Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015

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Law and Bills Digest Section

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Date introduced: 19 October 2015
House: House of Representatives
Private Member’s Bill introduced by: George Christensen MP
Commencement: On the day after the Act receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
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Purpose of the Bill

The Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015 (the Bill) is a Private Member’s Bill that will amend the Fair Work Act 2009 (the FWA) to prohibit employers from discriminating against prospective employees based upon their geographical location.¹

The Members who introduced and seconded the Bill argue that it is a measure that will ensure that ‘locals can never be specifically excluded’ from applying for jobs near where they live by making it ‘illegal for companies to lock people out of jobs based on their home location’.² It is argued that the Bill will ‘ensure that Central Queensladers can apply for Central Queensland jobs in our coalinging sector’ without facing discrimination in favour of fly-in-fly-out (FIFO) workers whilst still allowing ‘the flexibility to use FIFO where needed’ and thus ensuring that when the resource industry recovers FIFO workers can still be recruited.³

Background

The increasing use of fly-in-fly-out workers (FIFO) in the resources sector has been well documented.⁴ One controversial aspect of the increased usage of FIFO workforces on resources projects and in mines has been the preferential recruitment of employees who live near certain airports over those who do not. An extract from a job advertisement below highlights the type of conduct this Bill is aimed at preventing:

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| Reporting to the Maintenance Analysis and Improvement Superintendent, the Specialist Analysis and Improvement will be engaged to provide specialist advice, execute analysis and benchmarking of the Maintenance performance at the Caval Ridge Mine. You will be responsible for identifying and implementing improvement initiatives that enable Maintenance Excellence and support business priorities for continuous improvement. This role is a FIFO opportunity with the requirement for you to reside within 100km radius of the Brisbane Airport on a 4/2/4/4 roster. |
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Put simply, some employers are choosing only to employ workers on a FIFO basis, thus excluding potential employees who live near resources projects or mines who could drive or take public transport to the work site. The Bill seeks to end situations where locally based potential employees cannot apply for advertised jobs by prohibiting ‘discriminatory employment practices’ such as requiring a potential employee to ‘live within 100 km of specified airports’.⁵

Committee consideration

At the time of writing, the Bill had not been referred to any committee for inquiry and report.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.⁶

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3. Ibid.
5. Explanatory Memorandum, Fair Work Amendment (Prohibiting Discrimination Based On Location) Bill 2015, op. cit., p. 3.
Policy position of the Government

It appears that the Government has not adopted a formal policy position in relation to the specific measure proposed by the Bill. Despite this, the Government has previously indicated support for 100 per cent FIFO workforces in certain circumstances and introduced legislation that will curtail a tax concession currently available to FIFO workers (the Zone Tax Offset).\(^7\) The Government, in response to a recommendation to reform Fringe Benefits Tax laws to remove the exemptions for:

- FIFO work camps that are co-located with regional towns and
- travel to and from the workplace for operational phases of regional mining projects

has indicated that it will examine those (and other) existing taxation arrangements as part of the ‘upcoming White Paper on the Reform of Australia’s Tax System’.\(^8\)

Whilst the Government is open to reviewing various tax concessions that arguably incentivise FIFO work patterns, it has not demonstrated any intention to restrict the ability of employers to choose the composition of their workforce (in relation to the proportion of FIFO and local employees).\(^9\)

As such, the current policy towards the resource companies’ recruitment policies is perhaps best described as ‘non-interventionist’ and hence Government support for the Bill appears unlikely.

Policy position of non-government parties/independents

Whilst no formal policy position in relation to the Bill appears to have been adopted at the time of writing, at its 47th National Conference, the ALP noted that the ‘growing preference for itinerant over residential workforces’ was leading to ‘discrimination against local workers in regional areas’.\(^10\) As a result, the ALP adopted a formal policy to:

... work with State and where applicable Local Governments to establish a regulatory framework that... ensures FIFO work arrangements are limited to genuinely remote and temporary operations...\(^11\)

Whilst the above policy does not foreshadow legislation being implemented at a Commonwealth level, the desired outcomes of the above underlying policy are not necessarily incompatible with the measure proposed by the Bill.

Whilst the Greens do not appear to have adopted a formal policy position in relation to the Bill, they have previously issued policy documents stating that they would ‘work to ensure that all mining activity... delivers long and short term benefits to local communities and the wider Australian community and would ‘oppose mining activity that is detrimental to ... the community’.\(^12\)

Whilst the above policy does not foreshadow specific measures of the type proposed by the Bill, it does not appear incompatible with the measure proposed by the Bill.

Position of major interest groups

As at the time of writing no Commonwealth Parliamentary committee inquiry into the Bill has been conducted, the position of major interest groups can only be inferred from their submissions to inquiries conducted by the Commonwealth and state parliaments into issues posed by FIFO work practices in general. Most the comments below are drawn from the recently concluded Queensland Parliament’s Infrastructure, Planning and Natural

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9. W Truss (Deputy Prime Minister and Minister for Infrastructure and Regional Development), Australian Government responds to FIFO report, media release, 4 June 2015, accessed 12 November 2015, p. 1. ‘... the Government recognises that fly-in, fly-out (FIFO) work practices are one way the labour market is responding to the demand for skilled workers around Australia in a range of sectors.’
Resources Committee Inquiry into FIFO and other long distance commuting work practices in regional Queensland (the Queensland Inquiry).  

**Industry stakeholders**

Most industry stakeholders are opposed to any moves to restrict their ability to hire workers on a FIFO-basis. For example, in its submission to a Queensland Inquiry, Rio Tinto stated:

> Any move to arbitrarily limit FIFO / DIDO... would seriously impact the sector’s ability to meet its labour needs and in some cases threaten project viability.  

The Association of Mining and Exploration Companies (AMEC) also expressed opposition to any moves to either incentivise local employment or to restrict the deployment of FIFO workers, noting:

> It must also be considered that there would be significant costs imposed upon a local community should FIFO not be employed as a workplace strategy. More housing, education, employment (for family members not employed in the mining project), childcare and infrastructure upgrades would be necessary...

AMEC suggests that **FIFO will be necessary as part of a suite of employment practices** throughout Queensland dependent upon the remoteness of the project, the availability of appropriately skilled locals, and costs to the local community to support the project.

Due to the cyclical nature of mining and the relatively short time-frame for construction projects, it is impractical to suggest a company could commit to an “all-local” workforce or a local town could justify outlaying capital to support short term infrastructure... **FIFO workforces are often a more expensive option, but are necessary due to the lack of a local, appropriately-experienced and skilled workforce.** In this situation, to incentivise other workforce practices is futile and to penalise companies that must rely on FIFO is structurally unfair. (emphasis added)

The Australian Mines and Metals Association (AMMA) likewise expressed opposition to any moves to restrict employers ability to use FIFO workers, stating that where a mine was more than 80 kilometres (km) away from a community ‘operating with a FIFO workforce is the only legitimate and safe way their workforce can arrive at work and go home safely from work’ and hence if ‘FIFO was restricted or banned these mines would close down’.  

**Trade unions**

A number of trade unions expressed concern about aspects of the ability of companies to hire workers on a FIFO basis. For example, the Australian Workers Union (AWU) expressed the view that resources sector companies should be ‘encouraged to invest in local communities’ by contributing to infrastructure development, investment and the expansion of skills in the relevant communities. AWU also stated:

> ... there should be no barriers for local people who are qualified from obtaining employment in mines or their construction. Mining operators, whether new or well established, should place a particular emphasis on supporting local youth and indigenous workers through apprenticeship and traineeship programs.

Similarly, the Electrical Trades Union of Employees Queensland (ETU) noted that people living near mines or resource projects often:
... suffer from “post code discrimination” where employers refuse to employ workers from the local area, despite them having the necessary qualifications and experience, increasing unemployment and limiting job opportunities for young local residents, and the impact of the economic cycle of the resources sector.19

However, the ETU also acknowledged the role that FIFO workers can play, stating that ‘employers should employ both local and FIFO employees, based on their ability to perform the work required, rather than the post code in which they live’ and that it was not ‘the Union’s intention to see existing workers removed from employment’.20 As a result, the ETU recommends that employers should be required to ‘employ a proportion of local, resident workers in addition to non-resident workers.”21 The Australian Manufacturing Workers’ Union (AMWU) expressed a similar view, stating that whilst FIFO work practices:

... may provide employment opportunities for workers in metropolitan areas, 100% FIFO work practices come at the expense of local workers in regional areas. It is the AMWU’s view that 100% FIFO practice is unsupportive of individuals, families and regional communities. Efforts should be made to curb this practice to restore balance and choice to workers and a fair opportunity for regional communities to remain sustainable.22

The Queensland Council of Unions (QCU) noted that FIFO was an important part of the overall labour market, but also made the point:

The union movement does not advocate the eradication of FIFO and other long distance commuting work practices as they clearly have their place in a modern setting... There are also some projects that could only be serviced by such arrangements and the complete removal of FIFO would be absurd... The complete removal of FIFO would be as absurd as imposing a policy of 100% FIFO when there is a ready, willing and able workforce at the disposal of the companies constructing or operating the mine.23

The Construction, Forestry, Mining and Energy Union’s (CFMEU) recommendations to the Queensland Inquiry are broadly reflective of the views noted above. The CFMEU recommended that compulsory 100% FIFO operations be discontinued and that discrimination against local workers in favour of FIFO workers be stopped.24

**Local Councils**

The Local Government Association of Queensland (LGAQ) (the peak body for local government in Queensland) is opposed to 100% FIFO developments in ‘established resource communities’ because they:

- lead to discrimination against workers outside of identified FIFO hubs for employment opportunities
- negatively impact the social cohesion of local communities and
- diminish the transfer of economic benefits to local and regional communities.25

However, the LGAQ notes:

whilst the LGAQ’s policy position on 100 percent FIFO is clear, what might represent a suitable level of FIFO / non-resident workforce versus local workforce has not been generally well established. This is due to FIFO being seen to have both positive and negative impacts on local governments and their communities.26

A number of local councils in Queensland expressed similar sentiments.27 However, not all local governments oppose 100% FIFO workforces. For example, the Cairns Regional Council (CRC) noting that any restriction of

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20. Ibid., p. 8.
21. Ibid.
26. Ibid.
27. See for example: Western Downs Regional Council (WQCC), [Submission](#) to the Queensland Inquiry, 21 May 2015, p. 1, accessed 10 November 2015; ‘WQCC opposes a 100% FIFO workforce however understands the role and requirement for FIFO in regional areas. WQCC prefers and strongly encourages proponents to develop and implement a robust live local policy...’; Isaac Regional Council, [Submission](#) to the Queensland Inquiry, 25 May 2015, p. 11: ‘Overturn mandated FIFO practices and ensure the local labour market is not excluded from local employment opportunities’, Mackay Regional Council, [Submission](#) to the Queensland Inquiry, 25 May 2015, p. 1.: ‘... just as 100% local
‘FIFO work practices will have a significant impact on the Cairns economy’ and stating that it would ‘encourage the Queensland Parliament to consider not imposing any restrictions on FIFO work practices’.  

Other groups

The Australian Christian Lobby (ACL) noted that due to the demand for an exclusively FIFO workforce at certain mines and projects that ‘in some parts of Queensland... local workers can only be employed if they move away and fly in with everyone else’ and concluded that such practices were ‘destroying families and communities’.  

In its report on the Queensland Inquiry, the Queensland Parliament’s Infrastructure, Planning and Natural Resources Committee stated:

A fundamental recommendation of the committee’s inquiry is for the government to consider amending the Anti-Discrimination Act 1991 [QLD] to include location as a prohibited ground of discrimination. The committee was of the view that this is one of the ways to facilitate choice for local people without making retrospective amendments and creating sovereign risk.  

Financial implications

The Explanatory Memorandum to the Bill states that the Bill will not have any financial impact on the Commonwealth.  

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights ( Parliamentary Scrutiny) Act 2011 (Cth), Mr Christensen, the Member who introduced the Bill, has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act, and considers that the Bill is compatible.  

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights considers that the Bill does not raise human rights concerns.  

Key issues and provisions

As noted earlier in this Digest, the purpose of the Bill is to prohibit employers from discriminating against prospective employees based upon their geographical location. In short it aims to prohibit ‘postcode discrimination’, that is, practices such as employers:

- recruiting exclusively (or in a significantly biased way) from specific geographical locations and postcodes or
- refusing to consider applicants from outside specific geographical locations and postcodes.

Whilst the Bill is clearly aimed at reducing the prevalence of mining and resource companies exclusively recruiting FIFO workers located near certain airports and refusing to consider applications from workers who could drive to the worksite, it will be applicable to other circumstances and industries. This is because it seeks to extend the FWA’s ‘general protections’ regime to include discrimination on the basis of geographical location.
To give context to the proposed changes, the issues it raises, potential defences and the likelihood of the Bill achieving its policy objective, a brief overview of the FWA’s general protection regime is provided below.

**Overview of the Fair Work Act’s ‘general protections’ regime**

Part 3-1 of Chapter 3 of the FWA establishes the ‘general protections’ regime. In short, the FWA protects certain rights, which, relevantly to the Bill, includes the right to be free from unlawful discrimination. It does so by prohibiting a person from taking ‘adverse action’ against another person (amongst other things):

- because the other person has a ‘workplace right’ or
- because of the person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The protection in relation a ‘workplace right’ is one of general application, and encompasses the workplace right to be free from unlawful discrimination. However, the FWA also contains a specific protection in relation to adverse action taken because of unlawful discrimination. It is that provision that the Bill is modelled on. Both however, are triggered by ‘adverse action’ being taken.

**What is adverse action?**

Section 342 of the FWA sets out circumstances in which a person takes adverse action against another person. Relevantly to the measure proposed by the Bill, this includes circumstances related to employers dealing with prospective employees (that is, job applicants). Subsection 342(1) provides that a person takes adverse action when they:

- refuse to employ the person or
- discriminate against the prospective employee in the terms and conditions on which the prospective employer offers to employee the prospective employee.

However, action authorised by a Commonwealth or prescribed state or territory law is not adverse action.

**The prohibition against discrimination and adverse action**

Section 351 of the FWA, on which the Bill is modelled, prohibits an employer from taking adverse action against an employee on the basis of the protected attributes noted earlier. This includes circumstances where a prospective employer refuses to hire a person or discriminates against the prospective employee in the terms and conditions which are offered to the prospective employee because of a protected attribute. However, subsection 351(2) provides that an employer does not take adverse action where the action taken:

- is not unlawful under any anti-discrimination law in force in the place where the action took place (that is, under relevant Commonwealth, state or territory laws) or
- was taken because of the inherent requirements of the position concerned.

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37. This is because a ‘workplace right’ is defined in the FWA as where a person is ‘entitled to the benefit of… a workplace law’ or ‘able to initiate, or participate in, a process or proceedings under a workplace law’: *Fair Work Act 2009*, paragraphs 341(1)(a) and (b). Importantly, a ‘workplace law’ is defined as including both the FWA and any other Commonwealth, state or territory law that ‘regulates the relationship between employers and employees’, including work health and safety (WHS) laws: *Fair Work Act 2009*, section 12. The relevant legislation listed in the FWA is applicable in the workplace in each jurisdiction. Further, the various Commonwealth, state and territory anti-discrimination laws provide a ‘benefit’, namely the right to be free from unlawful discrimination, including in employment-related matters (see, for example, section 14 of the *Sex Discrimination Act 1984* (Cth)). It flows from this that the relevant laws therefore regulate ‘the relationship between employers and employees’ and hence each are a ‘workplace law’ for the purpose of the FWA. Therefore a key workplace right is to be free from unlawful discrimination, and, as a result the FWA general protection regime applies to discrimination rendered unlawful by either the *Fair Work Act 2009* itself, or other Commonwealth, state or territory laws.
42. *Fair Work Act 2009*, subsection 351(1).
As the Bill also includes the ‘inherent requirements’ defence, it is considered later in this Digest.

**Reverse onus of proof**

Section 361 of the *FWA* provides that where a person brings an application for adverse action under Part 3-1, it must be presumed that the action was taken for the alleged prohibited reason. The presumption arises where the applicant establishes facts that provide the basis for the alleged prohibited conduct by the respondent.43

This presumption can, of course, be displaced by evidence led by the respondent (for example, that a person was not hired because they lacked suitable experience, not because they lived outside of a particular postcode near a specific airport). It been noted that, from the majority of cases dealing with discrimination, a reverse onus of proof does not appear to be a panacea for easily proving allegations.44

If the Bill is passed, then the reverse onus of proof will apply to contraventions of the prohibition against taking adverse action against an employee or prospective employee because of where they live. As a result, an employer would be required to lead evidence to prove that they refused to hire a prospective employee on some other grounds other than where the person lived.

**Remedies**

An employee who believes they have been subjected to adverse action can commence proceedings by lodging an application with the Fair Work Commission (FWC) or a court (in certain circumstances).45 The diagram below outlines how non-dismissal disputes are handled by the FWC and Court.

*Figure 1: general protections claims dispute processes*

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The FWC then notifies both parties that it can only deal with the dispute if both parties agree. The parties are also advised that if they do not agree to the Commission having a conference, the applicant has the option of taking the dispute directly to the court. If the parties to the dispute agree to participate, the FWC may deal with a non-dismissal dispute by conference.\(^{46}\) If not, the applicant can commence court proceedings.\(^{47}\)

If the matter is heard before the FWC and resolved during the conference, the parties will enter into a settlement agreement that reflects their agreed outcome. For example, a settlement agreement may contain details of compensation or steps to be taken, as well as issues regarding privacy or non-disparagement terms. If the matter is heard before a court, the Federal Court or the Federal Circuit Court may make any order the court considers appropriate if satisfied that a person took adverse action against a person with one of the protected attributes discussed above, because of that protected attribute or because they had or exercised a workplace right (for example, where a prospective employer refused to hire a prospective employee because of their religion). Orders the Federal Court or Federal Circuit Court may make include an order:

- granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
- awarding compensation for loss that a person has suffered because of the contravention (including interest)
- imposing a pecuniary penalty to be paid to the Commonwealth, a particular organisation or a particular person (for example, the applicant) and
- requiring a person to pay costs incurred by another party to the proceedings.\(^{48}\)

In summary, where an adverse action claim is successful, a range of remedies are available including injunctions, compensation, the imposition of pecuniary penalties and recovering costs.

**Defence: inherent requirements of the job**

Currently section 351 of the *FWA*, on which proposed section 351A is modelled, provides that an action taken because of the inherent requirements of the position concerned is not adverse action. It is beyond the scope of this digest to fully explore how the phrase ‘inherent requirements’ has been interpreted by courts in the employment law context.\(^{49}\) However, some observations relevant to the measure proposed by the Bill include:

- the phrase ‘inherent requirements’ will usually be given its natural and ordinary meaning \textbf{but}
- the interpretation of ‘inherent requirements’ in cases decided under disability and sex discrimination legislation may be useful in some cases\(^{50}\) therefore
- whether a requirement is inherent to a position must be answered by reference to the terms of the contract and the function which the employee performs for the employer, by reference to that employer.\(^{51}\)

As a result, it would appear that the training, qualifications, experience, ability to meet certain physical demands and (possibly) the ability to comply with a particular roster may all be ‘inherent requirements’ of a position.

**What is proposed by the Bill**

Proposed section 351A provides:

- an employer \textbf{must} not take adverse action against a person who is an employee, or prospective employee, of the employer \textbf{because of} where the person lives \textbf{but}
- the prohibition \textbf{does not apply} to action that is taken \textbf{because of} the inherent requirements of the particular position concerned.

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51. Ibid., as per Brennan CJ at [1].
In short, the Bill proposes to prohibit discrimination based on where a person lives, unless the location where a person lives is an inherent requirement of the particular position.

**Will it work?**

If passed, it may dissuade employers from advertising in the manner complained off. However, there are two issues that suggest that the Bill may not be as effective in preventing forms of ‘postcode discrimination’ other than openly advertising for applicants near specific airports. The first relates to the ‘inherent requirements’ defence, the second to how courts have ‘narrowly’ interpreted the FWA’s general protections provisions.

**Is living near a mine an inherent requirement of the role?**

The first issue that suggests that the measure proposed by the Bill may not be entirely effective in preventing ‘postcode discrimination’ is the inherent requirement defence.

Whilst case law on the issue is not determinative, it is clear that the ability to comply with a particular roster (for example, one with 12-hour shifts) may, in some circumstances, be viewed by a court as an inherent requirement of a position. If so, this has direct implications for the measure proposed by the Bill, and may undermine the intended policy objective of eliminating ‘postcode discrimination’.

A House of Representatives Standing Committee on Regional Australia’s (the Committee) report on FIFO work practices noted that 12-hour shifts are a common feature of the resources industry. It also noted that such shifts expose employees who commute a significant distance to and from a workplace to an increased risk of being in a motor vehicle accident, due to driver fatigue.  

Employers and accommodation providers were quick to condemn fatigued driving because of the related risk between fatigue and traffic accidents.

Given that WHS laws impose an obligation on employers to ensure a safe working environment, it could be argued that knowingly hiring employees who must engage in significant commutes prior to and after 12 hours shifts is unacceptable. This point was made by the AMMA when they noted that where a workplace was more than 80 km away from a community ‘operating with a FIFO workforce is the only legitimate and safe way their workforce can arrive at work and go home safely from work’. In addition, the Maranoa Regional Council noted:

... the structure of FIFO work schedules also impact on workers who reside close to the gas fields. The two weeks on, two weeks off roster does not promote relocation to regional areas. Many locals employed in the CSG sector wish to return to their homes post shift, however due to the roster are not allowed. (emphasis added)

It would appear that, given the use of 12 hour shifts, long commutes and WHS obligations imposed on employers that it is at least arguable that living in accommodation provided by the employer near the worksite is an ‘inherent requirement’ of some positions. Put another way, it may be argued that being able to work on a FIFO basis is an inherent requirement for some positions where work is conducted on remote sites.

Whilst this would be determined on a case-by-case basis, taking into account how far the person had to travel to their home, it nonetheless appears at the very least that companies that want to use a 100 per cent FIFO workforce may be able to argue that due to the use of 12-hours shifts and the need to maintain a safe working environment, being employed on a FIFO basis and living near a particular airport is an inherent requirement of the position. Clearly, this would undermine the effectiveness of the measure proposed by the Bill in reducing or eliminating ‘postcode discrimination’, at least in some situations.

**The ‘narrow’ interpretation of the general protection provisions**

The second issue that suggests that the measure proposed by the Bill may not be entirely effective in preventing ‘postcode discrimination’ is how the general protections provision of the FWA has been interpreted by the courts.

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52. House of Representatives Standing Committee on Regional Australia, Cancer of the bush or salvation for our cities? Fly-in, fly-out and drive-in, drive-out workforce practices in Regional Australia, House of Representatives, Canberra, February 2013, paras 3.9, 3.56–3.73, accessed 10 November 2015.

53. Ibid., para 3.70.


It would appear that on the current interpretation, the provision may well be ineffective in circumstances where an employer convinces a court that the reason for refusing to employ a person living outside a certain area was motivated by non-prohibited reasons. This is because in most general protections cases the central question to be determined is whether adverse action was taken ‘because of’ a prohibited reason.  

Importantly, proposed subsection 351A(1) also uses the phrase ‘because of’. As a result of a number of recent court cases, the test that is currently applied can be summarised as follows:

- the court will determine the reasons of the employer's decision-maker for taking the adverse action
- this is a question of fact, answered by what actually (consciously) motivated the decision-maker (as determined by the evidence presented before the court)
- if the evidence given by the decision-maker is persuasive and properly tested against evidence relating to the surrounding circumstances (for consistency and reliability), then the court will accept the decision-maker’s evidence that they did not act for an unlawful reason in breach of Part 3-1 of the FWA and
- therefore adverse action will fail.

These decisions have attracted criticism from members of the judiciary, academics and trade unions. For example, one legal academic noted that these criticisms are not universally accepted. For example, the review of the FWA commission by the previous government (and prior to key High Court decisions being handed down) stated:

The Panel prefers the approach... [that] employers would have access to the defence that their belief about the lawfulness of their action was honestly held and reasonable considering all of the circumstances. If the employer gives testimony of such a belief about the lawfulness of the action, the employer no doubt would be

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59. CFMEU v Endeavour Coal Pty Ltd [2015] FCAFC 76, at [189].
60. Ibid., at [185].
cross-examined. To succeed, the employer would have to convince the judge, on a balance of probabilities, that in all of the circumstances the belief was honestly and sincerely held.  

The Panel recommended that the FWA be amended so that the ‘central consideration about the reason for adverse action is the subjective intention of the person taking the alleged adverse action’. Ultimately, whilst the FWA has not yet been amended to give effect to that recommendation, as this is the approach that has been adopted by the High Court, such an amendment would appear unnecessary at this time.

As a result, it is likely that where an employer refuses to employ a worker who lives locally in favour of a FIFO worker, provided the court is convinced that the ‘reason’ for doing so related to non-prohibited reasons such as:

• the local worker’s qualifications and experience
• their ability to safely commute to and from work or
• their ability to comply with a demanding roster featuring 12 hour shifts
then a court will find that no adverse action will have been taken, as it was not taken ‘because of’ where the person lived.

Concluding comments

The measure proposed by the Bill represents a simple and elegant response to a controversial issue. Its effectiveness is likely to be impacted by how courts interpret the ‘inherent requirement’ defence. In addition, clearly, if courts continue to apply the ‘narrow’ interpretation adopted by the High Court, then the effectiveness of the prohibition contained in proposed section 351A is likely to be, at the very least, limited.

However, despite this, if the Bill was passed it would, at the very least, be likely to somewhat deter some employers from engaging on a regular basis in the type of conduct that the Bill seeks to prohibit.

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64. Ibid., recommendation 47.