

### **341 Meaning of *workplace right***

#### *Meaning of workplace right*

- (1) A person has a ***workplace right*** if the person:
- (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
  - (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
  - (c) is able to make a complaint or inquiry:
    - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or
    - (ii) if the person is an employee—in relation to his or her employment.

#### *Meaning of process or proceedings under a workplace law or workplace instrument*

- (2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:
- (a) a conference conducted or hearing held by the FWC;
  - (b) court proceedings under a workplace law or workplace instrument;
  - (c) protected industrial action;
  - (d) a protected action ballot;
  - (e) making, varying or terminating an enterprise agreement;
  - (f) appointing, or terminating the appointment of, a bargaining representative;
  - (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
  - (h) agreeing to cash out paid annual leave or paid personal/carer's leave;
  - (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
  - (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
  - (k) any other process or proceedings under a workplace law or workplace instrument.

#### *Prospective employees taken to have workplace rights*

- (3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

**Note:** Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

#### *Exceptions relating to prospective employees*

- (4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of

employment conditional on the prospective employee accepting a guarantee of annual earnings.

- (5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business).

(Fair Work Act 2009)

### 342 Meaning of *adverse action*

- (1) The following table sets out circumstances in which a person takes *adverse action* against another person.

Meaning of <i>adverse action</i>		
Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the <i>principal</i> ) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the <i>principal</i> ) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or

	employed or engaged by the independent contractor	(c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).
<p>(2) <b>Adverse action</b> includes:</p> <p>(a) threatening to take action covered by the table in subsection (1); and</p> <p>(b) organising such action.</p> <p>(3) <b>Adverse action</b> does not include action that is authorised by or under:</p> <p>(a) this Act or any other law of the Commonwealth; or</p> <p>(b) a law of a State or Territory prescribed by the regulations.</p> <p>(4) Without limiting subsection (3), <b>adverse action</b> does not include an employer standing down an employee who is:</p> <p>(a) engaged in protected industrial action; and</p> <p>(b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.</p>		