When is a complaint of adverse action under the general protections "able to" be made? Section 341(1)(c)(ii) of the Fair Work Act 2009 (Cth) and PIA Mortgage Services v King

Emma Goodwin *MINTERELLISON*

Sections 340 and 341(1)(c)(ii) of the Fair Work Act 2009 (Cth) (FW Act) combine to protect employees from adverse action being taken against them by employers, in circumstances where the adverse action is being taken because the employee has made a complaint or inquiry to the employer in relation to the employee's employment. Precisely which complaints are worthy of protection has been the subject of extensive consideration since the enactment of the protection.

Earlier this year, in the Full Federal Court decision in *PIA Mortgage Services Pty Ltd v King*[1] (*PIA v King*), an appeal against a decision of Smith J in *King v PIA Mortgage Services Pty Ltd*[2] (*King v PIA*), their Honours Rangiah, Charlesworth and Snaden JJ explored this issue in depth.

Background: legal context

Legislative framework

The s 340 protection against the taking of adverse action in relation to workplace rights is a cornerstone of Pt 3-1 of the FW Act.

- Section 340 prohibits various workplace participants, such as employers, taking adverse action against other workplace participants, such as employees, in connection with the latter's workplace rights.
- Adverse action is defined in s 342 of the FW Act to encompass various actions, such as termination of an employee's employment.
- Workplace rights are defined in s 341(1) to include a range of matters. Importantly for present purposes, s 341(1)(c)(ii) provides that a person has a workplace right if the person "is able to make a complaint or inquiry . . . if the person is an employee — in relation to his or her employment".

Unlike many of the other protections in Pt 3-1, the s 340 protection on the basis of s 341(1)(c)(ii) has no direct equivalent in antecedent legislation. As a result, the scope of the protection has been much debated since its introduction in July 2009.

Court decisions and issues in interpreting the s 340 protection

Early decisions were mixed in their approach.[3]

A tension subsequently arose between a broad interpretation in *Murrihy v Betezy.com.au Pty Ltd*[4] (*Murrihy*) where Jessup J observed that the ordinary, literal reading of the provision was a wide one that covered the making of a complaint or inquiry to the relevant employer,[5] and a narrower approach in *Shea v TRUenergy Services Pty Ltd (No 6)*[6] (*Shea No 6*), where Dodds-Streeton J concluded that the use of the words "is able to" indicated that there were some complaints an employee *was not* able to make, and that a s 341(1)(c)(ii) complaint or inquiry is one underpinned by a source of "entitlement or right", such as a contract of employment, award or legislation.[7]

In 2019, the narrower *Shea No 6* approach was endorsed by the Full Federal Court in *Cigarette and Gift Warehouse Pty Ltd v Whelan*[8] (*Whelan*).

Another issue initially raised in *Shea No 6*, being the question of whether a qualifying complaint or inquiry must be made in "good faith", remained unsettled after Whelan.[9]

Recently, in *PIA v King*, a Full Court of the Federal Court has further considered these issues.

Background: the facts

Mr King was employed as the Chief Executive Officer of PIA, a mortgage broking business. PIA's sole director and shareholder was Mr Wang. For various reasons associated with illegal conduct of mortgage brokers (not by Mr King), Mr Wang elected to "park" PIA's business. On 3 April 2017, Mr Wang offered to

terminate Mr King's employment with 4 months' salary, being $100,000. Mr King did not accept. He commenced a period of pre-arranged annual leave on 4 April 2017 and on the same day wrote to Mr Wang, seeking greater compensation in relation to the termination. Mr Wang did not respond.

Mr King's lawyers then made claims of an alleged breach of contract (Mr King alleged that he was entitled to be retained for 5 years and it was apparent, by reason of Mr Wang's offer, that Mr Wang intended neither to employ him for the full 5 years nor pay a sum in lieu thereof) and an Australian Consumer Law (ACL)[10] claim (essentially, that Mr King had been misled about the potential of PIA's mortgage concern).

Following this, PIA wrote to Mr King asserting that, by reason of Mr King's failure to comply with the terms of his employment and his making of the contract and ACL demands, it was terminating his employment by accepting the repudiation of his employment contract and further because Mr King had been absent from work without reason for 2 or more days, in breach of a term of the employment contract.

Mr King brought proceedings, asserting:

- contraventions of ss 340 and 90 (payment of annual leave) of the FW Act
- breach of his employment contract and
- breach of the ACL

The breach of contract, ACL and s 90 claims are not discussed here.

Judgment at first instance: King v PIA

Complaint in relation to employment

In *King v PIA*, a decision handed down prior to *Whelan*, Smith J found that regardless of which of the *Shea No 6* or *Murrihy* interpretations was applied, Mr King had made a complaint in relation to his employment. This was because he had complained that his rights to be employed and paid for a 5-year term were threatened by Mr Wang's indication that he was going to terminate the contract.[11]

Without determining whether a complaint was required to be genuine to qualify, his Honour also assessed Mr King's complaint as genuine.[12] As Snaden J notes in his appeal judgment in *PIA v King*, it is not entirely clear whether Smith J found that the allegation of a breach of the ACL constituted a s 341(1)(c)(ii) complaint, although this appears to have been the case.[13]

Damages and accessorial liability

Smith J awarded Mr King $100,000 for the breach of contract, being the amount initially offered by Mr Wang to terminate Mr King's employment.[14]

Mr Wang was found, pursuant to s 550, to be accessorially liable for the s 340 contravention. This was because he had been involved in terminating Mr King's employment, instructed the solicitors, was at all critical meetings and had full knowledge of all facts and circumstances.[15]

Deferral of civil penalty decision

The civil penalty decision was deferred. That decision was ultimately made by Street J, who concluded that no civil penalty was required to be paid by either PIA or Mr Wang in respect of the s 340 contravention.[16]

Grounds of appeal

Employer's contentions

PIA appealed, contended that:

1) the Court erred in finding a contravention of s 340
2) the Court should have found the following:
   (a) Mr King was dismissed not because he exercised any workplace right to make a complaint, but by way of acceptance of his repudiation of the contract and by reason of his being absent without valid reason or permission for 2 or more days.
   (b) An employee does not have a workplace right to repudiate his or her contract of employment or be absent from employment without valid reason or permission.
   (c) Mr King's dismissal was not adverse action in relation to a workplace right.

PIA also challenged the quantum of compensation, the finding of accessorial liability and the penalty imposed for the s 90 breach.[17]

Cross-appeal by former employee

Mr King cross-appealed, contending that PIA was not entitled to terminate his contract; damages should be increased to the salary that would have been payable for the remainder of his employment; and that a penalty should be imposed for the s 340 contravention.[18]

Judgment on appeal to Full Court of Federal Court: PIA Mortgage v King

On appeal, there were two judgments, one of Rangiah and Charlesworth JJ, and the other of Snaden J. The court was in agreement that PIA had a right to terminate the contract and that the penalty for the s 90 breach should be reduced.

However, very different approaches were taken to the s 340 contravention.

What type of complaint is a person "able to" make under s 341(1)(c)(ii)? The majority judgment

Rangiah and Charlesworth JJ found that Mr King had two sources of a right to complain, and that he had exercised that right.[19] Mr King complained of an alleged breach of his contract of employment when PIA evinced an intention not to be bound, by terminating it prior to the end of the fixed 5-year period and refusing to pay his salary for the balance of the 5 years. He also complained of breach of the ACL. Accordingly, Mr King had exercised his s 341(1)(c)(ii) workplace right.[20]

PIA's solicitors' letter indicated that the reasons given for the dismissal included the making of those complaints and Mr Wang did not give evidence. The s 361 onus was therefore not discharged and the trial judge's finding was affirmed.[21]

Observations on Shea No 6 case

In reaching this conclusion, Rangiah and Charlesworth JJ concluded that Dodds-Streeton J was correct in *Shea No 6* to find that the phrase "is able to make a complaint or inquiry" in s 341(1)(c)(ii) operates to limit the scope of the protection.[22] However, their Honours considered that Dodds-Streeton J's statement that a complaint "must be underpinned by an entitlement or right" was ambiguous:

> On one view, it may indicate that the complaint "must be underpinned by an entitlement or right *to make a complaint*". On another, it may indicate that the provision captures any complaint by an employee concerning an entitlement or right related to his or her employment. In our opinion, the former view is consistent with the succeeding sentence in the passage and with s 341(1) of the FW Act as a whole. The phrase "is able to" appears in both s 341(1)(b) and (c). In s 341(1)(b), the phrase indicates an entitlement or right to initiate, or participate in, a relevant process or proceeding. In s 341(1)(c)(i), the phrase indicates an entitlement or right to make a complaint or inquiry to a person or body. Consonantly, in s 341(1)(c)(ii), the phrase describes a right or entitlement to make a complaint or inquiry in relation to the employee's employment.[23]

Broad operation of s 340(1)

Their Honours went on to observe that s 340(1) is protective, suggesting that an unduly narrow or restrictive view of s 341(1)(c)(ii) should not be adopted.[24] Further, the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) (EM) suggests that a broad operation is intended.[25] Accordingly, a narrow construction would "produce incongruous results that are inconsistent with the legislative purpose":

> There will be some conditions of employment that are both terms of an employment contract and prescribed under legislation or an industrial instrument, and some that are one but not the other. Section 340(1) of the FW Act, taken with s 341(1)(a), (b) and (c)(i), protects an employee who complains about a breach of conditions prescribed under legislation, an award or enterprise agreement. However, under the view taken by Snaden J, s 340(1) would only protect an employee who complained about the employer's breach of a purely contractual term if the contract itself provided an entitlement to make a complaint or inquiry (perhaps subject to ss 542 and 543). That would leave the many employees whose employment contracts do not contain such an entitlement vulnerable to dismissal or other adverse action upon complaining about employers' alleged breaches of the employment contract. The incongruity arises from employees being protected from adverse action upon complaining of an employer's breach of some conditions of employment but not others. Having regard to the broad language of s 341(1)(c)(ii), it seems unlikely that the legislative intention is to protect only some complaints of breaches of conditions of employment, and to leave others unprotected.[26]

Sources of ability to make complaints

The majority concluded that s 341(1)(c)(ii) is not confined to rights, rules and responsibilities under, or arising from, workplace laws and workplace instruments. An employee complaining under s 341(1)(c)(ii) has other sources of ability to make a complaint, such as legislative provisions that are not workplace laws, contractual terms providing a right to make complaints and the general law.[27]

For the majority, the EM supports this, by providing an example of an employee writing to the Australian Competition and Consumer Commission (ACCC) in the mistaken belief that it can investigate underpayment of wages, thereby showing that the section "may be engaged even where there is no statutory provision expressly or directly conferring a right to complain or commence proceedings".[28]

Their Honours further observed the following:

- ***Complaint about breach of statutory provision relating to employment***
  An employee is also "able to" complain of an alleged contravention of a statutory provision relating to the employment. The ability derives from at least the statutory provision alleged to have been contravened. The statute need not expressly or directly confer a right to bring proceedings or to complain to an authority:

  > The ability encompasses making a complaint to the employer or an appropriate authority about the alleged contravention, whether or not the statute directly provides a right to sue or make a complaint.[29]

- ***Right to complain under general law and breach of contract***
  In relation to contracts, the broad language of s 341(1)(c)(ii) extends to a right to complain arising under the general law, not just a right under

the contract itself to complain.[30]

In this respect, bringing a legal claim in relation to an alleged breach of the contract of employment:

> . . . may be regarded as the ultimate form of complaint . . . [I]n our opinion, an employee is "able to make a complaint" about his or her employer's alleged breach of the contract of employment. That ability is "underpinned by" . . . the right to sue, and extends to making a verbal or written complaint to the employer about an alleged breach of the contract.[31]

An employee is therefore "able to" complain in relation to an alleged breach of the contract of employment,[32] the source of the ability being the general law governing contracts of employment. For the majority, this conclusion is also consistent with *Whelan*.[33]

The majority made it clear that their observations were not intended to foreclose argument as to other circumstances that may give rise to an ability to make a complaint.[34]

What type of complaint is a person "able to" make under s 341(1)(c)(ii)? The minority judgment

More restricted view of scope of legislative provision

Snaden J took a more restricted view of the scope of s 341(1)(c)(ii). For Snaden J, neither of the complaints made by Mr King were complaints that he was "able to make" for s 341(1)(c)(ii) purposes,[35] so there was no contravention of s 340.[36]

His Honour also endorsed the observations in *Shea No 6* and *Whelan* that in order for there to be complaints that employees were "able to" make, there must also be complaints that employees were "not able" to make, and that Mr King was required to identify a source of an entitlement or right to complain or inquire.[37]

For Snaden J, however, such sources might be a dispute resolution clause in an employment contract; an award or statutory instrument that provides for the airing of employment-related grievances; a statutory procedure for dealing with alleged infractions; or an applicable workplace policy or procedure:[38]

> There is nothing inherent in an ability to vindicate rights under the law that confers a related ability to complain about their trespass beforehand. Absent some instrumental right to do so, a person who complains that their legal rights have been (or are being) interfered with does so not by dint of an ability conferred by the statute or law that establishes those rights; but, rather and more simply, by exercising nothing more than his or her freedom to communicate.[39]

Further, an ability to complain does not exist merely because the subject about which a grievance is aired or an inquiry is advanced is one for which a prevailing employment contract makes provision. That may be a reason why an employee wishes to complain, but it does not confer a relevant ability to do so.[40] A person doesn't have a s 341(1)(c)(ii) ability to complain or inquire merely because he or she may have legal rights that are or might imminently be adversely affected by another person's conduct, or that otherwise might potentially be the subject of some later vindication in court.[41]

In reaching this conclusion, Snaden J took the view that the decision in *Whelan* did not entirely reflect Dodds-Streeton J's decision in *Shea No 6*. For Snaden J, her Honour's conclusion was that it was the ability to *complain* that required the foundation, not the source of entitlement.[42]

Further observations: nature of complaint, genuinely held, good faith and proper purpose, and "extraneous" purpose

Snaden J further considered the dictionary meaning of "complaint"[43] and adopted Dodds-Streeton J's observations in *Shea No 6* that:

> (a) a complaint is a communication which, whether expressly or implicitly, as a matter of substance, irrespective of the words used, conveys a grievance, a finding of fault or accusation;
> (b) the grievance, finding of fault or accusation must be genuinely held or considered valid by the complainant;
> (c) the grievance, finding of fault or accusation need not be substantiated, proved or ultimately established, but the exercise of the workplace right constituted by the making of the complaint must be in good faith and for a proper purpose; [and]
> (d) the proper purpose of making a complaint is giving notification of the grievance, accusation or finding of fault so that it may be, at least, received and, where appropriate, investigated or redressed. If a grievance or accusation is communicated in order to achieve some extraneous purpose unrelated to its notification, investigation or redress, it is not a complaint made in good faith for a proper purpose and is not within the ambit of s 341(1)(c)(ii) . . .[44]

Potential implications for employment

Snaden J observed:

- a complaint need not be directly related to its maker's employment, but likely need only have potential implications for the complainant's employment[45]
- that in this case, both complaints were in relation to Mr King's employment[46] and
- that Mr Wang's failure to give evidence compelled a finding that the termination was because of the complaints[47]

Complaints were not within s 341(1)(c)(ii)

Nevertheless, for Snaden J, Mr King's complaints were not s 341(1)(c)(ii) complaints. This was because:

- the ACL complaint was:

> . . . founded upon nothing more than that Mr King perceived that he was the victim of actionable conduct. He was, of course, at liberty to prosecute that grievance, including by means of his 4 April Email and the 12 April Letter. But to observe as much is not to identify a right or entitlement, founded instrumentally or otherwise, to complain or inquire as he did. Mr King was "able to make" his complaint in the sense that he was possessed of the means to articulate it: he could compose and send an email, and instruct his lawyers to send a letter. He was "able to" threaten to access a universally available justice system through which he could seek to vindicate his legal rights (actual or perceived) in court. But his complaint was not one that he was "able to make" in the sense identified in *Shea*. He did not possess any identifiable "entitlement or right" to complain or inquire as he did[;][48]

- in relation to the contractual complaint:

> . . . Mr King . . . sought to hold PIAMS to what he considered was the bargain that he had struck with it. But . . . to acknowledge that reality is not to identify a right or entitlement, conferred instrumentally or otherwise, pursuant to which the grievance at the heart of the Termination Complaint was "able to" be advanced. Mr King undoubtedly felt that he had a *reason* to complain as he did; but that is not the same as possessing an *ability* to do so. A person is not endowed with an *ability* to complain about something merely because he or she has something to complain about. What must be shown is some right or entitlement to complain or inquire: some conveyed ability that distinguishes a complaint or inquiry that qualifies as the exercise of a workplace right from a complaint or inquiry made merely as an incident of the complainant's ability to communicate.[49]

Is there a requirement that a s 341(1)(c)(ii) complaint be made in good faith?

All three judges appear to have endorsed a requirement that a s 341(1)(c)(ii) complaint must be made genuinely, in good faith and for a proper purpose.[50]

Rangiah and Charlesworth JJ adopted the position on this issue taken in *Shea No 6*.[51] It should be noted that on appeal from *Shea No 6* in *Shea v EnergyAustralia Services Pty Ltd*,[52] a previous Full Federal Court had declined to expressly endorse the good faith requirement, commenting that such a limitation should not be "too readily" imposed.[53] The majority concluded that Mr King's complaints were genuinely made.[54]

Snaden J expressly approved observations of Dodds-Streeton J, including that the complaint should be genuine.[55] While Snaden J took the view that the question did not arise for consideration in *PIA v King*,[56] His Honour did observe that there was:

> . . . in my view, no doubt that Mr King's complaints were genuinely advanced (in the sense that he considered himself well-founded to complain about the states of affairs to which they pertained) and the appellants did not contend otherwise.[57]

Accessorial liability

The majority affirmed the first instance decision on the question of accessorial liability for the s 340 breach.[58] Snaden J would have set aside the accessorial liability finding, on the basis that there was no primary contravention of s 340.[59]

The issue of damages and penalty

As to damages and penalty, the majority concluded that compensation for the breach of contract had been correctly assessed at $100,000.[60] Snaden J would have set aside the compensation order, given that in his view there was no s 340 contravention.[61]

The majority concluded that Street J was incorrect and that penalties should be awarded for the s 340 contravention, being $8100 for PIA and $1620 for Mr Wang.[62] Snaden J found that if there had been a s 340 contravention, a penalty should have been imposed.[63]

All three judges agreed that the penalty for the s 90 contravention was excessive and should be reduced to $8100.[64]

Comment on PIA v King

PIA v King provides welcome superior court clarity in relation to some of the uncertainties that have plagued the operation of s 341(1)(c)(ii) since its introduction.

The decision entrenches the view originally espoused in *Shea No 6*, that a s 341(1)(c)(ii) complaint or inquiry is not one at large and must be underpinned by a source of "entitlement or right", such as a contract of employment, award or legislation. This will stand as the legal position unless and until Snaden J's dissenting, narrower, interpretation receives favour in a subsequent Full Federal Court or High Court judgment, or in the unlikely event that there is a resurrection of the broader view in *Murrihy*. In the author's view, of the two judgments, the majority's position in *PIA v King* is more consistent with the language and purpose of s 341(1)(c)(ii).

The case also represents the first Full Federal Court endorsement of the requirement that a s 341(1)(c)(ii) complaint be in good faith and for a proper purpose. Again, this is now the established legal test, unless and until the decision is overruled.

However, not all is resolved by *PIA v King*. The majority's judgment leaves open the question of exactly what may constitute a source of right or entitlement for

s 341(1)(c)(ii) purposes, leaving scope for future argument. Accordingly, the parameters of s 341(1)(c)(ii) are not yet entirely settled.

The views expressed in this article are those of the author and not necessarily of MinterEllison.

Emma Goodwin
Senior Associate
MinterEllison
Emma.Goodwin@minterellison.com
www.minterellison.com

Footnotes

1. *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15; BC202001049.
2. *King v PIA Mortgage Services Pty Ltd* [2018] FCCA 3426.
3. See, for example, *Construction, Forestry, Mining and Energy Union v Pilbara Iron Co (Services) Pty Ltd (No 3)* [2012] FCA 697; BC201204747; and *Harrison v In Control Pty Ltd* (2013) 273 FLR 190; 230 IR 452; [2013] FMCA 149; BC201301361.
4. *Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908.
5. Above, at [141].
6. *Shea v TRUenergy Services Pty Ltd (No 6)* (2014) 314 ALR 346; 242 IR 1; [2014] FCA 271; BC201402745.
7. Above, at [625].
8. *Cigarette and Gift Warehouse Pty Ltd v Whelan* (2019) 268 FCR 46; 285 IR 290; [2019] FCAFC 16; BC201900620 at [28].
9. Above n 6, at [620]–[624]; *Shea v EnergyAustralia Services Pty Ltd* (2014) 242 IR 159; [2014] FCAFC 167; BC201410382 at [12]; *Environmental Group Ltd v Bowd* (2019) 137 ACSR 352; 288 IR 396; [2019] FCA 951; BC201905295 at [143]–[145].
10. Schedule 2 to the Competition and Consumer Act 2010 (Cth).
11. Above n 2, at [127]–[128].
12. Above n 2, at [129]–[130].
13. Above n 1, at [109]–[110] per Snaden J.
14. Above n 2, at [150]–[152].
15. Above n 2, at [140]–[141].
16. *King v PIA Mortgage Services Pty Ltd (No 2)* [2019] FCCA 1460; BC201904523 at [33].
17. Above n 1, at [119]–[124] per Snaden J.
18. Above n 1, at [128]–[130] per Snaden J.
19. Above n 1, at [6] per Rangiah and Charlesworth JJ.
20. Above n 1, at [32] per Rangiah and Charlesworth JJ.
21. Above n 1, at [34]–[37] per Rangiah and Charlesworth JJ.
22. Above n 1, at [11] per Rangiah and Charlesworth JJ.
23. Above n 1, at [13] per Rangiah and Charlesworth JJ.
24. Above n 1, at [22] per Rangiah and Charlesworth JJ.
25. Above n 1, at [23] per Rangiah and Charlesworth JJ.
26. Above n 1, at [24] per Rangiah and Charlesworth JJ.
27. Above n 1, at [16] per Rangiah and Charlesworth JJ.
28. Above n 1, at [17] per Rangiah and Charlesworth JJ.
29. Above n 1, at [20] per Rangiah and Charlesworth JJ.
30. Above n 1, at [18] per Rangiah and Charlesworth JJ.
31. Above n 1, at [19] per Rangiah and Charlesworth JJ.
32. Above n 1, at [26] per Rangiah and Charlesworth JJ.
33. Above n 1, at [25] per Rangiah and Charlesworth JJ.
34. Above n 1, at [27] per Rangiah and Charlesworth JJ.
35. Above n 1, at [159] per Snaden J.
36. Above n 1, at [175] per Snaden J.
37. Above n 1, at [163]–[164] per Snaden J.
38. Above n 1, at [165] per Snaden J.
39. Above n 1, at [169] per Snaden J.
40. Above n 1, at [173] per Snaden J.
41. Above n 1, at [174] per Snaden J.
42. Above n 1, at [172] per Snaden J.
43. Above n 1, at [136]–[137] per Snaden J.
44. Above n 1, at [137] per Snaden J, citing above n 6, at [29].
45. Above n 1, at [138] per Snaden J.
46. Above n 1, at [140]–[143] per Snaden J.
47. Above n 1, at [157] per Snaden J.
48. Above n 1, at [166] per Snaden J.
49. Above n 1, at [168] per Snaden J.
50. Above n 1, at [26] per Rangiah and Charlesworth JJ and at [137], per Snaden J.
51. And subsequently in *Environmental Group Ltd v Bowd,* above n 9, at [143]–[145].
52. *Shea v EnergyAustralia Services Pty Ltd*, above n 9.
53. *Shea v EnergyAustralia Services Pty Ltd*, above n 9, at [12].
54. Above n 1, at at [29]–[32] per Rangiah and Charlesworth JJ.
55. Above n 1, at [137] per Snaden J.
56. Above.
57. Above.
58. Above n 1, at [37] per Rangiah and Charlesworth JJ.
59. Above n 1, at [183]–[185] per Snaden J.
60. Above n 1, at [38]–[51] per Rangiah and Charlesworth JJ.
61. Above n 1, at [182] per Snaden J.
62. Above n 1, at [52]–[61] per Rangiah and Charlesworth JJ.
63. Above n 1, at [213]–[214] per Snaden J.
64. Above n 1, at [62] per Rangiah and Charlesworth JJ and at [186]–[193] per Snaden J.