

**THE REVERSE ONUS OF PROOF THEN AND NOW:
THE *BARCLAY* CASE AND THE HISTORY OF THE
FAIR WORK ACT'S UNION VICTIMISATION AND FREEDOM
OF ASSOCIATION PROVISIONS**

ANNA CHAPMAN,* KATHLEEN LOVE** AND BETH GAZE***

I INTRODUCTION

Trade unions occupied a central role in the operation of the Australian system of conciliation and arbitration over the course of the 20th century. In recognition of this essential function as the voice of organised labour, the industrial system sought to promote and protect trade unionism. A key plank in ensuring the security of trade unions over this time was union victimisation protections, which have existed in statutory form at the federal level since the enactment of the first federal industrial relations statute in 1904.¹

Initially, the 1904 victimisation provisions were narrowly drawn. They protected employees from dismissal due to being a member or officer of a trade union, or by reason of being entitled to the benefit of an industrial award or agreement.² Over the course of the 20th century, the federal legislative framework was amended many times to greatly extend coverage in a number of different directions. A wide range of victimising conduct, beyond dismissal, was brought within the scope of the legislation, and not only did the prohibitions relate to the

* Associate Professor, Melbourne Law School; Centre for Employment and Labour Relations Law, The University of Melbourne. This paper is drawn from Beth Gaze and Anna Chapman, Australian Research Council Grant, 'Reshaping Employment Discrimination Law: Towards Substantive Equality at Work?'.
** Research Assistant, Centre for Employment and Labour Relations Law, Melbourne Law School, The University of Melbourne.

*** Associate Professor, Melbourne Law School; Centre for Employment and Labour Relations Law, The University of Melbourne.

1 See generally, Andrew Frazer, 'Trade Unions under Compulsory Arbitration and Enterprise Bargaining: A Historical Perspective' in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining – Trade Unions and the Law* (Federation Press, 1995) 52; W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials* (Law Book Company, 2nd ed, 1993) 1046 [29.6], 1028–1045 [29.50]–[29.59]; Edward I Sykes and Harry J Glasbeek, *Labour Law in Australia* (Butterworths, 1972) ch 14. On trade union security more broadly, see Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press, 1995).

2 *Conciliation and Arbitration Act 1904* (Cth) s 9.

conduct of employers, they were expanded over the years to cover the actions of a wide range of industrial players, including unions themselves. Extension occurred also in the range of grounds, including participating in proceedings under the legislative scheme, and in the 1990s engaging in lawful industrial action, in addition to the grounds of not being a union member and not engaging in lawful industrial action. These latter grounds were identified as furthering freedom of association.³

The current union victimisation protections are located as part of the 'General Protections' in part 3-1 of the *Fair Work Act 2009* (Cth). They comprise an extensive set of prohibitions on taking various forms of 'adverse action' 'because' of a person's 'industrial activities', whether those activities relate to a registered trade union or not, or because the person has a 'workplace right', such as an entitlement or role under a workplace law or a workplace instrument.⁴ Part 3-1 also includes prohibitions on adverse action on a range of discriminatory grounds such as race, sex and disability.⁵

A very important feature of the union victimisation protections from their outset in 1904 has been, and remains today, a reverse onus of proof. A reverse onus has been seen as essential to ensure adequate protection for unions and their members, given the difficulties of proving a victimisation claim. Generally speaking, in a civil action the onus is on the applicant to establish all elements of their claim, including that the action complained of was carried out for the particular reason alleged by the applicant. This is problematic where the respondent's reason must be proved, because relevant evidence is often entirely controlled by the respondent. The reverse onus has the effect of relieving the applicant of this burden, and requiring the respondent to establish that the reasons for the action did not include a prohibited reason. It comes into effect only when the applicant (eg, an employee) has established by evidence that they possess a prescribed ground, such as being a union member or delegate, and that they have

3 Protection for the right to not be a union member and not engage in industrial activity was introduced in 1996: *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), amending *Industrial Relations Act 1988* (Cth), one amendment of which was to rename the statute the *Workplace Relations Act 1996* (Cth). See further, Margaret Lee and David Peetz, 'Unions and the *Workplace Relations Act*' (1998) 9(2) *Labour & Industry* 5; Colin Fenwick and John Howe, 'Union Security after Work Choices' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 174–5. See also Richard Naughton, 'Sailing into Uncharted Seas: The Role of Unions under the *Workplace Relations Act 1996*' (1997) 10 *Australian Journal of Labour Law* 112.

4 *Fair Work Act 2009* (Cth) pt 3-1 divs 3–4. See Andrew Stewart, *Stewart's Guide to Employment Law* (Federation Press, 4th ed, 2013) 284–8 [14.10]–[14.14], 292–3 [14.19]; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work* (Oxford University Press, 2nd ed, 2011) 543–9 [10.3.2.2]–[10.3.2.6].

5 *Fair Work Act 2009* (Cth) pt 3-1 div 5. These provisions have a history in the unlawful termination protections enacted with the *Industrial Relations Reform Act 1993* (Cth) pt 4 inserting *Industrial Relations Act 1988* (Cth) pt VIA, and prior to that in the federal award test case jurisdiction, *Termination Change and Redundancy Case* (1984) 8 IR 34. For an overview of this jurisdiction, see Anna Chapman, 'Protections in Relation to Dismissal: From the *Workplace Relations Act* to the *Fair Work Act*' (2009) 32 *University of New South Wales Law Journal* 746.

suffered certain prohibited conduct (eg, dismissal or demotion). Then, once the applicant alleges the respondent (eg, their employer) took action for a particular reason, it is presumed that the respondent's action was taken for that reason unless the respondent proves otherwise.⁶

There have been many questions over the years about the exact meaning and interpretation of the causal link in the union victimisation protections, and how it is proven through the reverse onus of proof. This has been complicated by regular amendment of the provisions as successive parliaments varied or extended the legislation either in response to court decisions or for other reasons. Most recently, the reverse onus provision was extended in the *Fair Work Act 2009* (Cth) General Protections to cover a wider range of activity, including not only industrial organisations and activities, but also the exercise of workplace rights and a prohibition on adverse action on discrimination-type grounds. There has, however, been very little scholarly examination of the developments and major strands of judicial analysis of the protections.⁷ This article examines the history and development of the causal link and the reverse onus under the federal statutory framework, up to the enactment of the *Fair Work Act 2009* (Cth), as a context for assessing the High Court's decision in the *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*.⁸ It considers both legislation and case law developments.

The article provides a background for deeper understanding of the current *Fair Work Act 2009* (Cth) protections. As the Explanatory Memorandum to the *Fair Work Act 2009* (Cth) makes clear, key aspects of the adverse action provisions, including the reverse onus, are directly based on earlier versions of the legislation, in particular the *Workplace Relations Act 1996* (Cth), and are intended to be interpreted in accordance with the jurisprudence on those provisions.⁹ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*, the first decision of the High Court to consider the adverse action provisions in the *Fair Work Act 2009* (Cth), focussed specifically on these provisions and an historical analysis of the provisions and cases was a key component in the judgments of four of the five High Court judges.¹⁰ This article shows that the contrasting approaches taken by different courts during the course

6 Note that the reverse onus has not applied to proceedings for an interlocutory injunction since the 2005 changes brought about by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('*Work Choices* amendments'). This 2005 Act amended the *Workplace Relations Act 1996* (Cth) in important respects.

7 An exception is Chris Jessup, 'The Onus of Proof in Proceedings under Part XA of the *Workplace Relations Act 1996*' (2002) 15 *Australian Journal of Labour Law* 198.

8 (2012) 248 CLR 500.

9 Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [1459]–[1460].

10 (2012) 248 CLR 500, 517–22 (French CJ and Crennan J), 525–32 (Gummow and Hayne JJ). See also the earlier judgments in this litigation: *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 257–9 (Tracey J); *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 219–24 (Gray and Bromberg JJ). These three decisions are collectively referred to in the article as the *Barclay* case.

of that litigation appear to parallel developments prior to the enactment of the *Fair Work Act 2009* (Cth).¹¹

The research conducted for this article reveals that the federal victimisation jurisdiction is marked by considerable variance in approach and interpretation by courts over the course of the 20th century. This lack of stability in the reverse onus of proof and the causal link is remarkable, given the central importance of these protections for the security of trade unionism in the arbitration system. It highlights the victimisation provisions and the reverse onus as a central site of conflict in the underlying tensions in industrial relations law over the role of unions as a counterbalance to the power of capital and management. It is also worthy of exploration and analysis given the view of the importance of previous jurisprudence as an aid in interpreting the current legislative framework.

The jurisprudence on the reverse onus and the causal link was unsettled when the *Fair Work Act 2009* (Cth) was enacted. In part, this is due to the way in which each case has turned on its own facts. However, from a legal perspective, it is also apparent from the case law that a deeper source of uncertainty lies in different methodologies and understandings of courts over the years to the task of interpreting the causal link through the reverse onus of proof. Although, as discussed below, the legislation differed over the years in subtle ways, differences in statutory drafting do not appear to account for the divergences in approach and methodology adopted by courts to the causal link.¹² A principal difference in the earlier court approaches lay in the role given by judges to evidence of the surrounding circumstances in assessing whether the respondent had satisfied the reverse onus of proof. Courts differed on whether those broader circumstances were relevant merely to testing the veracity of the account given by the employer or other respondent of his or her conduct (which was the primary touchstone), or whether instead they were examined to reveal a broader connection – sometimes described as objective – between the respondent's conduct and a prescribed ground that sufficed to establish the existence of the causal link, whatever the respondent's evidence of their subjective reasons. The relevance of evidence of the surrounding circumstances varied according to whether the employer's credible subjective evidence alone was seen as sufficient to discharge the reverse onus of proof, or whether the courts would test that evidence against the context and circumstances.

11 Leading texts in the field draw on earlier decisions in explaining the *Fair Work Act 2009* (Cth) provisions, including the reverse onus of proof and the causal link: Stewart, above n 4; Owens, Riley and Murray, above n 4.

12 In the *Barclay* litigation the applicant argued that a change in drafting in the causal link from 'by reason of' to 'because' introduced an objective test rather than a subjective test of the causal link. This argument was rejected at all stages of the *Barclay* litigation: *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 258 (Tracey J); *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 220 (Gray and Bromberg JJ), 254 (Lander J); *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 616–17 (French CJ and Crennan J).

This divergence in judicial approach on the causal link and reverse onus apparent in judgments prior to the *Fair Work Act 2009* (Cth) appears to largely parallel the different judicial approaches evidenced in the judgments in the *Barclay* litigation of 2010–2012, and especially as between the trial judge and the High Court on the one hand, and the majority of the Full Federal Court on the other.¹³

A The *Barclay* Case

Mr Barclay was an employee of Bendigo Regional Institute of Technical and Further Education ('BRIT') and was President of the BRIT sub-branch of the Australian Education Union ('AEU'). He sent an email from his BRIT email address to all AEU members at BRIT, warning them against taking part in producing fraudulent documents for an upcoming audit of BRIT. He closed the email with 'Greg Barclay President BRIT AEU Sub-Branch'. Prior to sending this email, four union members had approached Barclay, confidentially, and expressed concerns regarding the preparation of documents for the audit. The CEO of BRIT formed the view that Barclay's email, and his failure to tell his managers about the allegations or reveal the identity of the employees who had approached him, may have constituted serious misconduct and a breach of the public sector employee code of conduct to which Barclay was bound. At trial, the CEO gave evidence that she considered the email was distressing to staff, damaging of BRIT's reputation and that it undermined confidence in the audit.¹⁴ Barclay was suspended on full pay.

The case was brought under part 3-1 of the *Fair Work Act 2009* (Cth) and it was conceded by BRIT that the suspension came within the meaning of 'adverse action'. The main issue at all stages of the litigation was whether BRIT's adverse action was taken for the prescribed reason of Barclay's industrial activities – that is, whether the causal link was made out. This depended on the correct interpretation and application of the reverse onus of proof.¹⁵

A divergence in approach is apparent in the different judgments in this case. The most direct or narrowest lens was adopted by Tracey J at the hearing.¹⁶ His Honour accepted the CEO's evidence of her reasons for suspending Barclay, and her express denial that his union status and activities were factors, and found in

13 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251 (hearing); *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 220 (Gray and Bromberg JJ) (Full Federal Court); *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500 (High Court).

14 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251, 264 (Tracey J).

15 Note that the prescribed ground of 'workplace right' was argued by Barclay but not decided at the hearing. It was not pursued on appeal.

16 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2010) 193 IR 251.

favour or BRIT. Justice Tracey found the CEO's evidence credible, and held that this evidence was a complete answer to the claim.¹⁷ His Honour said:

If an employer ... adduces evidence which persuades the court that it acted solely for a reason other than one or more of the impermissible reasons identified in a particular protective provision, it will have made good its defence. Because of the reverse onus provision the employer will normally need to call evidence from the decision-maker to explain what actuated him or her to act to the employee's detriment. ... That evidence can be tested in the light of established facts. The credibility of the decision-maker will be assessed by the court.¹⁸

In Justice Tracey's judgment, the evidence of the employer's decision-maker is given determinative weight in establishing whether the employer has satisfied the reverse onus, with evidence of the broader surrounding circumstances merely a source of material that can be used to test the credibility of the decision-maker's account of what motivated his or her decision.

The three separate judgments of the High Court to a large degree reflect a similar methodology to that adopted by Tracey J at the hearing, with the High Court unanimously finding in favour of BRIT.¹⁹ For example, the joint judgment of French CJ and Crennan J noted that evidence from the decision-maker may not always be accepted (eg, if it is contradicted by proven objective facts or by other parts of the decision-maker's own evidence). However, they accepted that 'direct testimony from the decision-maker which is accepted as reliable is capable of discharging the burden upon an employer'.²⁰ This judgment explicitly rejected the argument put on behalf of Barclay that the causal connection was to be assessed objectively through a reasonable observer test.²¹ Ultimately, Tracey J and the High Court took a straightforward approach to the issue of causation. If the decision-maker gives evidence that they did not take adverse action for a prescribed reason, and that evidence is accepted by the court, there will not be a breach of the Act.

This approach can be contrasted with the joint judgment of the majority of the Full Federal Court, Gray and Bromberg JJ, which placed emphasis on the objects of part 3-1, and indeed the Act, as protecting freedom of association.²²

17 Ibid 258, 260–1 (Tracey J).

18 Ibid 261 (Tracey J).

19 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 517 (French CJ and Crennan J), 542 (Gummow and Hayne), 544 (Heydon J). In the Full Federal Court Lander J (in dissent) adopted a similar approach, finding that 'the Court has to inquire into the subjective intention of the alleged contravenor. A person's reasons for taking adverse action cannot be ascertained by employing an objective test', and that '[t]he subjective intention of the alleged contravenor if accepted by the Court to be the actual intention will be determinative': *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 254.

20 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 657 (French CJ and Crennan J).

21 Ibid 506, 515–6 (French CJ and Crennan J). Justices Gummow and Hayne cautioned against inquiring as to either objective or subjective reasons, saying that neither approach is supported by the Act: at 540–41.

22 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 218 (Gray and Bromberg JJ).

The joint judgment expressed the view that although the decision-maker's state of mind is relevant, it is not conclusive.²³ What is required is a determination of the 'real reason' for the conduct, and further:

The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.²⁴

For Gray and Bromberg JJ, '[a]ll of the relevant conduct in issue ... involved Mr Barclay in his union capacity'.²⁵ What characterises this methodology is that it does not place determinative weight on the decision-maker's evidence and own understanding of what her or his subjective reason was. Rather, this approach looks to the broader surrounding circumstances to inquire whether there was an objective connection between the decision and the industrial activities of Barclay. Such an objective connection can satisfy the necessary causal link, and for Gray and Bromberg JJ, here it did.

This article shows how decisions that predate the *Fair Work Act 2009* (Cth) contain a divergence in judicial approach similar to that seen in the *Barclay* litigation, as between Tracey J and the High Court on the one hand, and Gray and Bromberg JJ of the Full Federal Court on the other. First, the article provides an overview of the many amendments to the legislative framework over the years, and key aspects of case law interpretations of these aspects of the jurisdiction, other than the reverse onus and causal link. This establishes the context in which the reverse onus and causal link has been situated up to the enactment of the *Fair Work Act 2009* (Cth).

II DEVELOPMENTS IN THE LEGISLATIVE FRAMEWORKS

At its most fundamental, the model used in the legislation over the years prohibits a range of conduct by the hirers of labour and others including unions themselves, where that conduct is causally connected to a prescribed ground such as the worker's trade union membership or activities. Four interlinked aspects of legislative amendments prior to the *Fair Work Act 2009* (Cth) are notable, and are explored below in turn: the prohibited conduct and prescribed grounds; the causal link and the reverse onus provisions; the significance of multiple reasons for the respondent's action; and changes in perceptions of legislative objectives.

23 Ibid 221.

24 Ibid.

25 Ibid 233.

This material provides the context for the article's discussion of cases on the causal link and the reverse onus.

A Expansion of Prohibited Conduct and Prescribed Grounds

The scope of the provisions in terms of respondent conduct prohibited, and prescribed grounds, has expanded dramatically over the years. In 1904, the prohibition covered only one prohibited action (dismissal), and two prescribed grounds: being an officer or member of an organisation, or being entitled to the benefit of an agreement or award.²⁶ Five years later, amendments added a new prohibited action (injuring an employee in their employment), and expanded the prescribed grounds to include being an officer or member of an association that has applied to be registered as an organisation.²⁷ In 1911, altering an employee's position to his or her prejudice was prohibited,²⁸ and in 1914 a new prescribed ground was added: where the employee has appeared as a witness, or given evidence, in a proceeding under the Act.²⁹

The trend of introducing new prohibited actions and prescribed grounds continued throughout the 20th century. The enactment in 1996 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) heralded significant expansion to the federal victimisation scheme. With this Act, the prohibitions on victimisation were expanded beyond the traditional realm of the federal system, to encompass, for example, conduct by an incorporated employer regulated through a state system, or conduct by a union that was not registered in the federal system.³⁰ Principals and independent contractors were brought within the scheme.³¹ These expansions relied on a broader constitutional base for the federal statute than its predecessors, and in 2000, Creighton and Stewart expressed the view that as a consequence the framework of the *Workplace Relations Act 1996* (Cth) 'is far more complex than its predecessors', and that the provisions 'have become ridiculously convoluted'.³²

Immediately before the *Fair Work Act 2009* (Cth) came into effect, the legislation defined five prohibited actions taken by an employer against an

26 *Conciliation and Arbitration Act 1904* (Cth) s 9(1). Note that this Act was originally titled the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), but in 1950 was renamed the *Conciliation and Arbitration Act 1904* (Cth) by *Conciliation and Arbitration Act 1950* (Cth) s 3. See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 505.

27 *Commonwealth Conciliation and Arbitration Act 1909* (Cth) s 2.

28 *Commonwealth Conciliation and Arbitration Act 1911* (Cth) s 6(a).

29 *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cth) s 2.

30 Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (Federation Press, 3rd ed, 2000) 284 [10.36].

31 *Workplace Relations Act 1996* (Cth) ss 298K(2), 298N (prior to the *Work Choices* amendments).

32 Creighton and Stewart, above n 30, 284 [10.36]. See also 287–8 [10.41]–[10.42].

employee or prospective employee,³³ and specified 16 prescribed grounds.³⁴ The prescribed grounds included:

- being, or not being, a union officer, delegate or member;³⁵
- making an application for a secret ballot;³⁶
- making an inquiry or complaint to certain persons or bodies;³⁷ and
- being absent from work without leave for the purpose of carrying out duties or exercising rights as a union officer, if an application for leave had been unreasonably refused.³⁸

Throughout the 20th century, there was considerable litigation regarding both the scope of prohibited conduct and the breadth of prescribed grounds, reflecting uncertainty in these aspects of the jurisdiction.³⁹ In one instance it is clear that the enactment of a new prescribed ground was due to Parliament addressing a perceived gap in the legislation that had come to light as a result of litigation.⁴⁰ At other times, the addition of new grounds was seen to be a matter of convenience, to spell out more clearly what was already covered. For example, in reflecting on the expansion of grounds in the *Workplace Relations Act 1996* (Cth) (prior to the *Work Choices* amendments)⁴¹ compared to the *Conciliation and Arbitration Act 1904* (Cth) as originally drafted, Weinberg J stated ‘these additional prohibited reasons were added as a matter of emphasis or clarification rather than because of any perceived restriction or limitation on the scope of the forerunner [provision].’⁴²

Doubt attached to what it was that an employee (or other applicant) was required to prove in terms of prohibited conduct and prescribed ground before the reverse onus provision was enlivened. To give a simple example, if an employee

33 *Workplace Relations Act 1996* (Cth) s 792(1). Namely:

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee’s prejudice;
- (d) refuse to employ another person as an employee;
- (e) discriminate against a person in the terms or conditions on which the employer offers to employ the other person as an employee.

34 *Workplace Relations Act 1996* (Cth) s 793(1).

35 *Workplace Relations Act 1996* (Cth) s 793(1)(a)–(b).

36 *Workplace Relations Act 1996* (Cth) s 793(1)(g).

37 *Workplace Relations Act 1996* (Cth) s 793(1)(j).

38 *Workplace Relations Act 1996* (Cth) s 793(1)(n).

39 See, eg, the analyses contained in Peter Punch, *Australian Industrial Law* (CCH, 1995) 429–33 [1913]–[1916]; Creighton, Ford and Mitchell, above n 1, 1045–6 [29.59]; Jessup, above n 7.

40 See, eg, *Pearce v W D Peacock & Co Ltd* (1917) 23 CLR 199, 202 (Barton ACJ) (‘*Pearce*’); *Commonwealth Conciliation and Arbitration Act 1920* (Cth) s 5, inserting *Conciliation and Arbitration Act 1904* (Cth) s 9(d); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 August 1920, 3594 (Littleton Groom).

41 See above n 6.

42 *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90, 119 (Weinberg J). See also the stronger statement in *Elliot v Kodak Australasia Pty Ltd* (2001) 108 IR 23, 28 (Marshall J).

alleges that he or she was dismissed because he or she was a union member, the employee would be required to prove that he or she was dismissed (the prohibited conduct of the employer), and that he or she was a union member (the prescribed ground), before the onus would shift to the employer in relation to the reason for the dismissal. Over the years, courts explored a number of issues in this scenario.

First, it is clear that the applicant was required to prove that the respondent took the action alleged, whether it be dismissal or other prohibited conduct, prior to the reverse onus coming into play.⁴³ In addition, the applicant has been required to specifically identify the alleged prescribed ground or grounds (eg, union membership, or participating in proceedings under an industrial law), and not simply allege that the respondent took the action for an unspecified prescribed ground, and then rely on the reverse onus.⁴⁴ Following from this, once the applicant has identified the alleged prescribed ground(s), courts have required the applicant to do more and prove that the prescribed ground(s) exists (eg, prove that the employee was in fact a union member or did in fact participate in proceedings).⁴⁵ Consistently with this approach, where an employer does an act on the mistaken belief that a prescribed ground exists, such as that the employee is about to participate in industrial activities, and that belief is incorrect, there can be no contravention as the facts constituting the basis of the allegation do not exist.⁴⁶ In some cases, employees have been required to prove not only the existence of a prescribed ground, but also that the employer knew about it.⁴⁷

43 *Australasian Meat Industry Employees' Union v Sunland Enterprises Pty Ltd* (1988) 24 IR 467, 473 (Gray J). See also *Linehan v Northwest Exports Pty Ltd* (1981) 57 FLR 49, 52 (Ellicott J); *Fraser v Fletcher Construction Australia Ltd* (1996) 70 IR 117, 119 (Moore J); *Transport Workers' Union of Australia v De Vito* (2000) 140 IR 33, 40–1 (Ryan J); *Buckingham v KSN Engineering Pty Ltd* (2008) 177 IR 427, 450 (Lucev FM). Some cases seem to conflate the issues of the action taken and the reverse onus: *Alfred v Primmer (No 2)* (2008) 177 IR 82, 113 (Cameron FM).

44 However the stage at which the prescribed ground or grounds were required to be identified varied depending on the wording of the particular legislation under consideration. See, eg, *Australasian Meat Industry Employees' Union v G & K O'Connor Pty Ltd* (2000) 100 IR 383, 390–1 (Gray J); *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, 480–1 (Einfeld J); *Australian Building Construction Employees and Builders' Labourers' Federation v Employment Advocate* (2001) 114 FCR 22, 34 (The Court); *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 97 (Wilson FM).

45 See, eg, *Wright v Scriball Pty Ltd* (1949) 65 CAR 344; *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257; *Leontiades v F T Manfield Pty Ltd* (1980) 43 FLR 193; *Construction, Forestry, Mining and Energy Union v Coal and Allied Operations* (1999) 140 IR 131; *Bahonko v Sterjov* (2007) 167 IR 43, 75 (Jessup J); *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306, 321–2 (Moore J); *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 100 (Wilson FM). For an argument that the *Workplace Relations Act 1996* (Cth) (prior to the Work Choice amendments of 2005) was different to the *Conciliation and Arbitration Act 1904* (Cth) in this respect, an argument that is not reflected in the decisions, see Jessup, above n 7, 203.

46 *Dowling v Fairfax Media Publications Pty Ltd* (2008) 172 FCR 96, 124 (Jagot J). See also *Wright v Scriball Pty Ltd* (1949) 65 CAR 344, 346 (Foster J); *Employment Advocate v Williamson* (2001) 111 FCR 20, 29 (Gray J); *Alfred v Primmer (No 2)* (2008) 177 IR 82.

47 *Sutherland v Hills Industries Ltd* (1982) 2 IR 287, 288 (Keely J); *Hayward v Rohd Four Pty Ltd* (2008) 221 FLR 91, 115 (Wilson FM); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* (2008) 176 IR 377, 390, 400 (North J).

However, other cases have reached the opposite conclusion, finding that there was no obligation on the employee to prove the employer knew about the prescribed ground, prior to the reverse onus coming into play.⁴⁸

The standard of proof in these provisions changed over the course of the 20th century. The *Conciliation and Arbitration Act 1904* (Cth) and *Industrial Relations Act 1988* (Cth) created offences which required the prosecutor to prove the elements of the offence to a standard ‘beyond reasonable doubt’. For example, the prosecutor was required to prove ‘beyond reasonable doubt’ matters such as the fact of dismissal, and the fact of union membership.⁴⁹ However, for the purposes of the reverse onus provision, the employer (or other accused) was only required to prove that they did not act for a prescribed reason on the ‘balance of probabilities’.⁵⁰ Under the *Workplace Relations Act 1996* (Cth), a contravention of the union victimisation provisions was not an offence.⁵¹ Accordingly, the civil onus of proof was applicable to all aspects of the allegation, such as the fact of dismissal⁵² and the reverse onus.⁵³

B The Causal Link and Reverse Onus

Over the years, the Commonwealth Parliament has used a variety of phrases to define the causal link and the reverse onus provision, and the table below identifies the relevant drafting. This aspect of the jurisdiction is the focus of this article, with the case interpretations of the causal link and reverse onus discussed in depth in the second part of the article.

48 *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463. The appeal from this decision was dismissed. See also *Hadgkiss (acting as delegate of the Employment Advocate) v Barclay Mowlem Construction Ltd* (2005) 214 ALR 463. See also *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981), which appears to suggest that the court considered that the employer’s lack of knowledge of the prescribed ground was a matter to be raised by the employer in rebutting the reverse onus, rather than an initial matter to be proved by the employee.

49 See, eg, *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67, 69 (Smithers and Evatt JJ).

50 See, eg, *ibid* 88; *Gibbs v Palmerston Town Council* [1987] FCA 732; *Australasian Meat Industry Employees’ Union v Sunland Enterprises Pty* (1988) 24 IR 467, 470 (Gray J); *Kelly v Construction, Forestry, Mining and Energy Union (No 3)* (1995) 63 IR 119, 126 (Moore J).

51 *Workplace Relations Act 1996* (Cth) s 298X (prior to *Work Choices* amendments); *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 68 (R D Nicholson J).

52 See, eg, *Community and Public Sector Union v Victoria* (2000) 99 IR 233, 237 (Marshall J); *Australian Workers Union v Johnson Matthey (Aust) Ltd* (2000) 96 IR 476, 488 (Marshall J); *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 194–5 (Greenwood J).

53 See, eg, *Howarth v Frigrite Kingfisher Pty Ltd* [1998] FCA 612; *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 68 (R D Nicholson J); *Elliott v Kodak Australasia Pty Ltd* [2002] FCA 154. See also Explanatory Memorandum, *Workplace Relations and Other Legislation Amendment Bill 1996* (Cth) [16.39]–[16.40]; Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill 2005* (Cth) [2613]–[2616].

Table 1: Causal Link and Reverse Onus 1904–2009

	Causal Link: A Person Must Not Take Prohibited Action [...] of a Prescribed Reason	Reverse Onus Provision
<i>Conciliation and Arbitration Act</i> (1904, 1909 and 1911) ⁵⁴	'by reason merely of the fact' ⁵⁵	'it shall lie upon the employer to show that any employee, proved to have been dismissed [or injured or had his position prejudicially altered] whilst an officer or member of an organization or entitled as aforesaid, was dismissed [or injured or had his position prejudicially altered] <i>for some reason other than those</i> ⁵⁶ mentioned in this section.' ⁵⁷
<i>Conciliation and Arbitration Act</i> (1914 and 1947) ⁵⁸	'by reason of the circumstance' ⁵⁹	'if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved, it shall lie upon the defendant to prove that he was <i>not actuated</i> by the reason alleged in the charge.' ⁶⁰
<i>Conciliation and Arbitration Act</i> (1977) ⁶¹	'by reason of the circumstance' ⁶²	'if all the relevant facts and circumstances, other than the <i>reason or intent</i> set out in the charge as being the reason or intent of an action alleged in the charge, are proved, it lies upon the person charged to prove that that action was <i>not actuated by that reason or taken with that intent</i> .' ⁶³

54 *Conciliation and Arbitration Act 1904* (Cth); *Commonwealth Conciliation and Arbitration Act 1909* (Cth); *Commonwealth Conciliation and Arbitration Act 1911* (Cth).

55 *Conciliation and Arbitration Act 1904* (Cth) s 9(1). The circumstance of injury was added in 1909 and prejudicial alteration in 1911.

56 The 1909 and 1911 versions use the word 'that' rather than 'those'.

57 *Conciliation and Arbitration Act 1904* (Cth) s 9(3) (emphasis added).

58 *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cth); *Commonwealth Conciliation and Arbitration Act 1947* (Cth).

59 *Conciliation and Arbitration Act 1904* (Cth) s 9(1) (emphasis added).

60 *Conciliation and Arbitration Act 1904* (Cth) s 9(4) (emphasis added).

61 *Conciliation and Arbitration Amendment Act (No 3) 1977* (Cth).

62 *Conciliation and Arbitration Act 1904* (Cth) s 5(1). Note that in 1947, s 9 was renumbered s 5: *Commonwealth Conciliation and Arbitration Act 1947* (Cth) s 26, sch 2.

63 *Conciliation and Arbitration Act 1904* (Cth) s 5(4) (emphasis added).

	Causal Link: A Person Must Not Take Prohibited Action [...] of a Prescribed Reason	Reverse Onus Provision
<i>Industrial Relations Act 1988</i> ⁶⁴	'because' ⁶⁵	'it is not necessary for the prosecutor to prove the defendant's reason for the action charged nor the intent with which the defendant took the action charged, but it is a defence to the prosecution if the defendant proves that the action was <i>not motivated</i> (whether in whole or part) <i>by the reason, nor taken with the intent</i> (whether alone or with another intent), specified in the charge.' ⁶⁶
<i>Workplace Relations Act 1996</i> (pre and post <i>Work Choices</i> amendments) ⁶⁷	'because' ⁶⁸	'it is presumed ... that the conduct was, or is being, carried out for that reason or with that intent, unless the person or industrial association' ⁶⁹ proves otherwise.' ⁷⁰
<i>Fair Work Act 2009</i> ⁷¹	'because' ⁷²	'it is presumed ... that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.' ⁷³

C Multiple Reasons

Another matter that has evolved over time is the way the legislation deals with the possibility of multiple reasons for the victimising conduct. In the early versions of the *Conciliation and Arbitration Act 1904* (Cth) (1904 to 1911 inclusive), the legislation prohibited actions taken 'by reason merely of the fact' that the employee was a union member (or had another characteristic).⁷⁴ The use of the word 'merely' suggests that a breach would only occur where the prohibited reason was the only reason for the action. In amendments made in

⁶⁴ *Industrial Relations Act 1988* (Cth).

⁶⁵ *Industrial Relations Act 1988* (Cth) s 334(1).

⁶⁶ *Industrial Relations Act 1988* (Cth) s 334(6) (emphasis added).

⁶⁷ As noted above, the *Workplace Relations Act 1996* (Cth) was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), hence the table references pre and post *Work Choices* amendments.

⁶⁸ *Workplace Relations Act 1996* (Cth) ss 298K(1)–(2), 298L(1) (prior to *Work Choices* amendments); *Workplace Relations Act 1996* (Cth) s 793 (post *Work Choices* amendments).

⁶⁹ The words 'or industrial association' do not appear in the post *Work Choices* amendments of the reverse onus provisions: *Workplace Relations Act 1996* (Cth) s 809.

⁷⁰ *Workplace Relations Act 1996* (Cth) s 298V (prior to *Work Choices* amendments); *Workplace Relations Act 1996* (Cth) s 809 (post *Work Choices* amendments).

⁷¹ *Fair Work Act 2009* (Cth).

⁷² *Fair Work Act 2009* (Cth) ss 340(1), 346, 351(1).

⁷³ *Fair Work Act 2009* (Cth) s 361(1).

⁷⁴ *Conciliation and Arbitration Act 1904* (Cth) s 9(1).

1914, the word ‘merely’ was discarded, and the test became whether the action was taken ‘by reason of the circumstance’ that the employee was a union member, or another ground.⁷⁵ A line of cases from the mid-1970s considered that the phrase ‘by reason of the circumstance’ required that, in order for a breach to be found, the prohibited reason was required to be a ‘substantial and operative’ reason, but need not be the sole or predominant reason, or the only substantial and operative reason.⁷⁶

When the *Industrial Relations Act 1988* (Cth) was enacted, the new legislation explicitly dealt with the possibility of multiple reasons or intents. This caused doubts to be expressed by courts as to whether the concept of ‘substantial and operative’ remained relevant under the *Industrial Relations Act 1988* (Cth).⁷⁷ The *Industrial Relations Act 1988* (Cth) provided a defence if the defendant proved ‘the action was not motivated (*whether in whole or in part*) by the reason, nor taken with the intent (*whether alone or with another intent*) specified in the charge’.⁷⁸ These words indicate that there would be a breach even if the prescribed ground was only part of the reason for the action.⁷⁹

The *Workplace Relations Act 1996* (Cth) also expressly dealt with the possibility of multiple reasons. For example, prior to the *Work Choices* amendments, the *Workplace Relations Act 1996* (Cth) prevented an employer from taking certain action ‘for a prohibited reason, or for reasons that include a prohibited reason’.⁸⁰ The same phrase was used in the *Workplace Relations Act 1996* (Cth) after the *Work Choices* amendments.⁸¹ Accordingly, the prohibited reason was not required to be the only reason for action. However, there were some exceptions to this general approach. For example, post the *Work Choices*

75 *Commonwealth Conciliation and Arbitration Act (No 2) 1914* (Cth) s 2.

76 The phrase ‘substantial and operative’ stems from *Roberts v General Motors-Holdens Employees’ Canteen Society Inc* (1975) 25 FLR 415, 424 (The Court). The formulation ‘substantial and operative’ was endorsed by the High Court a year later in *General Motors-Holdens Pty Ltd v Bowling* (1976) 12 ALR 605, 616 (Mason J). Courts continued to use the formulation ‘substantial and operative’ for some time. See, eg, *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67, 69 (Smithers and Evatt JJ); *Wood v City of Melbourne Corporation* (1979) 26 ALR 430, 438 (Smithers J); *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 107 (Morling J); *Webb v Nationwide News Pty Ltd* (1985) 10 IR 252, 254 (Wilcox J) (‘*Webb*’); *Gibbs v Palmerston Town Council* [1987] FCA 732; *Australasian Meat Industry Employees’ Union v Sunland Enterprises Pty* (1988) 24 IR 467, 477 (Gray J) (‘substantial operative factor’).

77 *Kelly v Construction, Forestry, Mining and Energy Union [No 3]* (1995) 63 IR 119, 130 (Moore J). However, his Honour went on to note the ‘observations of Northrop J apparently to the contrary in *Lawrence v Hobart Coaches Pty Ltd* (1994) 57 IR 218, 219.’ Notably, other cases on the *Industrial Relations Act 1988* (Cth) refer to the phrase ‘whether in whole or in part’ but do not consider it closely: see, eg, *Pryde v Coles Myer Limited* (1990) 33 IR 469, 472 (Keely J); *Lawrence v Hobart Coaches Pty Ltd* (1994) 57 IR 218, 220, 224 (Northrop J); *Kelly v Construction, Forestry, Mining and Energy Union [No 3]* (1995) 63 IR 119, 126, 128 (Moore J).

78 *Industrial Relations Act 1988* (Cth) s 334(6) (emphasis added).

79 Breen Creighton and Andrew Stewart, *Labour Law: An Introduction* (Federation Press, 1990) 213–14 [874]. The reverse onus provisions in ss 335–6 (which related to actions by unions) were very similar to s 334(6). In contrast, the reverse onus provision in s 334A(6) was different.

80 *Workplace Relations Act 1996* (Cth) s 298K(1) (prior to *Work Choices* amendments).

81 *Workplace Relations Act 1996* (Cth) s 792(1) (post *Work Choices* amendments).

amendments, if an employer took prohibited conduct against an employee or prospective employee because they were entitled to the benefit of an industrial instrument,⁸² there was no breach of the legislation ‘unless the entitlement ... [was] the sole or dominant reason’ for the conduct.⁸³

Although, as noted above, the continued relevance of the *Conciliation and Arbitration Act 1904* (Cth) concept of ‘substantial and operative’ was called into question under the *Industrial Relations Act 1988* (Cth), it was never completely abandoned, and indeed an early case under the *Workplace Relations Act 1996* (Cth) held that the prohibited ground had to be a ‘substantial and operative’ reason for the action.⁸⁴ However, a year later courts had begun to hand down judgments to the effect that the prohibited ground did not need to be a ‘substantial and operative’ reason.⁸⁵ Various other phrases were used in its place, including that the reason must be an ‘operative or immediate reason’ for the conduct,⁸⁶ a phrase that notably is quoted in the Explanatory Memorandum to the Bill that was to become the *Fair Work Act 2009* (Cth).⁸⁷

D Objectives of the Legislation

Over time, the courts’ perception of the purpose of the reverse onus provision has remained relatively constant. The courts view the reverse onus provision as reflecting the fact that it will be very difficult for an applicant (often an employee) to prove the reason for the respondent’s action. This was particularly the case under the *Conciliation and Arbitration Act 1904* (Cth) and the *Industrial Relations Act 1988* (Cth), when breach of these provisions was an offence and accordingly, without the reverse onus provision, the employee would have been required to prove the reason for the respondent’s action to a standard ‘beyond reasonable doubt’.⁸⁸ For example, in the 1975 case of *Bowling v General Motors-Holdens Pty Ltd*, Smithers and Evatt JJ said the reverse onus provision proceeds ‘on the basis that the real reason for a dismissal may well be locked up in the employer’s breast and impossible, or nearly impossible, of

82 Or an order of an industrial body or the Australian Fair Pay and Conditions Standard.

83 *Workplace Relations Act 1996* (Cth) s 792(4) (post *Work Choices* amendments). This section was applied in *Unsworth v Tristar Steering and Suspension Australia Ltd* (2008) 216 FCR 122, 139 (Gyles J).

84 *Howarth v Frigrite Kingfisher Pty Ltd* [1998] FCA 612.

85 See, eg, *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 69 (R D Nicholson J); *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 190 (Merkel J); *Employment Advocate v National Union of Workers* (2000) 100 FCR 454, 483–4 (Einfeld J); *Construction, Forestry, Mining and Energy Union v CE Marshall & Sons Pty Ltd* (2007) 160 IR 223, 228 (Collier J), quoting *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34, 69 (R D Nicholson J).

86 *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326, 337, 342 (Branson J).

87 Explanatory Memorandum, *Fair Work Bill 2009* (Cth) [1458].

88 Proceedings under the *Conciliation and Arbitration Act 1904* (Cth) and the *Industrial Relations Act 1988* (Cth) were considered to be criminal in character: *Grayndler v Cunich* (1939) 62 CLR 573; *Burgess v John Connell-Mott, Hay and Anderson Pty Ltd* (1979) 39 FLR 444, 446 (Smithers J), 456 (Evatt J); *Gapes v Commercial Bank of Australia Ltd [No 2]* (1979) 38 FLR 431.

demonstration through forensic processes.⁸⁹ Similarly, Northrop J has noted that '[t]he circumstances by reason of which an employer may take action against an employee are, of necessity, peculiarly with the knowledge of the employer. It is for this reason that [the reverse onus] is of such importance'.⁹⁰

Considering the union victimisation provisions more broadly (aside from the reverse onus provision), it does seem that courts' perceptions of the purposes of the provisions has shifted subtly over time as, indeed, have the stated legislative objectives. Originally, the provisions focused on encouraging the formation, and securing the existence and functioning, of trade unions,⁹¹ due to the central role played by unions in the system of conciliation and arbitration. Offering protection to individual workers was not the main purpose of the legislation but was merely a practical way to protect and support unions.⁹² For example, in 1939 Evatt J said

If an employee can be dismissed or prejudiced because, by joining a union, he becomes entitled to better conditions contained in an award of the Federal Court, the whole system of industrial arbitration would be threatened with destruction.⁹³

Almost 40 years later a similar sentiment was expressed by Mason J in *General-Motors Holdens Pty Ltd v Bowling* that the provisions

are, broadly speaking, designed to protect an officer, delegate or member of an organisation against discrimination by his employer. They have a legislative history which extends back to the turn of the century when the trade union was a more fragile institution than it is today and when it stood in need of a large measure of protection from employers.⁹⁴

From the mid-1980s, some decisions suggest the beginnings of a shift in perceived purposes of the provisions, towards being to protect both unions as a collective, and individual workers. One court noted the power in the *Conciliation and Arbitration Act 1904* (Cth) to order reinstatement, and took the view that this indicated a clear concern to protect individual workers, and not merely their trade union.⁹⁵ This changed reading of the statutory objectives in favour of protecting

89 (1975) 8 ALR 197, 204, quoted in *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 186 (Merkel J).

90 *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 267. This observation has been quoted with approval on many occasions. See, eg, *Maritime Union of Australia v CSL Australia Pty Ltd* (2002) 113 IR 326, 336 (Branson J); *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 193 (Greenwood J); *Police Federation of Australia v Nixon* (2008) 168 FCR 340, 359 (Ryan J). It was also used in an Explanatory Memorandum to a Bill amending the *Industrial Relations Act 1988* (Cth): Supplementary Explanatory Memorandum, Industrial Relations Reform Bill 1993 (Cth) 64.

91 See the original objects clause: *Conciliation and Arbitration Act 1904* (Cth) s 2(vi).

92 See *Jones v Thiess Bros Pty Ltd* (1977) 15 ALR 501, 517–8 (Keely J), quoting *Bowling v General Motors-Holdens Pty Ltd* (1975) 8 ALR 197, 210 (Smithers and Evatt JJ).

93 *Grayndler v Cunich* (1939) 62 CLR 573, 594.

94 *General Motors-Holdens Pty Ltd v Bowling* (1976) 12 ALR 605, 616, cited in *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90, 99 (Weinberg J). This passage was also quoted in *Greater Dandenong City Council v Australian Municipal, Administrative, Clerical and Services Union* (2001) 112 FCR 232, 245 (Wilcox J).

95 *Lewis Construction Co Pty Ltd v Martin* (1986) 70 ALR 135, 142 (Gray J). See also *Kelly v Construction, Forestry, Mining and Energy Union [No 3]* (1995) 63 IR 119, 130 (Moore J).

the individual and individualism more generally, became more pronounced from 1996, when victimisation protections were extended under the label of freedom of association to workers who chose to not join a trade union or not take part in industrial action.⁹⁶

Finally, it is interesting to note in this discussion of objectives that from the mid 1950s the case law is peppered with statements disavowing that the purpose of the legislation is to provide any special immunity to union officers and delegates. For example, in the earliest decision of this character, the Commonwealth Industrial Court explained:

This case is an example of how difficult it can be ... for an employer to dismiss an employee, however unsatisfactory his conduct as such may have been, if the employee has also been an active union delegate. But the purpose of the legislation is clearly not to give a union delegate any immunity from dismissal except that he cannot be dismissed because he is a delegate. In *Pearce v W.D. Peacock and Co. Ltd.* Barton A.C.J., who formed one of the majority of the High Court in that case, said: – ‘An employee who is dissatisfied with his work and wages may or may not be a unionist. When the dissatisfaction exists it would be absurd to say that a dismissal on that account is justified when he is not a unionist, but is a contravention of the section when he is a unionist ...’.⁹⁷

E Conclusion on Legislative Developments

This overview of developments in legislative frameworks, from 1904 to just prior to the enactment of the *Fair Work Act 2009* (Cth), reveals multiple waves of amendment. The jurisdiction has been transformed from a relatively narrow criminal offence where an employer dismissed an employee for a limited range of two prescribed reasons, to a broadly-based civil set of extensive protections applying to many potential respondents, and on a very wide range of grounds relating to union membership and activities, coverage by an industrial instrument, and non-membership and non-activities. Throughout, the reverse onus of proof has been a relatively stable feature of the jurisdiction, although the wording of it has altered in often subtle ways, as has the articulation of the causal link.

96 *Workplace Relations Act 1996* (Cth) s 298A(a) (prior to *Work Choices* amendments); see also *Workplace Relations Act 1996* (Cth) s 778(a) (post *Work Choices* amendments). See further, David Quinn, ‘To Be or Not To Be a Member – Is That the Only Question? Freedom of Association under the *Workplace Relations Act*’ (2004) 17 *Australian Journal of Labour Law* 1; Fenwick and Howe, above n 3. See also Phillipa Weeks, ‘Union Security and Union Recognition in Australia’ in Paul Ronfeldt and Ron McCallum (eds), *Enterprise Bargaining – Unions and the Law* (Federation Press, 1995) 184; Weeks, above n 1. Notably, there had been earlier limited statutory protection for non-unionists who were conscientious objectors to trade union membership.

97 *Atkins v Kirkstall-Repco Pty Ltd* (1957) 3 FLR 439, 445 (The Court). See also *Hyde v Chrysler (Australia) Ltd* (1977) 30 FLR 318, 332 (Northrop J); *Lewis v Qantas Airways Ltd* (1981) 54 FLR 101, 113 (Morling J); *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Australian Health and Nutrition Association Ltd* (2003) 147 IR 380, 381 (Gyles J).

III THE REVERSE ONUS CASES PRIOR TO THE *FAIR WORK ACT*

One of the very early cases considering the reverse onus provision under the *Conciliation and Arbitration Act 1904* (Cth) was the High Court decision in *Pearce*.⁹⁸ This case provides a useful starting point as it illustrates a similar divergence in approach and methodology as seen in the *Barclay* litigation.

In *Pearce*, an employee claimed that the reason for his dismissal was his union membership. The union had issued a log of claims, and the employer asked him to sign a document stating that he was satisfied with his wages and conditions. As the employee was the only union member at the business, if he had signed the document there would have been no dispute between the employer and the union and, under the then-current legislation, the employer could not have been made a party to the award. When the employee refused to sign the document, he was dismissed. The employer gave evidence that the employee's union status did not influence the decision to dismiss him – rather, he dismissed the employee because the employee was dissatisfied with his wages and he 'would not keep a man in [his] employ who was dissatisfied.'⁹⁹ The Magistrate had no reason to doubt the employer's testimony, and accordingly found the employer had not breached the section.

The majority of the High Court found that there was evidence to support the Magistrate's finding, and no ground to overturn it. Acting Chief Justice Barton found that the Magistrate had the benefit of hearing the witnesses and observing the cross-examination, and there was no sufficient basis to overturn his findings, although his Honour also noted that

The question was solely as to the reason for the dismissal. No doubt, it is an inquiry in a large measure as to motive; and no doubt also, the motive is to be inferred from facts, and mere declarations as to the mental state that prompted the employer's action are entitled to little or no regard, though in the present case they seem to have been admitted without objection.¹⁰⁰

Similarly, Gavan Duffy and Rich JJ found that there was no reason to overturn the Magistrate's finding as to the credibility of the witnesses, and accepting the employer's evidence meant that the employer had satisfied the onus.¹⁰¹

The majority's approach is similar to that taken by Tracey J and the High Court in *Barclay* (and for the purposes of this article, and for convenience only, we label this approach the 'Barclay Approach'). Put simply, this approach is that if the decision-maker gives evidence that they did not take adverse action 'because' of a prescribed ground, and that evidence is accepted, there will not be

98 (1917) 23 CLR 199.

99 Ibid 202 (Barton ACJ).

100 Ibid 203.

101 Ibid 213–14.

a breach. Evidence of surrounding circumstances may be relevant, but only to test the veracity of the evidence of the employer.

In *Pearce*, Isaacs J dissented. His Honour noted the purposes of the Act to facilitate and encourage the organisation of unions. In his Honour's view, the employee's dissatisfaction was bound up with his union membership, and if the employer could not say one is independent of the other, the employer could not rely on the excuse that the dismissal was because the employee was dissatisfied. Justice Isaacs said '[s]uch an excuse seems to me to have about as much validity as an excuse by a person accused of stealing a horse, that he only intended to take the halter, and not the horse to which it was attached.'¹⁰² His Honour referred to other evidence given by the employer which suggested that union membership was a factor – that 'there was a "horse" attached to the "halter", and that he knew it.'¹⁰³

On its face, Justice Isaacs' decision is consistent with the Barclay Approach taken by the majority of the High Court in the case – his Honour simply disagreed with the Magistrate's finding about the employer's evidence, because other parts of the employer's own evidence contradicted it. However, the 'horse and the halter' analogy also suggests a broader, and perhaps more nuanced, approach to the issue of the causal link which looks beyond the employer's stated reasons for acting. This approach resonates with that of the majority in the Full Federal Court in *Barclay*. For Gray and Bromberg JJ, it was not open to the CEO of BRIT to choose to ignore the fact that all of the conduct of Barclay that BRIT was concerned about was undertaken by him in his capacity as a union officer.¹⁰⁴ In other words, it was not open to BRIT to ignore that Barclay's union role (a horse) was attached to his email (the halter).

Justice Isaacs' decision, and the joint judgment of the Full Federal Court in *Barclay*, provide examples of the second strand of cases identified and discussed in this article. For the purposes of this article, and again simply for ease of reference, we label this second approach the 'Broader Approach'.

The remainder of this article uses these two categories, the Barclay Approach and the Broader Approach, as convenient labels for grouping the cases on the reverse onus prior to the *Fair Work Act 2009* (Cth). However, it is important to recognise that we use these categories for convenience only. They are not precisely defined, and there is no bright line between them. Indeed, it may be more useful to view these two approaches as constituting two end points on a continuum or spectrum of judicial approaches to the reverse onus of proof and the causal link in these victimisation provisions. The two categories are useful analytical tools for examining the decisions over the years, and the article examines each in turn.

102 Ibid 207.

103 Ibid 208.

104 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 233–4.

A Taking a Barclay Approach to Proof and Liability

Many cases over the years can be characterised as having taken a Barclay Approach to determining whether the action was because of a prescribed reason. In other words, these cases rest on the decision-maker's evidence as to their reasons for the action, and whether that evidence is accepted. In some cases the evidence of the decision-maker is accepted. In other cases it is not. These are examined in turn. In addition, in some cases employers seek to establish a non-prescribed reason as the 'real' reason for their action. This last theme is also examined under this heading of 'Taking a Barclay Approach', as are the cases that explicitly refer to the need to adopt a subjective view of the issue.

1 Decision-Maker's Evidence Accepted

A good example of a case that used the Barclay Approach, where the decision-maker's evidence was ultimately accepted and accordingly there was found to be no breach of the legislation, is provided in the 1957 case of *Atkins v Kirkstall-Repco Pty Ltd*.¹⁰⁵ The employee, a union delegate, was dismissed. The decision-maker 'swore that it was for absenteeism, and that [the employee's] position as a delegate of the union formed no part in the reason for the dismissal.'¹⁰⁶ The Court said '[t]he ultimate question for decision in this case is whether that evidence should be accepted.'¹⁰⁷ The Court noted that the employee had been involved in negotiations between the employer and the union, and the employer's offer had been rejected by the union (mainly, the employer believed, as a result of the employee's views) shortly before the dismissal.¹⁰⁸ Despite this context, the Court accepted the evidence of the manager and found that the employer had discharged its onus under the reverse onus provision.¹⁰⁹

In 2001, Weinberg J rejected a union's allegations that the employer's intention to conduct a 'spill and fill' redundancy process constituted prejudicial conduct for a prescribed reason, that reason being union membership – the employees had refused to approve an enterprise bargaining agreement.¹¹⁰ His Honour found that the action taken did not in fact constitute prohibited conduct.¹¹¹ Nevertheless, his Honour went on to consider whether any such action was taken for a prescribed reason. His Honour considered the evidence of the two decision-makers, noted that they were 'extensively cross-examined ... in a

105 *Atkins v Kirkstall-Repco Pty Ltd* (1957) 3 FLR 439. See also *Heidt v Chrysler Australia Ltd* (1976) 26 FLR 257, 268, 271 (Northrop J); *Hyde v Chrysler (Australia) Ltd* (1977) 30 FLR 318, 332 (Northrop J).

106 *Atkins v Kirkstall-Repco Pty Ltd* (1957) 3 FLR 439, 442.

107 *Ibid*.

108 *Ibid* 444.

109 See also *Turner v Victorian Railways Commissioners* (1953) 78 CAR 59, 60 (Kirby J).

110 *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90.

111 *Ibid* 118–19.

forceful manner',¹¹² and ultimately accepted their evidence.¹¹³ Justice Weinberg said

It is understandable that the ... employees might view with a degree of cynicism the protestations of management that those employees are not being targeted by the proposed spill and fill. That cynicism is undoubtedly heightened by the unfortunate conjunction of events whereby the decision to conduct the spill and fill was taken within weeks of the commencement of the protected action. However, ... the fact that there is some connection between an employer's act and the employee's union membership or activities does not mean that the employer did the act because the employee was a union member or because of the employee's activities. Whether an employer was motivated by a prohibited reason or reasons which included a prohibited reason is a question of fact, often involving questions of judgment. The fact that a particular act precedes another does not necessarily mean that it causes that other to occur.¹¹⁴

His Honour continued:

There is in any event a difference between welcoming an outcome which is reasonably foreseeable as a by-product of a particular course of action, and being motivated, in whole or in part, by a desire to achieve that outcome. The former state of mind is not sufficient to establish that the conduct in question was carried out for a prohibited reason. The latter is sufficient for that purpose.¹¹⁵

A further illustration of a successful argument by an employer using the Barclay Approach is provided in the 2009 decision of *Harrison v P & T Tube Mills Pty Ltd*, where an employee (a union delegate) was dismissed after he refused to remove a union sticker from his neck.¹¹⁶ This was in the context of conflict in the workplace between employees for and against the union, leading to a ban on all stickers.¹¹⁷ The decision-maker denied that the employee's union status had been a reason for the dismissal, and the primary judge accepted this evidence.¹¹⁸ The decision-maker said the reason for the dismissal was the employee's 'wilful disobedience'.¹¹⁹ The primary judge found that the employer had succeeded in rebutting the presumption. On appeal, the Full Federal Court noted that a central consideration of the primary judge 'was whether the direction to [the employee] to remove the sticker from his neck had been reasonable and lawful'.¹²⁰ The Full Federal Court found that the direction had been lawful and reasonable, although noting that even if it had been unreasonable or unlawful it would not necessarily follow that the dismissal was for a prescribed reason.¹²¹

112 Ibid 120.

113 Ibid.

114 Ibid (citations omitted).

115 Ibid 121.

116 (2009) 188 IR 270.

117 Ibid 272 (The Court).

118 Ibid 274 (The Court).

119 Ibid.

120 Ibid 271 (The Court).

121 Ibid 275 (The Court).

The Court distinguished this case from *Australian Tramway Employees' Association v Brisbane Tramways Co Ltd*,¹²² where it was found that the 'employer's giving of a direction that employees were not to wear badges of any kind, other than those supplied by the employer, was part of a policy of the employer to suppress unionism.'¹²³ The Court held that '[o]n the facts, that is not this case.'¹²⁴ The Court said that the decision-maker gave evidence that the reason for the dismissal was the misconduct, and that he had not been influenced by the employee's union status. It emphasised that '[h]is evidence was accepted and nothing has been shown on appeal to impugn that acceptance. It follows that [the employer] discharged the onus of proving that the dismissal had not been for a prohibited reason.'¹²⁵

A related issue with which courts have grappled is whether, in assessing the respondent's evidence, regard should be had to the applicant's evidence. In a series of decisions regarding the retrenchment of a union delegate, the Federal Court considered whether it was appropriate to take into account evidence called on behalf of the employee when assessing the credibility of the employer's evidence, and ultimately held that it was appropriate to do so.¹²⁶

In some cases, courts have looked very closely at the surrounding circumstances in determining whether to accept the decision-maker's evidence. For example, in the 1985 case of *Webb*,¹²⁷ Wilcox J of the Federal Court considered a claim by an active union member who was dismissed in the context of widespread retrenchment in which about one quarter of the journalistic staff of *The Australian* newspaper were made redundant. The chairman of the business instructed a news editor to prepare a list of 40 journalists for retrenchment, and the Court found it likely these instructions specifically referred to selecting people who were disruptive.¹²⁸ The news editor prepared the list of 40 people, and the employee was about sixth or seventh in order of those who should go. His reasons for including the employee were that he was highly paid, not very productive, wrote on a narrow range of matters, and had a poor attitude. The news editor 'denied that he was in any way influenced in favour of retrenching [the employee] because of his union position or ... union activities ... adding: "If anything it was a little to the contrary. I was quite worried on that score."¹²⁹

122 (1912) 6 CAR 35.

123 *Harrison v P & T Tube Mills Pty Ltd* (2009) 188 IR 270, 276.

124 *Ibid.*

125 *Ibid.*

126 *Elliot v Kodak Australasia Pty Ltd* (2001) 108 IR 23, 37 (Marshall J) (at first instance); *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251 (on appeal). The matter was remitted back to Marshall J who ultimately maintained his conclusion that the employer had discharged the onus: *Elliott v Kodak Australasia Pty Ltd* [2002] FCA 154. See also *Hamberger v Ramsey Food Packaging Pty Ltd* [2004] FCA 842, [7].

127 (1985) 10 IR 252.

128 *Ibid* 266 (Wilcox J).

129 *Ibid* 267–8 (Wilcox J).

The Court found that the chairman of the News Ltd Group, Rupert Murdoch, had indicated (through media interviews) that the dismissals related to more than just the economics of cutting staff numbers, and that 'he understood them to involve, at least in part, a clearing out of the people who had caused industrial trouble.'¹³⁰ Further, the Court found that at least two employees who were ultimately retrenched were put on the list not by the news editor, for journalistic reasons, but by superiors who considered them to be union activists. The Court also considered it a 'real possibility' that if the employee had not been on the news editor's original list, he would likewise have been added by more senior managers on the grounds of his union activities.¹³¹ However, that was not the case. The Court ultimately found the operative decision was made by the news editor, and accepted his evidence that it was 'made entirely upon editorial grounds.'¹³²

The Court examined detailed evidence about the employee's productivity, and found the view that the employee's 'output was less than might reasonably be expected of a senior journalist was well open to' the news editor who compiled the list.¹³³ Further, the Court accepted the news editor's evidence that he placed the employee on the list because he was highly paid, unproductive, had a narrow range of interests, and an unsatisfactory attitude.¹³⁴ The Court also accepted the evidence of the more senior employee who ultimately approved the list that he was not influenced by the employee's union activities, although he was aware that he held a union office.¹³⁵

Webb ultimately rested on an assessment of the evidence of the decision-maker, and for that reason is identified in this article as taking the Barclay Approach. In the Court's use of a wide range of broader evidence and surrounding circumstances, to some degree, *Webb* also illustrates that the dividing line between the Barclay Approach and the Broader Approach may be fuzzy.

2 Decision-Maker's Evidence Not Accepted

Other cases taking the Barclay Approach have found in favour of the applicant because the decision-maker's evidence was not accepted. These decisions revolve around an assessment of the evidence of the decision-maker, and for that reason are identified as taking the Barclay Approach, even though some of them could be considered to be closer on a continuum to the Broader Approach, because the courts looked at a range of other evidence and the surrounding circumstances in deciding to reject the evidence of the decision-maker.

130 Ibid 271 (Wilcox J).

131 Ibid 273 (Wilcox J).

132 Ibid.

133 Ibid 279 (Wilcox J).

134 Ibid 281 (Wilcox J).

135 Ibid.

A good illustration of the Barclay Approach where the evidence of the decision-maker was not accepted is provided in the 1967 case of *Joiner v Muir*.¹³⁶ A nurse who was dismissed claimed the reason for her dismissal was her union membership.¹³⁷ She had been employed by Mr and Mrs Muir.¹³⁸ The employee gave evidence that Mr Muir had asked her if she was a union member (she refused to reply), and said that he would find out which employees were members and get rid of them.¹³⁹ He gave her two weeks' notice.¹⁴⁰ A couple of days later, he gave her two weeks' pay in lieu of notice and then asked her again whether she was a union member.¹⁴¹ The employee's evidence was that she answered yes.¹⁴² However, Mr Muir swore that he did not know the employee was a union member until he received the summons in the case.¹⁴³ Mr Muir maintained that the employee had a poor attitude, had failed to perform her duties satisfactorily, and had threatened to resign several times.¹⁴⁴ He maintained that he gave her pay in lieu of notice because she had been dishonest in saying she was attending a doctor's appointment when in fact she attended wages board proceedings.¹⁴⁵

Contrary to the employer's evidence, the Court found that the employee's participation in a 'stop work' union meeting outside the hospital 'was the precipitating factor which led the defendants to give her ... two weeks['] notice of the termination of her employment.'¹⁴⁶ The Court also had to consider whether the employer knew she was a union member at that time.¹⁴⁷ The Court found that when she participated in the meeting Mr and Mrs Muir had come to the view that she was 'probably' a member of the union.¹⁴⁸ The Court found that Mr and Mrs Muir

had firmly in mind their other reasons for dissatisfaction with [the employee] and the arrangements already made with [another staff member] to take her place, but that it was her participation in the meeting ... and her probable membership of the federation as shown by that participation which was the precipitating factor in making the decision to give her two weeks notice.¹⁴⁹

The Court also found that by the time the employer gave the employee pay in lieu of notice a few days later, Mr and Mrs Muir had concluded 'without doubt'

136 (1967) 15 FLR 340. See also *Jones v Thiess Bros Pty Ltd* (1977) 30 FLR 422; *Bowling v General Motors-Holden's Pty Ltd* (1980) 50 FLR 79, 88; *Sutherland v Hills Industries Ltd* (1982) 2 IR 287.

137 *Joiner v Muir* (1967) 15 FLR 340, 340.

138 *Ibid.*

139 *Ibid* 342.

140 *Ibid.*

141 *Ibid.*

142 *Ibid* 343–5.

143 *Ibid* 345 (Dunphy and Kerr JJ).

144 *Ibid* 352 (Dunphy and Kerr JJ).

145 *Ibid* 349, 352–3 (Dunphy and Kerr JJ).

146 *Ibid* 352–3 (Dunphy and Kerr JJ).

147 *Ibid* 353 (Dunphy and Kerr JJ).

148 *Ibid.*

149 *Ibid* 354 (Dunphy and Kerr JJ).

that she was a member of the union,¹⁵⁰ and that this membership 'did actuate' the decision to dismiss her with pay in lieu of notice.¹⁵¹ 'Further, the existence of additional actuating circumstances does not mean that a breach of ... the Act has not occurred.'¹⁵² The employer had not met the onus of proving on the balance of probabilities that they were not actuated by the employee's union membership.¹⁵³ Throughout the judgment, it is clear that the focus is on the intention or motivation of the decision-makers, with broader circumstances used to assess the credibility of the employer's account.

More recently, a 2001 decision concerned an email sent by the Telstra managing director for employee relations, Mr Cartwright, to 275 managers and team leaders regarding a proposed reduction in staff by 10 000 positions.¹⁵⁴ Earlier cases had found that the email would have been regarded by many managers as an instruction to discriminate against employees covered by awards or agreements when selecting staff for redundancy, and that this instruction constituted a prejudicial alteration to the employees' position.¹⁵⁵ Justice Finkelstein considered whether Mr Cartwright gave the instruction in the email for a prescribed reason. His Honour said:

I propose to consider Mr Cartwright's evidence in the following context. First, there is the effect of [the reverse onus section]. So far as is presently relevant [the reverse onus section] provides that in an application ... it must be presumed that conduct was carried out for the reason alleged unless the opposite is proved. The result is that Telstra must establish that the email was not sent for a prohibited reason.

Second, I must have regard to the terms of the email. That is, to decide why Mr Cartwright sent the email it is appropriate to consider what is stated in the email. If Mr Cartwright's evidence is inconsistent with what he wrote, that inconsistency will bear upon the persuasiveness of Mr Cartwright's explanation, though it need not be decisive.

Finally, there is Mr Cartwright's explanation. When a person gives sworn testimony explaining why he took certain action, this will often be the only direct evidence the court will have on the issue. *If the evidence is accepted as true, it will resolve the issue one way or the other.*¹⁵⁶

Mr Cartwright gave evidence that he intended the email to be an instruction that managers not discriminate against employees on Australian Workplace Agreements ('AWAs'), rather than an instruction that they should discriminate against employees on awards and agreements.¹⁵⁷

150 Ibid 355 (Dunphy and Kerr JJ).

151 Ibid.

152 Ibid.

153 Ibid 356 (Dunphy and Kerr JJ).

154 *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 207, 207.

155 See *Community and Public Sector Union v Telstra Corporation Ltd* (2000) 99 IR 238; *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 107 FCR 93.

156 *Community and Public Sector Union v Telstra Corporation Ltd* (2001) 108 IR 207, 208–9 (Finkelstein J) (emphasis added).

157 Ibid 210 (Finkelstein J).

Justice Finkelstein took into account surrounding circumstances, including that there was a detailed redundancy procedure which focused on fair procedures, arguably making it unnecessary for any instruction to not discriminate against AWA employees, and held that while he could not reject the managing director's evidence (because it might be true), he was 'not sufficiently persuaded by his testimony to reach the conclusion that it overcomes both the effect of [the reverse onus section] and the language of the email.'¹⁵⁸

A final illustration is provided by a 2008 decision under the *Workplace Relations Act 1996* (Cth), in which Moore J considered an employer's argument that the employee was dismissed for misconduct rather than because the employee was a union member and delegate.¹⁵⁹ Justice Moore found that the employer had not discharged the onus.¹⁶⁰ His Honour did not accept the decision-maker's evidence that the dismissal was because of misconduct, and that he had no regard to the prescribed grounds.¹⁶¹ Justice Moore did not think the decision-maker 'ha[d] been entirely truthful in his evidence', and considered that 'his evidence was tailored, perhaps unconsciously, to support and avoid damaging the respondent's case.'¹⁶² His Honour pointed to inconsistencies in evidence under cross-examination, and a number of factors that 'collectively raise[d] a real issue in my mind about whether the dismissal ... was for the stated purpose',¹⁶³ including the way the investigation into the alleged misconduct was carried out, the fact that no other employees were investigated, the way the termination was effected and the 'manifest convenience' to the employer of having the union delegate out of the workplace.¹⁶⁴

3 Need for Explanation of a 'Real' Reason to Rebut the Presumption

In some cases where courts have taken the Barclay Approach to establishing the causal link in the context of the reverse onus of proof, employers have sought to establish a 'real' (non-prescribed) reason for their action to support their assertion that the action was not taken for a prescribed reason. Courts tended to

158 Ibid. See also *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, 174, 179–82, 190–2; *Australasian Meat Industry Employees' Union v Belandra Pty Ltd* (2003) 126 IR 165, 228; *Automotive, Foods, Metals, Engineering, Printing and Kindred Industries Union v Eaton Electrical Systems Pty Ltd* (2005) 139 IR 260.

159 *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306, 306. See also *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Thornton Engineering Australia Pty Ltd* (2008) 176 IR 377.

160 *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306, 322.

161 Ibid 322–4.

162 Ibid.

163 Ibid 322–3.

164 Ibid 323–4.

accept the appropriateness of such an approach,¹⁶⁵ although proof of a non-prescribed reason was not technically required to satisfy the reverse onus, such proof could assist an employer's case. For example, in the 1957 case discussed above of *Atkins v Kirkstall-Repro Pty Ltd*, an employer claimed that the reason for dismissal was the employee's absenteeism, not his status as a union delegate.¹⁶⁶ The Commonwealth Industrial Court stated:

Provided that the company shows on the evidence that it was not actuated in dismissing [the employee] because he was a union delegate, it is of course unnecessary for it to prove why it dismissed him, or whether it did so on reasonable grounds, but at the same time when it advances a reason of dismissal, the reasonableness of its conduct may be of importance in weighing the truth of the evidence which its officers give as to what actuated the dismissal.¹⁶⁷

Thirty years later, Gray J of the Federal Court noted:

As a matter of logic, [the reverse onus section] of the Act does not impose on an employer charged with an offence ... the burden of showing that it had a reason, good or bad, for dismissing an employee. It is sufficient if the employer concerned establishes that it was not actuated by any of the proscribed circumstances charged. No doubt, however, the failure of an employer to advance a positive reason to justify a dismissal must make it more difficult to satisfy the onus than if a reason is advanced. Further, the existence of a genuine reason, established as a matter of evidence, justifying the dismissal, must give an employer the best possible defence against a charge under the section. The advancement of a reason which is found to have been non-existent in fact may render the employer's task of establishing innocence more difficult.¹⁶⁸

In 2008, Moore J of the Federal Court went further, cautioning that, generally speaking, it is not enough for a respondent to merely deny the existence of a prescribed reason in order to rebut the presumption. Rather, 'in most cases an explanation for the real reason for the dismissal, consistent with the absence of a prohibited reason, is, in a practical sense, also necessary'.¹⁶⁹

4 Subjective View

The Barclay Approach may be seen to support a subjective view of the issue, because the focus is on determining what was in the mind of the decision-maker. Although the issue of whether the court should use an objective or subjective approach in determining whether the causal link is made out was explicitly rejected by Gummow and Hayne JJ in the High Court in *Barclay* as unhelpful,¹⁷⁰

165 See, eg, *Construction Forestry, Mining and Energy Union v CE Marshall and Sons Pty Ltd* (2007) 160 IR 223, 229, 235, 237, 239 (Collier J); *Community and Public Sector Union v Commonwealth* [2007] FCA 1861, [71], [74], [75] (Cowdroy J); *Liquor, Hospitality and Miscellaneous Union v Cuddles Management Pty Ltd* (2009) 183 IR 89, 105, 119-20, 122 (Lucev FM). There was a later decision on penalty in *Liquor, Hospitality and Miscellaneous Union v Cuddles Management Pty Ltd (No 2)* (2009) 188 IR 435.

166 (1957) 3 FLR 439.

167 Ibid 441 (Spicer CJ, Dunphy and Morgan JJ).

168 *Gibbs v Palmerston Town Council* [1987] FCA 732, 18.

169 *Rojas v Esselte Australia Pty Ltd (No 2)* (2008) 177 IR 306, 321 (Moore J).

170 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 503, 537 (Gummow and Hayne JJ).

it is a frame of reference that appears in the cases that predate the *Fair Work Act 2009* (Cth). In several cases, courts explicitly refer to the need to take a subjective approach.¹⁷¹ In 1979, one judge spoke of the need to ‘look into the mind of [the decision-maker] and ask what were the substantial and operative factors in his mind. This is to be determined not as a matter of logic but of fact.’¹⁷²

5 Conclusion on Taking a Barclay Approach

It is clear that prior to 2009, many cases took the Barclay Approach to assessing whether the causal link in the union victimisation protections had been satisfied through the reverse onus of proof. The focus for the court in these cases was on the evidence of the decision-maker as to what motivated their decision. Surrounding circumstances were examined, not to ascertain whether an objective connection existed between the ground and the conduct, but rather for the purpose of assessing the veracity of the employer’s account. In some cases the employer’s account was accepted, in other cases it was not.

B The Broader Approach

In contrast to the Barclay Approach discussed above, other cases prior to the enactment of the *Fair Work Act 2009* (Cth) have taken the ‘Broader Approach’ to considering the causal link. These cases are characterised by courts applying a wider lens to the situation, to do more than merely test the veracity of the respondent’s characterisation of their reasons. The courts are not simply seeking to assess the credibility of the respondent’s evidence. Rather, it appears that the courts independently consider the extent to which the stated innocent reason of the employer, and sometimes more broadly the decision of the employer, is linked to the alleged prescribed ground. Notably, and not surprisingly, in all these cases the employer or other respondent is found to have contravened the prohibitions.

This approach is similar to the halter and the horse analogy used by Isaacs J in his dissenting judgment in *Pearce*.¹⁷³ His Honour considered that the employer’s stated reason for acting (that the employee was dissatisfied with his wages and conditions) was interrelated to his union membership, and that as the employer could not show that one is independent of the other, the employer could not rely on the excuse that the dismissal was because the employee was dissatisfied.¹⁷⁴ In other words, in a charge of horse stealing, it is not open to a

171 See, eg, *Musgrove v Murrayland Fruit Juices Pty Ltd* (1980) 47 FLR 156, 160–1 (Smithers J); *Lineham v Northwest Exports Pty Ltd* (1981) 1 IR 125, 132 (Ellicott J); *Willis v Chew* (Unreported, Federal Court of Australia, Ellicott J, 9 October 1981); *Australian Workers’ Union v John Holland Pty Ltd* (2001) 103 IR 205, 216 (Goldberg J); *McIlwain v Ramsey Food Packaging Pty Ltd* (2006) 154 IR 111, 121, 213–17, (Greenwood J).

172 *Wood v City of Melbourne Corporation* (1979) 41 FLR 1, 10.

173 (1917) 23 CLR 199.

174 *Ibid* 206–7.

respondent to say it only intended to take the halter, and not the horse attached to it.¹⁷⁵ The joint judgment of the Full Federal Court in *Barclay* also resonates with this Broader Approach, with Gray and Bromberg JJ noting that '[a]ll of the relevant conduct in issue ... involved Mr Barclay in his union capacity',¹⁷⁶ and that it was not open to the decision-maker to choose to ignore the objective connection between the suspension of Barclay and his union activities.¹⁷⁷ The cases discussed in this section take a similar approach.

1 The Pearce Halter and the Horse Analogy

In the 1980s, the Australian Building Construction Employees' and Builders Labourers' Federation ('BLF') imposed significant bans at sites across the building industry.¹⁷⁸ The Master Builders' Association of Victoria delivered an ultimatum to the BLF that BLF members would be dismissed unless the bans were lifted.¹⁷⁹ The bans were not lifted and many employees were dismissed.¹⁸⁰ In the 1986 case of *Lewis Construction Co Pty Ltd v Martin*, a Full Bench of the Federal Court dealt with four appeals by four separate employers who had each been convicted of dismissing one or more employees by reason of the fact that they were members of the BLF.

In one of the cases, the employer argued that it did not dismiss the employees because they were union members – rather, it dismissed the employees because it believed that the dismissal of all BLF members 'was the only course open to it as a means of countering' the BLF campaign.¹⁸¹ It argued that this was the 'real' reason for the dismissal, and the employee's union membership was merely a criterion for selection for dismissal, not the 'reason' for dismissal.¹⁸² The employer was not successful. The Full Bench found that 'an offence was committed if [the employee's] membership of the BLF was a "substantial and operative factor" in the decision to dismiss him', which it was.¹⁸³ The Court held:

there is no inconsistency between the presence of a perceived need to dismiss BLF members in order to counteract a BLF campaign as a reason for dismissal, and the existence of other reasons for that dismissal. The search for the 'real' reason for a dismissal is not one sanctioned by the authorities.¹⁸⁴

The employer had failed to lead any evidence to support the proposition that union membership was not a substantial and operative factor in the decision to dismiss. The Court also considered the attempt to characterise union membership

175 Ibid 207 (Isaacs J).

176 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 233 [73].

177 Ibid.

178 *Lewis Construction Co Pty Ltd v Martin* (1986) 17 IR 122, 124–5 (Gray J).

179 Ibid 125 (Gray J).

180 Ibid.

181 Ibid 123 (Gray J).

182 Ibid 124 (Gray J).

183 Ibid, citing *General Motors-Holdens Pty Ltd v Bowling* (1976) 51 ALJR 235, 241–2 (Mason J).

184 *Lewis Construction Co Pty Ltd v Martin* (1986) 17 IR 122, 124 (Gray J).

as a factor in a reason, rather than a reason in itself, must also fail ... The attempt to decide whether a particular circumstance was a factor in a reason, or a reason itself, tends to distract from the essential question, which is whether that circumstance was a substantial and operative factor or reason in the decision.¹⁸⁵

The Court also noted that the very nature of the 'real' reason advanced by the employer was one which required, as an essential step in the decision to dismiss, a consideration of whether the employee was a union member.¹⁸⁶ It is clear that in this case the Full Bench went beyond the Barclay Approach of simply considering whether or not to believe the evidence of the decision-maker. It examined the substance of the reason advanced by the employer, and how to characterise that reason, in effect whether the reason of countering the BLF campaign was interconnected with a prescribed ground, which it was.

In another of the four cases, the Court noted the decision-maker had given evidence that if the employee 'had not been in the BLF he would not have been terminated'.¹⁸⁷ The Court said '[s]uch express evidence made it very difficult, if not impossible, for [the employer] to discharge the onus of proving that it was not actuated by the circumstance that [the employee] was a member of the BLF'.¹⁸⁸

Another interesting example of the Broader Approach is found in the 1976 High Court decision of *General Motors-Holdens Pty Ltd v Bowling*.¹⁸⁹ At first instance, the Court rejected the employer's argument that the reason for the dismissal was the employee's work record and attitude. On appeal, the employer did not seek to overturn this finding, but instead sought to argue that the real reason for the dismissal was that the employee 'deliberately disrupted production and thus was setting a very bad example to others', and that this view was not connected to his status or activities as a shop steward.¹⁹⁰

In the view of Mason J, the primary reason for the dismissal was the employer's view that the employee was a troublemaker, but he considered it a big leap to find that this was 'a comprehensive expression of the reasons for dismissal and that they were dissociated from the circumstance that the [employee] was a shop steward'.¹⁹¹ Justice Mason also noted that although the relevant activities were not undertaken in the employee's capacity as a shop steward, his position as a shop steward meant that he had a 'status in the work force and a capacity to lead or influence other employees',¹⁹² which effectively meant that he was more able to set a 'bad example' for other employees. The employer's appeal was dismissed. In this case the High Court went beyond the

185 Ibid 125 (Gray J).

186 Ibid.

187 Ibid 127 (Gray J).

188 Ibid.

189 (1976) 12 ALR 605.

190 Ibid 617.

191 Ibid. This was particularly the case in light of the fact that the two directors who ultimately made the decision (on the manager's recommendation) were not called to give evidence: at 617-9.

192 Ibid 618.

employer's stated reason to assess the extent to which that reason was 'dissociated', on the facts, from the prescribed ground of union status or activities.

In a case decided in 2000, Einfeld J found that a union officer had encouraged an employer to remove an employee from a worksite on the basis that the employee refused to join the union.¹⁹³ The site had been a closed shop arrangement. The union officer gave evidence that his suggestion that the employer relocate the employee 'was aimed not at injuring him in his employment, but at preserving the preference agreement and preventing an on-site industrial dispute that appeared imminent.'¹⁹⁴ However, Einfeld J disagreed, saying:

It is, in my view, very artificial to suggest that [the union official's] reasons for acting were to settle a dispute and that these reasons were completely unconnected to the reason why that dispute was arising. It is simply not realistic to argue that the reason there is a pending dispute is because one employee does not wish to become a union member but that the inciter's reasons for acting are only to prevent the dispute and have nothing to do with the fact that the employee does not wish to join the Union.¹⁹⁵

Further:

In my opinion, it is not permissible to disconnect [the union official's] claim that he was trying to avoid a dispute (employing a non-member in a 'closed shop') from the cause of the dispute (a non-member on site) and the means he advocated of avoiding the dispute (removing the non-member).¹⁹⁶

Similarly to the other cases characterised by the Broader Approach, Einfeld J has applied a wider lens to the circumstances, assessing the link or connection between the employer's stated reason, and the alleged prescribed ground.

More recently, in a 2002 Federal Court decision under the *Workplace Relations Act 1996* (Cth), Wilcox J considered a situation where a bank manager (who was also the National President of the Finance Sector Union ('FSU')) took part in protected industrial action and spoke to the media about job security in the banking industry.¹⁹⁷ She was counselled and given a written warning that if she failed to act as directed, her employment might be terminated.¹⁹⁸ The employee brought a number of claims, including that the counselling and warning altered her position to her prejudice, and had been taken because she had participated in industrial action and was a union officer, delegate or member.¹⁹⁹

Justice Wilcox considered whether the employer had shown that the counselling and warning 'was not carried out, wholly or partly, because [the

193 *Employment Advocate v National Union of Workers* (2000) 100 FCR 454.

194 *Ibid* 457 (Einfeld J).

195 *Ibid* 487.

196 *Ibid* 488 (Einfeld J).

197 *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* (2002) 120 FCR 107.

198 *Ibid* 107.

199 *Ibid* 108.

employee] ... had engaged, ... in the stoppage of work'.²⁰⁰ The manager who called the counselling meeting said the employee's participation in the industrial action 'played no part in his decisions to conduct a counselling meeting and to issue a warning letter'.²⁰¹ Further, the employer pointed out that 'no complaint was made' about the industrial action in the counselling meeting itself, or the warning letter.²⁰² Justice Wilcox said:

The question is whether I should accept [the manager's] assertion. I need to ask myself whether it is probable that, if [the employee] had not participated in the stoppage ... [the manager] would, nonetheless, have decided to require her to attend a counselling meeting and/or to give her a written warning of future disciplinary action.²⁰³

Justice Wilcox determined that this question could not be answered affirmatively, and the main reason was his Honour's assessment of the relevant manager. His Honour considered that the manager's 'knowledge of industrial matters [was] sparse and his attitude to them simplistic and naïve'.²⁰⁴ The manager strongly believed that it was the employee's responsibility as branch manager to promote the bank's position to employees, and to keep the branch open when the industrial action was proposed.²⁰⁵ His Honour found that the manager 'must have thought it a betrayal for her, not only to fail to urge the staff to work, but to give a lead in the opposite direction by stopping work herself'.²⁰⁶ One of the main grounds relied on in the counselling meeting and warning letter was that the employee had 'failed to take appropriate steps in ensuring [the] ... branch would open for business' on the day of the industrial action.²⁰⁷ His Honour considered that this was a 'wooly' expression,²⁰⁸ and that really the manager meant she should have persuaded her staff not to join in the action, and she herself should not have joined in the action.²⁰⁹ Justice Wilcox quoted from *Cuevas v Freeman Motors Ltd* in which it was said

where it is probable that an employer believes it would be in his interest to be without an employee because his position as a shop steward results in situations disturbing to him in the management of his business, the fact that the grounds of dismissal asserted by the employer in a particular case have puzzling or unreasonable aspects is of considerable importance.²¹⁰

200 Ibid 134.

201 Ibid.

202 Ibid.

203 Ibid 134–5.

204 Ibid 135.

205 Ibid.

206 Ibid 135–6.

207 Ibid 137.

208 Ibid.

209 Ibid.

210 Ibid 137, quoting *Cuevas v Freeman Motors Ltd* (1975) 25 FLR 67, 78.

In relation to the alleged prescribed ground of being a union officer, delegate or member, Wilcox J considered that in giving a media interview and taking industrial action, the employee was wearing her union ‘hat’,²¹¹ and

the activities for which she was disciplined were associated with her position in FSU. Therefore, ... it is necessary to ask whether the particular activities that gave rise to the disciplinary action may have constituted misconduct of a sufficient degree of seriousness as to exclude the possibility that she was being counselled and warned because of her position in FSU.²¹²

His Honour went on to find that speaking to the media was not a ‘serious transgression’ of her employment duties,²¹³ and that the manager’s views of the employee were ‘shaped’ by her union position and activities.²¹⁴ Accordingly, ‘it would be naïve to accept his assurance that they had nothing to do with his decision’ to counsel and warn her.²¹⁵

The approach taken by Wilcox J is interesting, and appears to be a type of ‘but for’ approach to the issue of the causal link – but for the employee’s participation in industrial action, and her role in the union, would she have been counselled and warned? This indicates a broader inquiry than the Barclay Approach. It evidences an investigation of surrounding circumstances to consider whether the decision to counsel and warn her was associated with her union activities.

A final example is provided in a 2005 decision of the Federal Court.²¹⁶ A shop steward called a stop work meeting to discuss the use of contractors at the site.²¹⁷ The employer called him out of the meeting, and ordered him to return to work.²¹⁸ He returned to the meeting, explained what had happened, and adjourned the meeting until lunchtime.²¹⁹ When he emerged from the meeting 5–12 minutes later, he was dismissed for failing to follow directions.²²⁰ The question was whether the employer had proved that his status as a delegate played no part in the decision to dismiss.²²¹

The employer argued that the reason for the dismissal was the employee’s failure to follow directions for the ‘third or fourth’ time that morning,²²² and that his union status was not a reason for the dismissal.²²³ However, Marshall J did not

211 *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* (2002) 120 FCR 107, 141.

212 *Ibid.*

213 *Ibid* 143.

214 *Ibid* 144.

215 *Ibid.*

216 *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v ACI Operations Pty Ltd* (2005) 147 IR 315.

217 *Ibid* 316 (Marshall J).

218 *Ibid.*

219 *Ibid.*

220 *Ibid.*

221 *Ibid.*

222 *Ibid* 321 [33].

223 *Ibid* 322 [38].

accept that evidence.²²⁴ Justice Marshall identified only two main issues that the employer pointed to – the employee’s ‘refusal’ to arrange for electricians to assist the contractor (in fact, he spoke to the union about the clause in the agreement on the use of contractors, and then notified the employer that there was a dispute about the use of that contractor), and the employee’s ‘refusal’ to return to work during the stop work meeting.²²⁵ Justice Marshall found that ‘[t]here was a clear connection between Mr Williams’ shop steward status, his Union activity and his termination.’²²⁶ Further, ‘[n]o aspect of the conduct of Mr Williams which actuated [the employer] is divorced from his role as a delegate’,²²⁷ indicating again a broader investigation of the connections between the employer’s impugned decision, and the alleged prescribed ground.

2 Objective View

The Broader Approach to proof and liability aligns, broadly speaking, with an objective view of the causal link, because the court is willing to look beyond the employer’s subjective reasons and consider whether the conduct of the employer or other respondent was connected to a prescribed ground. The majority judgment of the Full Federal Court in *Barclay* explicitly referred to an objective connection, which the employer could not simply ‘choose to ignore’.²²⁸ A number of cases prior to the *Fair Work Act 2009* (Cth) adopted a similar approach in determining the causal link.²²⁹

The 2001 decision of *Elliott v Kodak Australasia Pty Ltd* involved a challenge to the retrenchment of a union delegate.²³⁰ At first instance, Marshall J said that the reverse onus in this case has two limbs: first, ‘that the redundancy selection criteria was not inherently biased against [the employee] in his role as a union delegate, or union delegates in general’; and secondly, that the particular employee ‘was not selected for redundancy because he was a union delegate, and then allocated low points under the selection criteria’.²³¹ The first limb identified above is particularly interesting, because it appears to accept the possibility that the redundancy selection criteria might have been unintentionally biased against union delegates, and that this would have constituted a breach. This suggests an objective, rather than subjective, view of the situation. However, ultimately Marshall J found that the selection criteria were not inherently biased against union delegates,²³² and the possibility of an unintentional breach was not explored

224 Ibid.

225 Ibid 322 [38]–[40].

226 Ibid 324.

227 Ibid.

228 *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212, 221 (Gray and Bromberg JJ).

229 In addition to the cases discussed in this article, see also *Vong v Sika Australia Pty Ltd* (2010) 203 IR 214, 223, 238–9. A decision of Lloyd-Jones FM explicitly adopted an objective approach: at 239.

230 (2001) 108 IR 23.

231 Ibid 30–1.

232 Ibid 32.

further. There was an appeal from Justice Marshall's decision, but this aspect of his Honour's decision was not challenged.²³³

On appeal, the Full Federal Court considered Justice Marshall's treatment of the evidence of the senior decision-maker (Walshe), who gave final approval of the redundancy decision, and whose evidence was not subject to cross-examination.²³⁴ Justice Marshall had found 'the fact that Mr Walshe was not cross-examined on that evidence to be a critical factor in support of Kodak's discharge of its onus' under the reverse onus provision.²³⁵ However, the Full Court found that even if one of the more junior decision-makers (Lay) had been influenced by a prohibited reason, that would have affected process, as Walshe had taken Lay's initial rankings and worked from there:

It follows that if the Lay/Shannon assessment is affected (or infected) by either Lay or Shannon having held an undisclosed prohibited reason, then he would have, in effect, inadvertently adopted it so that its force continued regardless of the lack of any express prohibited reason in the mind of Walshe.²³⁶

Again, this reasoning appears to support an objective approach. Even though Walshe, the decision-maker, did not have a prescribed reason in his mind when making the final decision (and so subjectively the final decision was not made because of a prescribed reason), there may still have been a breach if the initial rankings prepared by Lay had been tainted by a prescribed reason.

3 Conclusion on the Broader Approach

Prior to the enactment of the *Fair Work Act 2009* (Cth), several courts took a Broader Approach to the establishment of the causal link in the context of the reverse onus of proof. In contrast to the cases discussed as illustrative of the Barclay Approach, these Broader Approach cases appear to be more prevalent in the second half of the 20th century than the first. They also appear to draw more support from a reading of the objectives or purposes of the legislation as supporting trade union security, than the Barclay Approach cases. In the Broader Approach cases, courts have looked beyond the stated reason or reasons of the decision-maker, to examine broader factual material for the purpose of assessing, and inevitably finding, a connection or association between the employer's stated reason for its decision, or more broadly its decision, and the alleged prohibited ground.

233 *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251, 255–6.

234 *Ibid.*

235 *Ibid* 260, quoting *Elliot v Kodak Australasia Pty Ltd* (2001) 108 IR 23, 36 (Marshall J).

236 *Elliott v Kodak Australasia Pty Ltd* (2001) 129 IR 251, 260.

IV CONCLUSION

This article maps the history and development of the union victimisation protections, and more recently freedom of association provisions, considering both the legislative and case developments from the very early provisions in 1904, up until the position immediately before the *Fair Work Act 2009* (Cth) commenced. The article focuses on the causal link and reverse onus provisions, as these have been the most litigated and discussed aspects of the federal legislation over the years. It considers how the causal link and reverse onus sits in the context of a litigated matter as a whole, and discussed the matters that the applicant must prove before the reverse onus comes into effect as well as the level of proof required.

The second half of the article reviewed cases over the years, grouping them into two broad categories: cases taking a Barclay Approach (a reference to the High Court's decision in *Barclay*, where the fact that the decision-maker's evidence was accepted was a complete answer to the claim); and cases taking a Broader Approach (those that look beyond the decision-maker's evidence to consider the broader factual matrix). These categories are used in this article for convenience only. They provide useful groupings of decisions for analytical purposes, even though each is not defined by bright lines. Overall, it is difficult to discern any clear themes that explain why some courts took a Barclay Approach and others a Broader Approach, but it is interesting to note that examples of both categories can be found right throughout the history of these federal provisions.