section 351 of the FW Act is clearly directed at adverse action that is taken "because of" an employee or prospective employee's attribute that is protected under that section. The type of indirect discrimination referred to by Gordon J in *Klein* as being included in the meaning of "adverse action" is "*facially neutral*" or "*seemingly innocent or innocuous*" criterion specifically chosen by an employer for a prohibited reason. Accordingly, Gordon J was referring to a type of action that is still taken "because of" a prohibited reason.

Therefore, the introduction into section 351 (or the general protections in the FW Act more broadly) of a concept of "indirect discrimination" similar to that found in the Commonwealth anti-discrimination laws would represent a substantial expansion of the existing protections contained in Part 3-1.

Question 1: Should the FW Act expressly prohibit indirect discrimination?

No.

If Parliament had intended for the FW Act to prohibit indirect discrimination in the same way as indirect discrimination provisions contained in other Commonwealth anti-discrimination laws, it would have expressly done so. A different approach should not be adopted now.

The following extract from the Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) (**Explanatory Memorandum**) makes it clear that whilst the meaning of "adverse action" was intended to capture conduct that was previously prohibited under the freedom of association, unlawful termination and other provisions of the *Workplace Relations Act 1996* (Cth) (**WR Act**), the effect of section 342 was nonetheless a broadening the type of actions persons (including employees and prospective employees) are protected from:

> *Clause 342 – Meaning of adverse action*
>
> 1383. Adverse action is a key definition that intersects with a number of the substantive protections in the Part.
>
> 1384. … The scope of the conduct captured by the concept of adverse action is based on conduct that is prohibited by the freedom of association, unlawful termination and other provisions in the WR Act that have been incorporated into the General Protections.

1386. The consolidation of the existing specific WR Act provisions into generally applicable prohibitions means that the new provisions protect persons against a broader range of adverse action.

To alter the definition to expressly include indirect discrimination would have the effect of further expanding the type of action covered by the provisions.

Retrofitting concepts of indirect discrimination from other Commonwealth anti-discrimination laws to a framework clearly directed toward direct discrimination would represent a significant expansion beyond the express wording in section 351. Such an expansion is inappropriate in the context of the existing over-regulation, complexity and compliance burden for employers in this area.

Further, and as explained above, inclusion of the type of "indirect discrimination" concepts found under the four primary Commonwealth anti-discrimination laws will reach far beyond the extent to which Courts have accepted (in particular, in *Klein*) indirect discrimination as being recognised within the FW Act.

To expand the concept of "discrimination" for the purpose of sections 351 and 342 of the FW Act to include indirect discrimination would also be inconsistent with the way in which the concept has been interpreted elsewhere in the FW Act. For example, in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 (**NRA No.2**) the Federal Court of Australia held that in the context of section 153 of the FW Act – which states that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the various grounds set out therein (and which are the same grounds contained in section 351) – the word "discriminate" did not extend to "indirect discrimination".

Relevantly, the Court held at [52] – [58] that:

> 52 The Act does not define the word "discriminate" or the words "discriminate against"…
>
> 53 It is next to be noted that not all discrimination is proscribed. What is proscribed is discrimination *against* an employee. That means the making of an *adverse* distinction between employees: cf *Helal v McConnell Dowell Constructors (Aust) Pty Ltd* (2010) 193 FCR 213 at [24] (per Ryan J). The adverse distinction must be drawn for one of the reasons, including age, which appear in the sub-section.
>
> 54 As can be seen, the proscribed reasons for adverse discrimination are those which are commonly dealt with in Federal and State anti-discrimination legislation. Typically, such legislation defines discrimination so that it covers both direct and indirect discrimination: see for example the *DD Act 1992* (Cth) ss 4, 5 and 6; *SD Act 1984* (Cth) ss 5, 6, 7 and 7B; *Equal Opportunity Act 2010* (Vic) ss 8 and 9 …
>
> 55 No attempt has been made in the Act to provide an extended definition of the term "discrimination".
>
> 56 It would be highly unlikely that the Parliament intended that s 153(1) could be contravened by indirect discrimination…

Gordon J declined to follow NRA No.2 in *Klein*.

Lastly, depending on how an express prohibition on indirect discrimination might be included in the FW Act (and in particular, whether it would be subject to the limitation in subsection 351(2)(1)), there is potential for it to result in an expansion of the circumstances in which employees are protected from indirect discrimination under existing anti-discrimination laws.

Specifically, protection from discrimination on the ground of family responsibilities under the SD Act is limited to direct discrimination (SD Act, s.7A). Expansion of the general protections to include protection from indirect discrimination on the ground of family responsibilities would therefore have the effect of ***expanding*** existing protections available to workers under Commonwealth anti-discrimination laws in relation to alleged adverse treatment at work on the grounds of family responsibilities.

This is inappropriate, having regard to:

- the wording in subsection 351(2)(a), which makes it clear that subsection 351(1) is not intended to expand upon the protections in the existing framework of anti-discrimination laws;
- the First Principle in the Discrimination Consultation Paper, which concerns "alignment and consistency" with key features of anti-discrimination law. The effect of the introduction of a broad definition of indirect discrimination to the grounds in section 351 of the FW Act would be an ***expansion*** (**not** alignment or consistency) of Commonwealth anti-discrimination laws;
- other rights and protections for employees with family responsibilities under the FW Act, including:
    - a right under subsection 65(1) of the FW Act to request a change in working arrangements where the employee would like to do so because they are the parent, or have responsibility for the care, of a child who is of school age or younger, and
    - in so far as the right to request a flexible work arrangement amounts to a "workplace right" (within the meaning of section 341 of the FW Act), protection under subsection 340(1) of the FW Act from adverse action against the employee in relation to the existence, exercise or proposed exercised of that right, or to prevent the exercise of that right; and
- the overall impact on employers, by virtue of the above, being to increase regulatory burden and complexity in navigating this area of law.

Defining 'disability'

Subsection 351(1) of the FW Act makes it unlawful for an employer to take adverse action against a person who is an employee, or prospective employee, because of (amongst other things) the person's "physical or mental disability".

Use of the term "disability" appears elsewhere in the FW Act, for the purpose of:

- a defined term ("employee with a disability") in section 12;

- the circumstances in which an employee may request a change to his or her working arrangements, pursuant to section 65 (which deals with requests for flexible working arrangements);
- terms allowed to be included in modern awards and enterprise agreements (subsections 139(1)(a)), 153(1) and 195(1));
- minimum wages (subsections 284(1)(e) and (3)(a), and 294(1)(b)(iii)); and
- the meaning of "adverse action" taken by an industrial association, or an officer or member of an industrial association, against a person (subsection 342(1)).

As the Discrimination Consultation Paper notes, there is no definition in the FW Act regarding what "physical or mental disability" means (whether for the purpose of section 351 of the FW Act, or more broadly).

Meaning of "disability" in the DD Act

The Discrimination Consultation Paper identifies that all Australian jurisdictions provide protection against either disability or impairment as that term is defined in the relevant anti-discrimination law.

For specific consideration, is whether the FW Act should be aligned with the meaning of "disability" contained in the DD Act.

Relevantly, section 4 of the DD Act defines "disability" in relation to a person, as meaning:

> (a) total or partial loss of the person's bodily or mental functions; or
> (b) total or partial loss of a part of the body; or
> (c) the presence in the body of organisms causing disease or illness; or
> (d) the presence in the body of organisms capable of causing disease or illness; or
> (e) the malfunction, malformation or disfigurement of a part of the person's body; or
> (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
> (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
> and includes a disability that:
> (h) presently exists; or
> (i) previously existed but no longer exists; or
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
> (k) is imputed to a person.
> To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

Meaning given to the term "disability" in section 351 by Courts

The meaning of "disability" in subsection 351(1) of the FW Act, and the extent to which that meaning is affected or informed by the DD Act was first considered by Cameron FM in *Hodkinson v Commonwealth* (2011) 207 IR 129 (**Hodkinson**) who relevantly held:

140. Although s.351 is headed "Discrimination" this heading is not to be taken as part of the Act: s.13(3), *Acts Interpretation Act 1901*. The section does not prohibit "discrimination" as such but, rather, identifies conduct which is generally considered to be discriminatory. It is by demonstrating the occurrence of adverse action and the fact that it was motivated for a reason prohibited by s.351(1), such as a person's disability, that a contravention is proved. **The criteria found in s.351(1) rely in no way on the *DD Act*.**

141. Further, s.351 does not employ the word "discrimination" other than as a term by which to identify other Acts which provide exceptions to the operation of s.351(1). The absence of that word from the list of prohibited reasons for adverse action found in s.351(1) means that **there is no grammatical link between that sub-section and ss.5 and 6 of the *DD Act*. There is, therefore, no term in s.351(1) whose proper construction may be understood by reference to what is contained in ss.5 and 6 of the *DD Act*.**

142. **Additionally, the fact that s.351(1)'s operation is limited by reference to exceptions derived from anti-discrimination legislation provides no basis to conclude that other features of those Acts should also influence the operation of s.351** …

145.… **nothing about the way the word "disability" is used in s.351(1) suggests that it should be understood other than according to its ordinary meaning or that it should have the extended meaning which it is given in the *DD Act*.** To the extent that the *DD Act* defines "disability" in terms consonant with the ordinary meaning of that word, it can assist in its interpretation where it appears in s.351(1). However, it is by reference to that ordinary meaning that it should be understood. In that regard, the *Macquarie Dictionary* (5th ed.) relevantly defines "disability" as:

> *1. lack of competent power, strength, or physical or mental ability; incapacity.*
>
> *2. a particular physical or mental weakness or incapacity.*

Further, the *Shorter Oxford English Dictionary* (6th ed.) relevantly defines "disability" as:

> *a person's movements, activities, or senses.*

146. **Where it is used in s.351(1), I conclude that the word "disability" should be understood to refer to a particular physical or mental weakness or incapacity and to include a condition which limits a person's movements, activities or senses.** Examples can be found in the definition of disability in the *DD Act*. **Importantly, however, while physical or mental limitations may be a disability or an aspect of a disability, their practical consequences, such as absence from work, are not. This distinction is significant when a party is required to identify the disability said to be the reason of adverse action alleged to have been taken against them.**

(**emphasis** added)

Whether the meaning of "discrimination" in the FW Act extends to the characteristics or manifestations of disability

The Discrimination Consultation Paper states (at page 6) that a consequence of the FW Act not defining disability is uncertainty as to whether discrimination protections under the FW Act only cover a disability itself or extend to the characteristics or manifestations of a disability.

In *Stephens v Australian Postal Corporation* (2011) 207 IR 405 (**Stephens**), Smith FM referred to and agreed with the observations of Cameron FM at [145] – [146] of *Hodkinson* that in the absence of

any statutory definition, the work "disability" should be construed by reference to its ordinary meaning. Smith FM went on to say (at 440 – 441):

> 86 … However, that meaning is to be considered in the context of the statutory objects of the provision, which is to proscribe adverse action when taken because the employee has one of a variety of personal attributes which are specified in the section. The section operates in a real world, where an employer might otherwise be tempted to take adverse action by reason of one of these attributes, motivated by a variety of considerations including irrational prejudices or a rational belief that the employer's business would benefit materially by removing a person with that attribute from its workforce. The underlying motive for the proscribed action is irrelevant to the existence of the contravention — all that is needed is the requisite "reason" in the sense explained in Barclay.
>
> 87 **Where it is intended that a "physical or mental disability" may be one of these attributes, it would not, in my opinion, be a proper construction of the words to limit them in an overly refined way to the underlying diagnosed medical or physiological or psychological condition. Some of the inherent consequences of the underlying condition on the personal capacities of the disabled person, including some of the inherent consequences of the medical condition bearing on the employee's presentation as a person and his or her work performance must be intended to be part of the employee's "disability". So much, in my opinion, would be consistent with the dictionary definitions' references to "incapacity" and "that limits a person's movements, activities, or senses".**
>
> 88 **A statutory intention to include some functional and other practical consequences of an underlying condition within the concept of "disability" is also implicit in the "defences" given to employers under s 351(2)** …
>
> 89 **Exactly what practical consequences or functional effects of a diagnosed condition are to be regarded as inherently part of a "disability", is best left to the consideration of particular circumstances.** I accept that a line may need to be drawn between a disability covered by s 351(1) and some effects of a disability which are not to be regarded as attributes of the disability itself, but this line is not easily drawn by a general verbal formula. (**emphasis** added)

In *Railpro Services Pty Ltd v Flavel* (2015) 242 FCR 424 (**Railpro**), Perry J stated (at 459):

> **I agree that the term "disability" cannot be limited to the "underlying diagnosed medical or physiological or psychological condition".** Unless the term included symptoms or manifestations of the disability, the Act may well fail to achieve its object. For example, it may permit adverse action because of its manifestation in an unsightly skin condition. **That such manifestations or symptoms are embraced within the term is consistent with the existence of the defence, for example, in s 351(2)(b) of the Fair Work Act excluding adverse action taken because of the inherent requirements of the job.** Thus, as Smith FM explained in this regard in Stephens v APC at [88], this "defence" permits adverse action by reason of a disability "where it can be shown that functional or practical effects of a disability are incompatible with the employment of the disabled person". **However, particularly close consideration needs to be given to the reasons of the employer for taking the adverse action where it may not be apparent that the symptom or manifestation is in fact a symptom or manifestation of a disability,** as is the case here. (**emphasis** added)

This position has been subsequently affirmed by decisions of the Federal Court of Australia and Federal Circuit Court of Australia (as it then was). Notably, in *Shizas v Commissioner of Police* [2017] FCA 61 (**Shizas**) Katzmann J stated:

119 But the question here is not whether a condition and its manifestations may be disaggregated; it is whether a particular disability can be severed from its manifestations. With the greatest respect, absent a statutory definition to that effect, which is missing from the FW Act, I have real difficulty with the notion that "disability" can ever exclude the manifestations of a condition. In the absence of a statutory definition, one must look to the ordinary meaning of the word. In its ordinary meaning "disability" denotes both the condition and its manifestations. "Disability" is relevantly defined in the *Shorter Oxford English Dictionary*) as:

"1. Lack of ability (*to do* something); inability, incapacity. Now *rare.*

…

3. An instance of lacking ability; now *spec.* a physical or mental condition (usu. permanent) that limits a person's movements, activities, or senses, esp. the ability to work … "

120 Similarly, the *Macquarie Dictionary* on-line relevantly defines "disability" as:

"1. lack of competent power, strength, or physical or mental ability, incapacity.

2. a condition which restricts a person's mental or sensory processes, or their mobility … "

Question 2: Should the FW Act be aligned with the DDA and include a definition of 'disability'?

For reasons explained in more detail below, Ai Group agrees that it may be useful to include a definition of 'disability' in the FW Act, but does *not agree* that the definition should be the same as that contained in the DD Act.

Benefits of including a definition of 'disability' in the FW Act

Section 12 of the FW Act includes an existing definition of "employee with a disability":

> ***employee with a disability*** means a national system employee who is qualified for a disability support pension as set out in section 94 or 95 of the *Social Security Act 1991*, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.

The phrase "employee with a disability" is not used elsewhere in either the FW Act or the *Fair Work Regulations 2009* (Cth). The Explanatory Memorandum states that the definition is relevant to whether a special national minimum wage applies to an award/agreement free employee (see paragraph 1177). The definition has been applied (seemingly, incorrectly) for the purpose of section 351 in at least two cases (*Construction, Forestry, Mining and Electrical Union v Leighton Contractors Pty Ltd* (2012) 225 IR 197, 233-4 [161] - [162] and *Corke-Cox v Crocker Builders Pty Ltd* [2012] FMCA 677, [145]-[146]).

The relevance of the definition of "employee with a disability" to section 351 of the FW Act appears to be correctly stated in *Crosby v Quebec Nominees Pty Ltd* [2019] FCCA 2797 (**Crosby**):

> There is no definition of "disability" in the *FW Act.* The Court does note however that s.12 of the *FW Act* does define "employee with a disability". This phrase appears only to be used in those provisions of the *FW Act* concerning national minimum wages. That definition refers to an "employee with a

> disability" being one who qualifies for the receipt of a disability support pension pursuant to ss.94 and 95 of the *Social Security Act 1991* (Cth) ("*SS Act*"). Those provisions plainly have no application to what constitutes a "disability" for the purposes of s. 351 of the *FW Act* …

There is merit in the proposition advanced by Allen[2] that inclusion of a definition of disability in the FW Act would avoid employees having to "*mount a complex argument based on the case law … that their ailment constituted a disability; they could simply point to the definition in the Act*".

Given the evolution of case law on this issue Ai Group agrees that it may be beneficial to both employees and employers (and the efficient administration of the law, more broadly) for a definition of "disability" to be inserted into the FW Act for the purpose of section 351. This may enable legal arguments on this threshold issue to be streamlined (for example, through the earlier identification of a jurisdictional objection) and therefore reduce unnecessary time and cost for the parties (as well as the potential for error in applying the definition, as in the two cases mentioned above).

It would however require careful consideration of any consequences (intended or otherwise) for other provisions of the FW Act that use the term "disability".

Inappropriateness of using the definition of 'disability' from the DD Act

However, any definition that might be inserted into the FW Act for the purpose of section 351 should go no further than consolidating the existing caselaw. This may include manifestations of the disability.

It should not extend further – for example, to capture a disability that is "imputed" to the person. As we outline in response to Question 4 below, it also should not go so far as to include attribute extension provisions.

Clarifying the interaction between the inherent requirements exemption and reasonable adjustments

Section 15 of the DD Act makes it unlawful for an employer (or person acting or purporting to act on behalf of an employer) to discriminate against both employees and prospective employees, in the following terms:

> **15 Discrimination in employment**
>
> (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:
>
> (a) in the arrangements made for the purpose of determining who should be offered employment; or
>
> (b) in determining who should be offered employment; or

[2] Allen, at page 854.

(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:

(a) in the terms or conditions of employment that the employer affords the employee; or

(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or

(c) by dismissing the employee; or

(d) by subjecting the employee to any other detriment.

(3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

Failure to make Reasonable Adjustments is "discrimination" under the DD Act

For the purpose of section 15, an employer will be taken to discriminate (either directly or indirectly) against an employee or prospective employee if the employer does not make (or proposes not to make) "reasonable adjustments" for the person which results in the person with disability:

- being treated less favourably than a person without the disability would be treated in circumstances that are not materially different (direct discrimination under subsection 5(2) of the DD Act), and/or
- not being able to comply with a condition or requirement, with the likely effect of disadvantaging persons with a disability (indirect discrimination under subsection 6(2) of the DD Act).

"Reasonable adjustments" is defined in section 4 of the DD Act, which states:

> ***reasonable adjustment***: an adjustment to be made by a person is a ***reasonable adjustment*** unless making the adjustment would impose an unjustifiable hardship on the person.

"Unjustifiable hardship" (considered in more detail, below) is defined in section 11 of the DD Act:

> **11 Unjustifiable hardship**
>
> (1) For the purposes of this Act, in determining whether a hardship that would be imposed on a person (the first person) would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:
>
> (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
>
> (b) the effect of the disability of any person concerned;

(c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;

(d) the availability of financial and other assistance to the first person;

(e) any relevant action plans given to the Commission under section 64.

The "inherent requirements" exemption in the DD Act

Section 21A of the DD Act contains an "inherent requirements" exemption, the effect of which is that it is not unlawful for an employer to discriminate against an employee or prospective employee if:

- the discrimination relates to particular work (including promotion or transfer to particular work) (subsection 21A(1)(a)); and
- because of the disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person (subsection 21A(1)(b)).

The exemption applies in relation to discrimination that is prohibited under subsections 15(1)(a) - (c) (inclusive) and subsections 15(2)(a) and (c).

It also applies in a more limited way to discrimination under subsections 15(2)(b) and (d), in relation only to discrimination in determining who should be offered promotion or transfer. It does not apply in relation to the denial of a benefit, limiting of access to opportunities for promotion, transfer and training, and the imposition of any other detriment (subsection 21A(4)(a)).

Question 3: Should the inherent requirements exemption in the FW Act be amended to clarify the requirement to consider reasonable adjustments?

No.

The definition of 'adverse action' is already broad and onerous

The definition of "adverse action" for the purpose of section 351 of the FW Act is already broad. Inclusion in the definition of a further type of adverse action, in the form of a failure to make reasonable adjustments, would necessarily lead to a further broadening of this concept.

Additionally, under the DD Act the burden rests with an employer to prove that a reasonable adjustment would pose an unjustifiable hardship (subsection 11(2)). To incorporate this into the FW Act would compound the compliance burden for employers arising from the existing reverse onus of proof in the general protections.

Interaction of an obligation to make "reasonable adjustments" with the right of employees to make flexible work requests

Regard also needs to be had to the existing obligation on employers, under section 65 of the FW Act, to consider any request made by an employee who has a disability to change his or her working arrangements due to the disability. The employer may only refuse the request on "reasonable business grounds", which include but are not limited to the following grounds currently set out in subsection 65(5A) of the FW Act (and which from 6 June 2023, will form part of new subsection 65A(5)):

- that the new working arrangements requested by the employee would be too costly for the employer;
- that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;
- that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;
- that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;
- that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

It is evident there is a level of similarity between these grounds, and the criteria for assessing "unjustifiable hardship" under section 11 of the DD Act.

The obligation on employers to take steps to accommodate a request by an employee for a flexible work arrangement has recently been strengthened under Part 11 of Schedule 1 to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (the **SJBP Amendment Act**) with additional measures commencing on 6 June 2023 that require an employer to genuinely try to reach agreement with the employee about requested changes, have regard to the consequences of any refusal on the employee, only refuse on reasonable business grounds, and set out changes (other than the requested changes) the employer would be willing to make. Employees will also be able to apply to the FWC in relation to any dispute about a request for flexible work arrangements to accommodate a disability, with the potential for the FWC to make an order that the employer grant the request or make specified changes (other than those requested) (SJPB Amendment Act, section 65C of Part 11, Schedule 1).

To introduce into the FW Act a concept that "adverse action" includes failing to make reasonable adjustments is likely to cause complexity and overlap between the operation of the flexible work request provisions and the prohibition on discrimination in section 351. This is both undesirable, and unnecessary having regard to the existing obligations.

Inappropriateness of mirroring workers' compensation obligations in the FW Act

The Discrimination Consultation Paper notes the absence of a "reasonable adjustments" requirement in the "inherent requirements" exception in subsection 351(2)(b) of the FW Act "*despite it being a common requirement under workers compensation laws for businesses and employers to make reasonable adjustments for the purposes of assisting workers, who have acquired a disability during employment, to return to work*". This is not an appropriate justification for inclusion of a "reasonable adjustments" requirement in the FW Act, for the following reasons:

- first, the obligation to make reasonable adjustments to assist an employee in receipt of workers' compensation payments to return to work, already exists under statute. To replicate this in the FW Act is unnecessary, and only leads to increased complexity and compliance burden on employers; and
- second, the prohibition on discrimination in section 351 of the FW Act applies to employees and prospective employees who have a physical or mental disability, regardless of whether that disability was acquired during the course of their employment with the employer or is one in respect of which the employee is entitled to receive workers' compensation payments. Any suggestion or inference that the inclusion of a "reasonable adjustments" requirement for the purpose of section 351 of the FW Act would simply reflect an employer's existing workers' compensation obligations belies the significant difference in the breadth of to whom the obligation applies.

Attribute extensions

The Discrimination Consultation Paper proposes the potential extension of the grounds of discrimination in section 351 of the FW Act to include not only the protected attribute (for example, race, sex, age or disability) itself but also characteristics that people who have this protected attribute either generally have, or are generally assumed to have (known as "attribute extension provisions").

In doing so, it relies on:

- existing attribute extension provisions in the SD Act and AD Act, as well as references in the DD Act to a number of characteristics relating to some people with a disability; and
- views expressed by the Australian Human Rights Commission (**AHRC**), that discrimination frequently occurs because of concerns about which members of a group either have or have attributed to them, and that in the absence of attribute extensions the definition of direct discrimination can have a much-reduced effect.

It is appropriate at the outset to consider these items in more detail, for the purpose of informing any position as to whether the FW Act should be amended to include attribute extension provisions (presumably as part of any definition of 'direct discrimination').

Attribute extension provisions in Commonwealth anti-discrimination Laws

Existing examples of attribute extension provisions in Commonwealth anti-discrimination laws are found in:

- subsection 5(1) of the SD Act, which protects against discrimination on the ground of sex by including "*characteristics that appertain generally, or are generally imputed, to a person because of their sex*", and
- subsection 14(b) of the AD Act, which makes it unlawful to discriminate on the basis of "*a characteristic that is generally imputed to persons of the age of the person*".

The definition of "disability" in section 4 of the DD Act includes a disability that "is imputed to a person". Subsection 8(1) of the DD Act states that the Act "*applies in relation to having a carer, assistant, assistance animal or disability aid in the same way as it applies in relation to having a disability*".

In the context of the SD Act, the Federal Court held in *Thomson v Orica Australia* (2002) 116 IR 186 (**Orica**) that characteristics imputed to a woman include the capacity or ability to become pregnant, and the taking of maternity leave (at 229, [168]).

In *Thompson v Big Bert Pty Ltd t/as Charles Hotel* [2007] FCA 1978 (**Thompson**) the applicant attempted to argue (unsuccessfully) that the reason for the reduction in her hours of work and removal of her regular shifts included a characteristic that is generally imputed to persons of her age or age group, being the characteristic that persons in their late 30s are less attractive, and less glamorous, than persons in a younger age group.

In the context of the *Anti-Discrimination Act 1977* (NSW), the Administrative Decisions Tribunal of New South Wales accepted in *Sleeman v Tullock Pty Ltd (t/a Palms on Oxford)* [2013] NSWADT 235 (**Sleeman**) that the characteristics identified by the applicant of being "*too old*", "*perhaps too square*", "*too conservative*", had "*grey hair*", was "*balding*" and "*being conservatively dressed*" could be "*said to appertain generally to people of his age or to be generally imputed to persons of his age*" (at [134] – [136]).

Position of the AHRC in relation to attribute extension provisions

In its December 2011 Submission to the Commonwealth Attorney-General's Department, "*Consolidation of Commonwealth Discrimination Law*"[3] the AHRC said the following in relation to "characteristics extensions":

> *4.2 "Direct discrimination"*
> *…*
> *(b) Characteristics extensions*

[3] Australian Human Rights Commission, Submission to the Commonwealth Attorney-General's Department, *Consolidation of Commonwealth Discrimination Law* (6 December 2011) < https://humanrights.gov.au/ourwork/legal/consolidation-commonwealth-discrimination-law>.

…

36. As noted in that earlier submission, discrimination frequently occurs because of concerns about characteristics which members of the group either often have, or have imputed to them. The Commission noted that without provision for characteristic extensions, definitions of direct discrimination could have much reduced effect.

…

38. Characteristics such as pregnancy, potential pregnancy, breastfeeding and family responsibilities, use of assistive devices, or being accompanied by an assistant or an assistance animal, would be likely as a matter of law to be covered by an appropriately broadly drafted characteristics extension. However the Commission considers that specific recognition of these particular characteristics plays an important role in making the application of the legislation clear, and should be maintained together with a general characteristics extension.

Some observations may be made in relation to the AHRC's position, in the context of the FW Act.

First, the approach was considered appropriate for inclusion in "*a consolidated Commonwealth equality law*". Consideration of the extensions is in this instance, being undertaken in the context of the FW Act which is a broader piece of industrial legislation in circumstances where the inclusion would occur *in addition to* rather than as a consolidation of existing protections.

Second, the extent to which the effect of section 351 of the FW Act may be said to have (or potentially have) a "much reduced effect" due to the absence of attribute extension provisions needs to be considered in the broader context of rights and protections contained in the FW Act and specifically, relating to various rights contained in the National Employment Standards and the protection in relation to "workplace rights" contained in section 340 of the FW Act.

Question 4: Should attribute extension provisions be included in the FW Act?

Some of the characteristics said to be imputed characteristics are indeed, already expressly protected in section 351 of the FW Act – for example, pregnancy, breastfeeding and family responsibilities.

Further, certain acts that an employer might consider an employee with a protected attribute could or might do will be protected under the FW Act and an employer is prohibited from treating an employee adversely because they have that right, have or have not exercised the right, propose to or not to (or have at any time proposed to or not to) exercise the right, or to prevent the employee from exercising the right.

Ai Group does not support the expansion of the discrimination provisions in the FW Act to include attribute extensions, beyond the type of extended protections that already exist by virtue of section 340 and 343.

Protection already afforded to employees under section 340 of the FW Act

Subsection 340(1) of the FW Act protects an employee from adverse action by their employer:

- because the employee:
  - has a workplace right,

    - has, or has not, exercised a workplace right, or
    - proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right, or
- to prevent the exercise of a workplace right by the employee.

Section 343 also has the effect of prohibiting an employer from organising or taking, or threatening to organize or take, any action against an employee with intent to coerce them to:

- exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
- exercise, or propose to exercise, a workplace right in a particular way.

Subsection 341(1) of the FW Act provides that the circumstances in which a person has a "workplace right" includes where the person:

- 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
- is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument

where "workplace law" which includes the FW Act.

Accordingly, the general protections may already be said to protect employees from adverse action where the imputed characteristic or behaviour is grounded in a protected attribute and concerns the existence of a workplace right or proposed exercise of a workplace right.

By way of example, an employee with a disability who meets the minimum service requirements, has a "workplace right" to request a flexible work arrangement pursuant to section 65 of the FW Act. It is conceivable an employer may "impute" that a worker with a disability will request a flexible work arrangement (for example, to accommodate having an assistant or assistance animal at work). If the employer did impute such a characteristic to the employee, the employer is prevented from treating the employee adversely because they have the right, propose at any time to exercise the right, or to prevent the exercise of the right to request a flexible work arrangement.

By way of further example, a pregnant employee will (if they meet the minimum service requirements) have a right to unpaid parental leave under section 70 of the FW Act. It is conceivable an employer may "impute" that the pregnant worker will apply to take unpaid parental leave. If the employer did impute such a characteristic to the employee, the employer is prevented from treating the employee adversely because they have the right, propose at any time to exercise the right, or to prevent the exercise of the right to take unpaid parental leave.

By way of third example, an employee with family or carer's responsibilities may have a right to take paid and/or unpaid carer's leave. It is conceivable an employer may "impute" that the worker will (at some point) apply to take carer's leave. If the employer did impute such a characteristic to the employee, the employer is prevented from treating the employee adversely because they have the

right, propose at any time to exercise the right, or to prevent the exercise of the right to take paid or unpaid carer's leave.

Ai Group does not support the expansion of the discrimination provisions in the FW Act to include attribute extensions, beyond the type of extended protections that already exist by virtue of section 340 and 343. The FW Act is not "*a consolidated Commonwealth equality law*" (of the type being considered in the AHRC submission). It is a broader piece of industrial legislation, under which Ai Group considers an appropriate balance is already struck by:

- directly protecting particular attributes (in section 351),
- providing various rights and entitlements in the National Employment Standards designed to accommodate the needs of the employee at work arising from the attribute (for example, the right to request flexible work arrangements, parental leave and related entitlements, and personal/carer's leave) (Part 2-2), and
- protecting the worker from adverse treatment because they have this right, or propose to exercise this right etc.

Complaints processes

Division 8 of Part 3-1 of the FW Act provides separate compliance mechanisms for "Contraventions involving dismissal" (Subdivision A of Division 8), and "Other contraventions" (Subdivision B of Division 8).

As noted in the Discrimination Consultation Paper, the powers of the FWC to deal with a general protections dispute differ depending on whether the dispute relates to a dismissal or not.

Overview of existing FWC processes for applications concerning dismissal-related and "other" general protections contraventions

Dismissal-related disputes ***must*** be commenced in the FWC (section 365) and the FWC ***must*** deal with it other than by arbitration (section 368). A note to subsection 368(1) of the FW Act confirms this may include mediation or conciliation, or making a recommendation or expressing an opinion as the FWC is empowered to do pursuant to subsection 595(2). A recommendation the FWC might make, is that an application for unfair dismissal instead be made under Part 3-2 of the FW Act. Where a dismissal-related general protections dispute fails the parties can agree for the FWC to deal with the dispute by arbitration (section 369) or alternatively, apply to the Federal Court of Australia (**Federal Court**) or Federal Circuit and Family Court of Australia (**FCFCA**) (section 370) (known as **a general protections court application**).

In contrast, an applicant whose complaint does not include an allegation they have been dismissed in contravention of the general protections is *required* to utilise Subdivision B of Division 8, Part 3-1 and is *not entitled* to make a claim under Subdivision A (see section 372). An applicant may elect to file the dispute with the FWC or file it directly with the Federal Court or FCCA. If the dispute is filed with the FWC, the FWC can conduct a private conference (only) to deal with the dispute if the parties

agree to participate (section 374). If the matter does not resolve in conference, the applicant may proceed to make a general protections court application.

Question 5: As per the broader Commonwealth anti-discrimination framework, should a new complaints process be established to require all complaints of discrimination under the FW Act (i.e. both dismissal and non-dismissal related discrimination disputes) to be handled in the first instance by the FWC via conciliation? What would be the benefits and limitations of establishing such a requirement?

Ai Group makes a number of threshold observations regarding the question posed, namely whether all dismissal and non-dismissal complaints of ***discrimination*** should be handled in the first instance by the FWC ***via conciliation***.

First, the question is limited to "complaints of discrimination". We assume (although it is not clear) that this refers to general protections disputes that are made in reliance on section 351.

As outlined above, Part 3-1 currently distinguishes between the process applied for dismissal and non-dismissal related disputes.

Ai Group does not agree with any proposal to further differentiate how the FWC should deal with dismissal and non-dismissal related disputes depending on whether they are made pursuant to section 351 or another provision in Part 3-1. This is likely to lead to further complexity and confusion for employers in relation to the administration of the jurisdiction. Further, and as outlined above, there is merit to *all* general protections disputes having the benefit of the assistance of the FWC before a general protections court application is made (subject to any constitutional limitations that may prevent this outcome being able to be achieved under the FW Act). These merits are not confined to general protections disputes made pursuant to section 351 and apply to a general protections dispute made on any one or more of the grounds in Part 3-1.

Second, the question posits whether all such complaints should be handled by the FWC in the first instance "via conciliation". As outlined above, a dismissal-related dispute concerning alleged discrimination in contravention of section 351 can be dealt with by the FWC "other than by arbitration". This is broader than simply conciliation, and also includes the ability of the FWC to mediate, make a recommendation or express an opinion. No basis has been identified in the Discrimination Consultation Paper as to any need or benefit of limiting the type of assistance provided by the FWC to conciliation only. In the absence of any explanation or understanding as to why this may be considered beneficial, Ai Group opposes any such limitation on the FWC's power to assist the parties.

As to whether the parties to a non-dismissal related general protections application should be required to participate in conciliation, Ai Group considers there is merit to this suggestion taking into account the benefit of early assistance of the FWC. This may allow the issues to be narrowed, and for unmeritorious arguments to be excluded from any general protections court application.

However, it is important this requirement be able to be circumvented in appropriate circumstances (for example, where an interim injunction is sought) and able to be waived by the FWC on application by a party where appropriate (for example, if the FWC considers there is no prospect that conciliation would resolve the matter).

Potential benefits of a requirement that all applications concerning general protections contraventions are required to undergo conciliation by FWC in the first instance

As a general proposition, Ai Group sees mutual benefit for employers and employees of early opportunities to explore whether it is possible to resolve a general protections dispute, particularly at a time at which costs incurred by either side are minimal.

For non-dismissal related disputes where an employment relationship may still be on foot, conciliation by the FWC may be quicker, less formal and less expensive than court and ultimately more conducive to preservation of the employment relationship.

One of the benefits of a general protections dispute being filed initially with the FWC, is the requirement that the FWC must advise the parties if it considers taking into account all the materials before it, that the dispute would not have reasonable prospects of success if an arbitration under section 369 (in the case of dismissal-related applications) or a general protections court application were commenced (see subsection 368(3)(b) and section 375).

Where a non-dismissal related general protections court application is made directly to the Federal Court or FCCA there is no opportunity for the FWC to consider the prospects of the application and advise the parties pursuant to section 375, if it considers the application does not have reasonable prospects of success.

It is not in the interests of employers, employees or the efficient administration of the Courts for general protections court applications to be commenced without reasonable prospects of success in circumstances where an earlier and less formal process via the FWC could put the parties on notice regarding this.

Potential limitations of a requirement that all applications concerning general protections contraventions are required to undergo conciliation by FWC in the first instance

There is an existing mechanism in the FW Act to allow dismissal-related general protections disputes to circumvent the requirement to first make the application to the FWC where the application includes an application for an interim injunction (section 370). The Explanatory Memorandum explains (at paragraph 1490) that "*this recognises that a conference may be a barrier to obtaining urgent relief in some cases – e.g., where the employment of a bargaining representative has been terminated for reasons related to this role*".

Accordingly, a limitation of requiring that *all* applications concerning general protections contraventions undergo conciliation is that this may prevent a barrier to accessing urgent relief of a type only able to be obtained from a general protections court application.

Ai Group considers it would be appropriate to replicate this exemption in Subdivision B of Division 8 of Part 3-1, if a requirement is introduced for non-dismissal related general protections applications to undergo conciliation (or receive other assistance, other than arbitration) by the FWC before a general protections court application is made.

The Explanatory Memorandum also contains an example, that an optional conference before the FWC may not be appropriate in the case of a non-dismissal related general protections dispute where an Inspector is bringing the action and is seeking a monetary penalty (see paragraph 1496). It is conceivable that there may be other situations where a FWC conciliation (or other assistance) may lack any utility.

Question 6: If a new complaints process were to be established, should it attract a filing fee consistent with other similar dispute applications to the FWC?

Yes.

In the context of Question 5 of the Discrimination Consultation Paper (and the discussion that precedes it), Ai Group understands that the extent of the change being proposed to the general protections complaints process is for non-dismissal related general protections disputes that are made on the ground of (or a ground that includes) adverse action in contravention of section 351 to be subject to a compulsory (rather than voluntary) conciliation process.

Currently, both dismissal-related and "other" general protections dispute applications attract a filing fee when made to the FWC.

Accordingly, Question 6 in effect poses the question of whether it is appropriate for the FWC to continue to charge a filing for an application made to the FWC under Subdivision B of Division 8 of Part 3-1 in circumstances where it is proposed:

- an applicant will no longer have the choice to make a general protections court application without first having made a general protections application to the FWC, and
- where such an application is made, participation in conciliation will no longer be voluntary.

The Discrimination Consultation Paper notes that filing fees currently charged by it for unfair dismissal, unlawful termination, stop bulling applications and general protections applications contributes to FWC resourcing (without being cost recovery). Further, imposition of a filing fee is intended to achieve a balance between the competing objectives of providing access to justice (noting in this regarding that the FWC has discretion to waive this fee where a party is experiencing serious hardship) and deterring vexatious complaints.

Ai Group considers it is important for this balance to be maintained.

A likely consequence of the proposed changes is to increase the workload of the FWC. It is appropriate a filing fee be charged in step with that which is applied to other applicants who seek to engage the assistance of the FWC (and also contribute to its resourcing requirements).

The Discrimination Consultation Paper does not outline any reason as to why in these circumstances it may no longer be appropriate to charge a filing fee (other than perhaps to note that complaints about discrimination (including sexual harassment) under the commonwealth anti-discrimination laws can be made to the AHRC for free).

It is conceivable that a potential outcome of a system in which a filing fee is payable for some types of applications but not others may encourage applicants to file a type of application for which there is no fee (simply because it costs nothing to do so) when in may not necessarily be the most appropriate type of claim.

Alternatively, if it is proposed that a filing fee only be charged in relation to non-dismissal related general protections applications in which a ground of discrimination is alleged, this could potentially cause an applicant to be motivated to select section 351 as a ground (or one of the grounds) as the basis for dispute for the purpose of avoiding the requirement to pay a filing fee.

Accordingly, maintaining parity between filing fees for claims where there may be more than one potential jurisdiction in which an application could be brought is relevant to ensuring an applicant is motivated to file a particular type of application based on the merits of the matter and suitability of the jurisdiction (and not by the absence of a filing fee).

Vicarious liability

Vicarious liability provisions in Commonwealth anti-discrimination acts

By way of preliminary comment, page 8 of the *Discrimination Consultation Paper* states:

> The four Commonwealth anti-discrimination Acts contain vicarious liability provisions, though the elements differ.

On Ai Group's review, only the SD Act and RD Act contain provisions dealing with vicarious liability; neither the AD Act nor the DD Act deal with vicarious liability.

Accordingly, the question posited regarding whether vicarious liability in relation to discrimination under the FW Act should be made consistent with the new sexual harassment jurisdiction "*and other Commonwealth anti-discrimination laws*" should necessarily be confined to a consideration of potential alignment with the SD Act and RD Act since vicarious liability provisions are not a common feature across all four Commonwealth anti-discrimination Acts.

Difference between prohibition on "persons" under section 527D and "employers" under 351 of the FW Act

New section 527D of the FW Act (which commenced on 6 March 2023) states:

> (1) A **person** (the ***first person***) must not sexually harass another person (the ***second person***) who is:
> (a) a worker in a business or undertaking; or
> (b) seeking to become a worker in a particular business or undertaking; or
> (c) a person conducting a business or undertaking;
> if the harassment occurs in connection with the second person being a person of the kind mentioned in paragraph (a), (b) or (c). (**emphasis** added)

As is evident from the wording in subsection 527D(1) of the FW Act, the prohibition is directed at the act of a "person".

"Person" is not defined in the FW Act. However, section 2C of the *Acts Interpretation Act 1901* (Cth) provides:

> **2C References to persons**
> (1) In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), **include a body politic or corporate as well as an individual**. (**emphasis** added)

In contrast, subsection 351 of the FW Act is directed at the actions of an "employer":

> (1) An **employer** must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. (**emphasis** added)

Section 335 provides that for the purpose of Part 3-1 (including section 351) "employee" and "employer" have their ordinary meaning.

Extended liability under the FW Act for contraventions of sections 527D and 351

Both subsections 527D(1) and 351(1) of the FW Act are civil remedy provisions. Accordingly, section 550 of the FW Act operates so as to create potential liability for persons "involved in" the contravention of a civil remedy provision:

> **550 Involvement in contravention treated in same way as actual contravention**
> (1) A **person** who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.
> Note: If a person (the ***involved person***) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).
> (2) A **person** is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:
> (a) has aided, abetted, counselled or procured the contravention; or
> (b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention. (**emphasis** added)

For completeness, it is noted that this provision is of a similar nature to section 56 of the AD Act, section 122 of the DD Act and section 105 of the SD Act (and accordingly represents an existing level of alignment with Commonwealth anti-discrimination laws).

In addition, new section 527E of the FW Act goes on to provide for vicarious liability of "principals" on the following basis:

(1) If an employee or agent of a person (the ***principal***) does, in connection with the employment of the employee or with the duties of the agent as an agent, an act that contravenes subsection 527D(1), this Act applies in relation to the principal (subject to subsection (2)) as if the principal had also done the act.

(2) Subsection (1) does not apply if the principal proves that the principal took all reasonable steps to prevent the employee or agent from doing acts that would contravene subsection 527D(1).

Question 7: Should vicarious liability in relation to discrimination under the FW Act be made consistent with the new sexual harassment jurisdiction and other Commonwealth anti-discrimination laws? Why or why not?

No. Vicarious liability for section 351 of the FW Act not required, given the differences between it and section 527D.

In an employment context, vicarious liability provisions generally operate to render an employer liable for the actions of its employees in circumstances where the employer itself has not engaged in the unlawful behaviour (and it would be appropriate to hold the employer responsible for the actions of its employee(s)).

Section 351 of the FW Act is directed at the actions of an "employer". This creates **direct liability** for an employer. An employer that is a corporation will of course, act through individuals however the actions of those individuals on its behalf creates direct liability.

The "aide and abet" provisions in section 550 of the FW Act effectively provide for consequences at an individual level for those persons by virtue of having been "involved in" a contravention.

In contrast, new section 527D of the FW Act prohibits a "person" from sexually harassing another person. The "person" who engages in sexual harassment can be held directly liable for his or her (or in the case of a body corporate, its) actions. This could include, but is much broader than, just a person's employer.

An employer will not have direct liability under section 527D unless it was the "person" who engaged in the harassment.

The effect of section 527E is to make an employer ***vicariously*** liable if the person who engaged in the harassment was an employee acting in connection with their employment with the employer.

The Explanatory Memorandum to the *SJBP Amendment Bill* (**SJBP Explanatory Memorandum**) explains (at paragraph 446) that new section 527E of the FW Act is modelled on the vicarious liability provision in section 106D of the SD Act. Relevantly, the SD Act directly prohibits conduct by both "*employers*" and "*persons*".

Paragraph 447 of the SJBP Explanatory Memorandum explains that the inclusion of section 527E in the FW Act "*ensures an aggrieved person can obtain a remedy from the principal in addition to, or instead of, the perpetrator*".

On this logic, there is no need to extend the vicarious liability provision to apply to section 351 of the FW Act because an employer is already directly liable.

The Discrimination Consultation Paper states that the absence of a vicarious liability provision similar to that in section 527E applying to discrimination claims under the FW Act "*means the circumstances in which an applicant can recover a remedy from the perpetrator's employer or principal are narrower for discrimination claims under the FW Act compared to sexual harassment claims or discrimination claims under Commonwealth anti-discrimination law*".

It is not clear how this is the case, since an application alleging a contravention of section 351 will in all cases be made against an employer (as it is the employer against whom the prohibition on adverse action is directed).

The 'not unlawful' exemption

Subsection 351(2)(a) of the FW Act states that the prohibition on an employer taking adverse action against an employee because of the attributes listed in that subsection does not apply in relation to action that is:

(a) Not unlawful under any anti-discrimination law in force in the place where action is taken;

The Explanatory Memorandum explained the intention of the "not unlawful" exemption in the following terms:

> 1429. The exception in paragraph 351(2)(a) ensures that action authorised by or under a State or Territory anti-discrimination law (defined in subclause 351(3)) is not adverse action under subclause 351(1). This would occur, for example, where the action is exempt from being discrimination because it was taken to protect the health and safety of people at a workplace (see the relevant exemption in section 108 of the *Anti-Discrimination Act 1991* (Qld)).

Ai Group does not agree with the statement in the Discrimination Consultation Paper that "*(t)he 'not unlawful' exemption was intended to specifically incorporate exceptions in other anti-discrimination laws into the FW Act. However, it has sometimes been interpreted too broadly…*". There is no basis as to why the words "not unlawful" in subsection 351(2)(a) should not read as only

including situations in which conduct is not unlawful (or using the wording from the Explanatory Memorandum, "authorised") because there is no ground of protection, as well as situations in which conduct is not unlawful because it is done pursuant to a specific exemption/exception (in circumstances where it would otherwise be unlawful). Whilst the Explanatory Memorandum includes the latter as an example, in no way is this expressed in a manner that suggests that to be the only context in which it has work to do.

In *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768 (***McIntyre***), Commissioner Cambridge applied subsection 351(2)(a) in the following manner:

> [35] In the present circumstances, the applicant mistakenly commenced proceedings under s. 365 of the Act and he has subsequently endeavoured to overcome that mistake with his application under s. 773 of the Act. Consequently, there is no attempt by the applicant to seek multiple actions or remedies in respect to the same conduct, his s. 365 application has failed, and in my view, had his particular circumstances being properly examined at the time, it would have been established that he was not a person who was entitled to make a general protections court application in relation to conduct which, in New South Wales, was caught by the provisions of subsection 351 (2) (a) of the Act.
>
> [36] A consideration of the operation of subsection 351 (2) (a) of the Act is assisted by the following extract from the explanatory memorandum to the Fair Work Bill 2008:
>
> > "1429. The exception in paragraph 351(2)(a) ensures that action authorised by or under a State or Territory anti-discrimination law (defined in subclause 351(3)) is not adverse action under the subclause 351 (1)."
>
> [37] Consequently, I believe that the operation of subsection 351 (2) (a) of the Act, in the circumstances of the applicant, had the effect of extinguishing the general protection established under subsection 351 (1) of the Act. Therefore, for the purposes of s. 723 of the Act, the applicant was not a person who was entitled to make a general protections court application in relation to the particular conduct that was the subject of his s. 365 application. Therefore, the s. 773 unlawful termination application made by the applicant is not jurisdictionally barred by the prohibition established under s. 723 of the Act.

In 2021, a Full Bench of the FWC in *Dr Daniel Krcho v University of New South Wales T/A UNSW Sydney* [2021] FWCFB 350 (**Krcho**) distinguished *McIntyre* from the appeal before it, however relevantly stated (at [54]):

> [54] Section 351(1) of the Act establishes protection against discrimination by an employer against a person because of attributes, including political opinion. Section 351(2) provides that an employer does not discriminate and that s. 351(1) does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. It was accepted before the Commissioner and not disputed in this appeal, that consistent with the decision in McIntyre, the Appellant cannot make a general protections application on this ground because anti-discrimination legislation in New South Wales does not prohibit discrimination on the ground of political opinion.

McIntyre was again referred to by a Full Bench of the FWC in *Sue Jacobs v Adelaide Theosophical Society Inc. (New Dimensions Bookshop)* [2022] FWCFB 79 (**Jacobs**), in which it said (at [89]):

> The applicant in McIntyre, through his representative, incorrectly made an application under s. 365 of the FW Act, asserting that he was dismissed because of his political opinion. As was the case in Krcho, an allegation that

> adverse action (dismissal) was taken because of political opinion, is not one that can be brought in a general protections court application, when the alleged conduct occurs in New South Wales, where discrimination on the ground of political opinion is not unlawful under State anti-discrimination law. The decision in McIntyre predates the Full Bench decision Krcho but is consistent with it.

There is no reason to suggest that McIntyre was incorrectly decided.

Question 8: Should the application of the 'not unlawful' exemption be clarified?

It is inappropriate to view any clarification of subsection 351(2)(a) of the FW Act as a "levelling up" opportunity to address differences between Commonwealth, State or Territory jurisdictions as to which attributes are protected from unlawful discrimination.

Consistent with *McIntyre*, any amendment to the FW Act should be directed at clarifying that the prohibition in subsection 351(1) of the FW Act does not apply in circumstances where *either*:

- an attribute listed in that section is not an attribute from which an employee is protected from unlawful conduct under any anti-discrimination law in force where the action is taken, *nor where*
- an exception exists under an anti-discrimination law in force where the action is taken, which renders particular conduct lawful.

The alternative course would cause a "levelling up" in anti-discrimination laws across the Commonwealth, States and Territories by using section 351 to create new protections for employees in jurisdictions where a particular attribute is not protected under its anti-discrimination law.

Ai Group strongly opposes any such "levelling up" exercise, in an area that is already complex, over-regulated and burdensome for employers.

The burden on employers of this would in Ai Group's view outweigh any certainty which the Discrimination Consultation Paper asserts may flow from the protections in section 351 of the FW Act applying in the same way to all employees across Australia (that is, without regard to whether the conduct would be "not unlawful" in that jurisdiction).

Improving the coverage of section 351 and removing the unlawful termination provision

Section 351 is contained in Part 3-1 of the FW Act.

Section 335 states that in Part 3-1, "employer" and "employee" have their ordinary meaning. The Explanatory Memorandum stated (at paragraph 1344):

> 1344. In this Part, the terms employer and employee have their ordinary meaning because references to these terms are not limited to national system employers and employees (see clause 13 and clause 14). Part 3-1 regulates the conduct of all employers and employees and a range of other persons but only where the

conduct is connected to (principally) the constitutional powers that support the main provisions of this Bill (e.g., **the corporations power**). (**emphasis** added)

Section 772 is contained in Division 2 of Part 6-4 of the FW Act and relevantly provides (in part):

772 Employment not to be terminated on certain grounds

(1) An employer **must not terminate an employee's employment** for one or more of the following reasons, or for reasons including one or more of the following reasons:

(a) temporary absence from work because of illness or injury of a kind prescribed by the regulations;

(b) trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;

(c) non-membership of a trade union;

(d) seeking office as, or acting or having acted in the capacity of, a representative of employees;

(e) the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(f) **race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin**;

(g) absence from work during maternity leave or other parental leave;

(h) temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:

(a) the reason is based on the inherent requirements of the particular position concerned; or

(b) if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—the employment is terminated:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

… (**emphasis** added)

Part 6-4 is expressed as using the ordinary meaning of "employee" and "employer". The consequence of this is that the protections contained in Part 6-4 are not limited to national system employers and national system employees.

The Explanatory Memorandum stated (at paragraph 2770) that Division 2 assists in giving effect to Australia's international treaty obligations in relation to termination of employment. It further explained:

> **The Part is supported by the external affairs power** and can therefore apply to any employer and employee in Australia, not only to national system employers and employees.
>
> - Division 2 can apply in relation to any employee in Australia, subject to clause 723, which prevents a person from making an unlawful termination application in relation to certain conduct if the person is entitled to make a general protections court application in relation to that conduct. (**emphasis** added)

Clause 723 of the FW Act states:

> **723 Unlawful termination applications**
>
> A person must not make an unlawful termination application in relation to conduct if the person is entitled to make a general protections court application in relation to the conduct.

The Explanatory Memorandum stated (at paragraph 2702):

> 2702. This clause prevents a person from making an unlawful termination application under Division 2 of Part 6-4 if they are able to make an application under the general protection provisions in Part 3-1 in relation to the same termination of employment. This is because the general protections and unlawful termination provisions cover the same grounds of when a termination is for a prohibited reason. The unlawful termination provisions are only intended to be an extension of these protections to persons who are not covered by the general protections in relation to the termination. The additional coverage in unlawful termination arises because these provisions rely on the external affairs power, as they give effect, or further effect, to the *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer* (Geneva, 22 June 1982) [1994] ATS 4.

Question 9: Should the unlawful termination provision in the FW Act dealing with discrimination be repealed, and section 351 of the Act broadened to cover all employees?

No.

This would result in a substantial expansion in the protections afforded to non-national system employees since the definition of "adverse action" in section 342 of the FW Act that applies for the purpose of section 351, covers conduct of an employer that is far broader than termination of employment.

No basis has been articulated as to why such a "levelling up" is needed or justified taking into account the other protections non-national system employees may have under other Commonwealth, State or Territory laws.

The Discrimination Consultation Paper also fails to explain the constitutional basis upon which such a change would be made (taking into account section 351 is based on the corporations power, and section 772 is based on the external affairs power).

Contrary to the statement in the Discrimination Consultation Paper that the operation of section 772 (and its interaction with section 351) is duplicative and potentially confusing, Ai Group's position is:

- that the effect of section 723 is to in fact, expressly avoid duplication, and
- there is nothing inherently confusing in the way in which the two provisions are to be applied, namely that an applicant seeking to challenge the termination of their employment should as a starting point ascertain whether he or she is able to bring a claim under section 351. If the applicant is not entitled to (for example, because subsection 351(2) operates to preclude the claim) the applicant should then proceed to consider an application relying on the protection in subsection 772(1) of the FW Act.

If clarity is required, a Note to section 351 of the FW Act could be inserted to this effect.

Modernising the Fair Work Act

'Family and domestic violence status' as a protected attribute

Existing protected attributes under section 351 of the FW Act

Section 351 of the FW Act already includes an expansive list of attributes against which employees and prospective employees are protected from adverse action by their employer. As noted earlier in this submission, the list was most recently updated in December 2022 to include three additional attributes.

Entitlements under the FW Act for employees experiencing or impacted by FDV

Recently, entitlements were introduced into the FW Act to provide victims of family and domestic violence with an entitlement to 10 days of paid family and domestic violence leave in a 12-month period (**paid FDV leave**).

Section 106C of the FW Act imposes specific confidentiality obligations on an employer to:

- take steps to ensure information concerning any notice or evidence an employee has given to support the request to take paid FDV leave is treated confidentially, as far as it is reasonably practicable to do so, and
- not, other than with the consent of the employee, use such information for a purpose other than satisfying itself in relation to the employee's entitlement to paid FDV leave.

Subsection 106C(2) goes on to specifically state "*In particular, an employer must not use such information to take adverse action against an employee*" (with the important exception that an employer is not prevented from dealing with information provided by an employee if doing so is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person).

Section 65 of the FW Act entitles eligible employees to request a change in working arrangements where the employee is experiencing violence from a member of their family, or is providing care or support to a member of their immediate family or household who requires it because they are experiencing violence from the member's family. (For completeness, it is noted that the language in section 65 will shortly be updated to refer to "family and domestic violence" in substitution of the phrase "violence from a member of the employee's family".)

Question 10: Should experiencing family and domestic violence be inserted as a protected attribute in the FW Act?

Ai Group recognises the scourge of family and domestic violence (**FDV**) that exists in the community.

While Ai Group understands the desire to protect certain attributes not currently protected from discrimination, we are concerned at the very long and growing list of attributes that employers need to be aware of to reasonably comply with the general protections provisions in the FW Act.

Employers developing anti-discrimination and harassment policies typically devote pages of these policies to identifying the various attributes covered by anti-discrimination protections and it is at a point where the list of protected attributes is so extensive employers are struggling to ensure that these attributes are understood by employees, management and others in the business for the purpose of prevention.

Ai Group is also concerned at the extent to which the imposition of further new obligations on employers are being looked to, to address what is a complex and insidious problem.

In this regard, whilst the First Principle in the Discrimination Consultation Paper speaks to "alignment and consistency" with key features of anti-discrimination law, it also notes that FDV is currently only a protected attribute under the *Discrimination Act 1991* (ACT). Accordingly, protection from discrimination on the ground of FDV status is not a common feature within existing Australian anti-discrimination laws.

As noted above, paid FDV leave was recently inserted in the FW Act. In addition, employees also have the ability under section 65 of the FW Act to request flexible work arrangements if the employee is experiencing violence from a member of the employee's family and/or to provide care or support to a member of the employee's immediate family household who requires care or support because the member is experiencing violence from the member's family.

These measures are likely to assist the wellbeing and productivity at work for an employee who is experiencing family and domestic violence, and thereby alleviate some of the concerns identified in the Discrimination Consultation Paper as the potential basis for taking adverse action against an employee who is experiencing FDV.

It is noted that the concerns identified by the AHRC concerning the impact of employees of FDV at work, and which are referred to in the Discrimination Consultation Paper, pre-date the introduction of the paid FDV leave entitlement which only commenced operating this year.

Concerns to protect employees from any potential stigma attached to seeking flexible work arrangements or accessing paid FDV leave, may be addressed via existing safeguards in the form of confidentiality requirements attached to the taking of FDV leave (as set out in section 106C of the FW Act) and section 340 of the FW Act which will operate to protect an employee from any adverse action by their employer should they seek to exercise their right to either request a flexible work arrangement or access FDV leave.

The existing effect of section 106C of the FW Act is that an employer who uses any information provided by an employee as evidence or notice to support the taking of paid FDV leave to take "adverse action" against the employee may be found to have breached the National Employment Standards (**NES**). Section 44 of the FW Act prohibits an employer from contravening the NES and is a civil remedy provision.

Employees who are experiencing or impacted by FDV will also be protected from adverse action being taken against them by their employer because they:

- have a right to paid FDV leave and/or to request a flexible work arrangement,
- have or have not exercised either of these rights, or
- propose or propose not to, or at any time propose or propose not to, exercise either of those rights (subsection 340(1)(a)).

The protection extends to protection from adverse action to prevent the exercise of either of these rights by an employee (subsection 340(1)(b)).

Given paid FDV leave has only recently been inserted into the FW Act, Ai Group considers it would be appropriate to first monitor the operation of the entitlement in the context of the existing safeguards to evaluate their effectiveness in reducing stigma attached to FDV status. In the event the existing safeguards prove inadequate, consideration may at that time be given to any further appropriate safeguards.

Multiple attribute discrimination

Intersectional discrimination, and the way in which this should be dealt with under Australian anti-discrimination laws, is still a relatively emerging issue

As Blackham and Temple have recently noted[4], "*there is a fundamental lacuna in empirical legal evidence of intersectionality as it relates to discrimination law*".

[4] See Alysia Blackham and Jeromey Temple, *Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework* (2020) 40(3) UNSWLJ 773 (**Blackham and Temple**), at page 774.

The Discrimination Consultation Paper identifies that neither the FW Act, nor the four Commonwealth anti-discrimination laws, contain provisions dealing with claims of discrimination combining multiple grounds.

Current framework under Commonwealth anti-discrimination laws for dealing with discrimination based on more than one attribute

Existing anti-discrimination laws in Australia, and the FW Act, essentially treat grounds of discrimination as separate and distinct.

There is some recognition for the potential for individuals to be impacted by conduct due to more than just one ground of discrimination. For example, provisions dealing with discrimination done for "two or more reasons" (such as section 16 of the AD Act and section 360 of the FW Act).

The Discrimination Consultation Paper notes, and it has been elsewhere argued[5], that the expression of these grounds as being separate may be disconnected from how employees experience discrimination in practice which can include multiple and overlapping (or 'intersecting') grounds.

Further data and information is required to inform any development of Australian anti-discrimination law in relation to intersectional discrimination

Notwithstanding the recognition that Australia's legal framework (including but not limited to, the FW Act) does not currently deal with intersectional discrimination, there remains a very real and practical question given the complexity of the issue as to how this might be addressed.[6]

It will give rise to "*complexities of compoundedness*" and challenge, at a fundamental level, the existing framework of anti-discrimination laws in Australia.[7] Effectively embedding insersectionality in discrimination law has been described as a "*gargantuan project*".[8]

It is not apparent at this early stage of conceptualisation of the issue, whether the FW Act might be an appropriate or workable vehicle in which to effect change.

Blackham and Temple suggest that further data and information is required to inform the potential the development of the legal framework in Australia regarding intersectional discrimination. This will aide in informing any consideration of the effectiveness or gaps in the legal framework.[9]

In addition to any data collection that may be able to be undertaken by the Australian Bureau of Statistics (**ABS**), AHRC and/or the FWC, or other empirical analysis, it is noted that the FW Act was recently amended to permit the consideration of a presence of a combination of attributes in the context of terms of an enterprise agreement being able to include "special measures to achieve

[5] As above, at page 774.
[6] As above, at page 796.
[7] As above, at pages 775,777.
[8] As above, at page 797.
[9] As above, at page 799.

equality". Specifically, subsection 195(2) of the FW Act provides that a term of an enterprise agreement does not discriminate against an employee if it is a "special measure to achieve equality" (to the extent that action that may be taken because of the term is not unlawful under any anti-discrimination law in force in a place where the action may occur).

Relevantly, subsection 195(4) (and the Note to that subsection) states:

> **195 Meaning of *Special measures to achieve equality***
>
> (4) A term of an enterprise agreement is a ***special measure to achieve equality*** if:
>
> (a) the term has the purpose of achieving substantive equality for employees or prospective employees who have a particular attribute or a particular kind of attribute (as the case may be) mentioned in subsection (1), **or a particular combination of these**; and
>
> **Note: For example, a term that has the purpose of achieving substantive equality for employees who are female and have a physical or mental disability.**
>
> (b) a reasonable person would consider that the term is necessary in order to achieve substantive equality. (**emphasis** added)

It may be that enterprise agreements, including any decisions of the FWC considering whether particular terms of an enterprise agreement meet the definition of a "special measure to achieve equality" (as set out in subsection 195(4)) are able to provide a useful source of information in future regarding the most common types of intersectionality for which special measures are sought, and the measures being implemented for the purpose of achieving substantive equality.

Question 11: Should the FW Act be updated to prohibit discrimination on the basis of a combination of attributes? Why or why not?

Ai Group acknowledges that some members of the community may be more vulnerable to discrimination based on multiple attributes they possess.

Whilst the FW Act does not expressly provide for claims of discrimination based on more than one attribute listed in section 351 to be made, nor does there appear to be anything within the FW Act as currently drafted that operates to prevent an employee from making a claim that adverse action has been experienced because of more than one attribute.

Intersectional discrimination, and the way in which this should be dealt with under Australian anti-discrimination laws, is still a relatively emerging issue.[10]

Given the highly variable nature of experiences with intersectionality of different attributes, Ai Group suggests that these issues are (at least, for now) most appropriately raised and discussed during the

[10] See for example discussion in Blackham and Temple.

complaints and conciliation process rather than necessitating any change in the way in which attributes are referred to in section 351.

A suggestion that has been made (and with which Ai Group agrees) is that further data and information is required to inform the potential development of the legal framework in Australia regarding intersectional discrimination.

It would be premature to propose specific reforms to the FW Act to address intersectionality for the purpose of claims made under section 351, until such time as the FWC (as well as potentially, the ABS and/or the AHRC) have had an appropriate opportunity to obtain and collate such information and data, to enable a more considered approach. This is particularly so, given (as noted in the Discrimination Consultation Paper) that intersectional discrimination is currently not expressly dealt with in the SD Act, DD Act, AD Act nor RD Act.

Options for reform – Adverse Action

Section 346 of the FW Act provides:

> **346 Protection**
> A person must not take adverse action against another person because the other person:
> (a) is or is not, or was or was not, an officer or member of an industrial association; or
> (b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or
> (c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).
> Note: This section is a civil remedy provision (see Part 4-1).

As is evident from section 346, and as noted in the Discrimination Consultation Paper, the types of industrial activity from which an employee is protected from adverse action are set out in section 347 of the FW Act, which provides:

> **347 Meaning of engages in industrial activity**
> A person engages in industrial activity if the person:
> (a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or
> (b) does, or does not:
> (i) become involved in establishing an industrial association; or
> (ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or
> (iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or
> (iv) comply with a lawful request made by, or requirement of, an industrial association; or
> (v) represent or advance the views, claims or interests of an industrial association; or
> (vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or
> (vii) seek to be represented by an industrial association; or
> (c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or
> (d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or
> (e) complies with an unlawful request made by, or requirement of, an industrial association; or

(f) takes part in industrial action; or

(g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or

(ii) to which an employee is not entitled because of that Division.

The formulation of the protections in Division 4 of Part 3-1 of the FW Act (and specifically, sections 346 and 347) are in general terms similar in nature to protections found previously under the WR Act, however were broadened in a number of respects.

By way of some examples of this:

- Under the WR Act, recognition of "organisations" of employees limited to registered organisations. Under the FW Act, the definition of "*industrial association*" was expanded to include unions that are not registered or recognised under a law (see definition in section 12, and Explanatory Memorandum at paragraph 1401) and employees are also protected where they exercise a representative function in the workplace, even if they are not a union member, officer or workplace delegate (Explanatory Memorandum, at paragraph 1417).

- Section 402 of the WR Act made it unlawful for an employer, "in negotiating a collective agreement or variation to a collective agreement" to discriminate between union and non-union members (including between members of different unions). In contrast, subsections 346(a) and (b) of the FW Act are drafted so as to protect a union member from being subjected to adverse action in a range of contexts, including but extending far beyond circumstances connected with agreement-making (see Explanatory Memorandum, at paragraph 1407).

Question 12: Are there improvements that could be made to the general protections to clarify protections for a person engaging, or not engaging, in industrial activity?

The formulation of the protections in Division 4 of Part 3-1 of the FW Act (and specifically, sections 346 and 347) are in general terms similar in nature to protections found previously under the WR Act, however were broadened in a number of respects.

Given the expansion of these types of protections when the FW Act was introduced beyond that provided for under the WR Act, Ai Group does not support any proposed reform to these provisions that would result in any further broadening of their scope.

The decision of the High Court of Australia in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 (**Barclay**) provided crucial clarification as to how the reasons for a decision maker's actions should be determined.

Ai Group does not support any proposal to change the manner in which the motives of an employer are to be determined for the purpose of assessing whether adverse action is taken because of one or more attributes protected under Part 3-1 of the FW Act.

We do however note that where the actions of an employer may be attributable to collective decision making, it can result in a burdensome evidentiary case for employers as a consequence of needing to consider the state of mind of each decision maker. We address this further in response to Question 13.

Options for reform – Other considerations

Question 13: Are there any other reforms you would like to see to the FW Act's anti-discrimination and adverse action framework? Why?

Yes.
Ai Group is supportive of other reforms directed to removing the current unfairness for duty holders arising from:

- the 'reverse onus' for the purpose of claims under section 351 of the FW Act,
- the need for burdensome evidentiary cases by duty holders who engage in collective decision making,
- "forum shopping", and
- divergent approaches to how aspects of the general protections have been applied, which leads to uncertainty.

Further detail in relation to each of these is set out below.

Unfairness to duty holders arising from a reverse onus

The test for discrimination under section 351 of the FW Act is inherently different to the tests for discrimination under Commonwealth, State and Territory anti-discrimination laws. To prove a claim of discrimination under section 351 of the FW Act, a complainant merely needs to assert that they were treated adversely by the employer for the reason that they possess a protected attribute, leaving the employer with the difficult task of disproving the claim. This has made it far too easy for employees to pursue speculative claims aimed at achieving a monetary settlement during conciliation.

Burdensome evidentiary cases for duty holders who engage in collective decision making

Further, the general protections case law has evolved so as to require a court or tribunal to consider, when a decision involving adverse action is alleged to have been made by or on behalf of a body corporate, which of the officers or employees of the corporation are the '*decision-maker(s)*' for the purpose of ascertaining their state of mind (relevant to discharging the reverse onus of proof in section 361 of the FW Act). This can be onerous and complex where, for example, decisions are made at company board level, a committee, or one (or more) employees or officers with input from others.

Unfairness to duty holders arising from '*forum shopping*'

While a complainant is not entitled to make a complaint or initiate proceedings under other discrimination laws if they have already made a complaint or initiated proceedings under the provisions of the FW Act dealing with the same type of claim, it still permits complainants to potentially '*forum shop*' for a jurisdiction which would result in a more favourable outcome for their claim.

'*Forum shopping*' by applicant employees for a jurisdiction which results in the more favourable outcome for their claim is inappropriate and unfair for duty holders, such as employers, who must ensure compliance with multiple laws covering the same subject matter, requiring different actions to comply and exposing them to different remedies.

Uncertainty for duty holders arising from divergent approaches to how aspects of the general protections have been applied

Section 340 of the FW Act prohibits a person from taking adverse action against another person because the other person has a workplace right, has (or has not) exercised a workplace right, or proposes (or proposes not to) or has at any time proposed or proposed not to, exercise a workplace right; or to prevent the exercise of a workplace right by the other person.

Relevantly, the circumstances in which a person has a workplace right include (amongst other circumstances) where an employee is able to make a complaint or inquiry in relation to his or her employment.

Divergent approaches in case law regarding interpretation of the phrase '*is able to make*' a complaint, as well as to the phrase '*in relation to his or her employment*' create difficulties for employers in understanding when a workplace right (for the purpose of the general protections) has been enlivened, as well as complexity associated with the legal arguments required to defend any general protections claim involving this ground. These provisions in the FW Act should be significantly tightened to provide for more targeted and consequently clearer application of these protections.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry, retail, social and community services and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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