



Industrial Relations Commission  
of New South Wales

# Freedom from Victimisation under the IR Act and Barclay revisited.

30 April 2026

Commissioner Anthony Howell  
Commissioner Alison McRobert

# Industrial Relations and Other Legislation Amendment (Workplace Protections) Act 2025 (NSW)



## Commencement:

Date of assent: 3 July 2025  
(GG No.287, 11/07/2025, NSWGG-2025-287-3)

The focus is on when the detriment occurred (post 3 July 2025) not on when the protected matter arose.

## No retrospective operation

This approach was confirmed in *Grant v Commissioner of Police (NSW) (No 2)*

## Grant v Commissioner of Police (NSW) (No.2) [2025] NSWIRComm 1060 McDonald C at [26]

“... if an employee suffered a detriment as a result of action taken by the employer prior to 3 July 2025, the substantial and operative cause of which was because of a new protected matter referred to in s 210(1), regardless of when that new protected matter arose, the employee will not be entitled to relief. However, if the existence of the new protected matter arose prior to 3 July 2025, but the detrimental actions of the employer, that is, the act of victimisation occurred after 3 July 2025, the employee would, prima facie, be entitled to relief.”

See also *Walter v Transport Secretary* [2026] NSWIRComm 1008, *Gopinath v Health Secretary in respect of Northern Sydney Local Health District* [2025] NSWIRComm 1113



# Expanded Freedom of Association and Freedom from Victimisation

The three most significant reforms

1. **Creation of an express right to engage in industrial organising activity** (s 209(3)) (Freedom of Association)
2. **Expansion of the range of protected matters for victimisation** (s 210)
3. **Substantial change to the reverse onus of proof** (formerly s 210(2), now s 213(5))



# Amendments

**209A**

- See 209(3)

**209**

- 209 (3) definition of industrial organising activities

**210**

**211**

- Substantial amendment to subsection (1)

**212**

**213**

- Deletion of existing ss (2).

**213A**

New reverse onus in ss 213(5)

**214**

- Insert new ss 210 (2) and (3), connected with amendments to ss (1)

## 210 Freedom from victimisation – NEW

- 1) An employer or industrial organisation must not victimise an employee or prospective employee because the person—**
  - c) engages or proposes to engage in industrial organising activities, or**
  - d) refuses to engage in industrial action or another industrial organising activity, or**
  - g) has a role or responsibility under industrial relations legislation or an industrial instrument, or**
  - j) Is entitled to a benefit or claims a benefit:**
    - (i) under either or both of the following—**
      - (A) the Workers Compensation Act 1987, or**
      - (B) the Workplace Injury Management and Workers Compensation Act 1998, or**
    - (ii) in relation to other entitlements for a workplace injury, or**
  - k) has a characteristic protected from discrimination under the Anti-Discrimination Act 1977, or**
  - l) makes a complaint or inquiry—**
    - (i) about the person’s employment, or**
    - (ii) to a public authority about the person’s employer, including about matters other than about the person’s employment.**
- 2) The matters referred to in subsection (1)(m)–(s) do not limit the kind of complaint or inquiry referred to in subsection (1)(l).**
- 3) Subsection (1)(j) does not apply to matters concerning the dismissal of an employee to which the Workers Compensation Act 1987, Part 8 applies.**



# Modifications and renumbered provision

## New

### Section 210(1)

210(1) (c) (d) ,(g), (j), (k), (l)  
210(2) and (3)

## Modified

210(1)(d) (modified former (1)(c))  
210(1)(f) (modified former (1)(d))  
210(1)(i) (modified former (1)(e))  
210(1)(m) (modified former (1)(j))

## Renumbered

210(1)(e), formerly (1)(g)  
210(1)(i), formerly (1)(h)  
210(1)(m), formerly (1)(j)  
210(1)(n), formerly (1)(f)  
210(1)(o), formerly (1)(i)  
210(1)(p), formerly (1)(ia)  
210(1)(q), formerly (1)(ic)  
210(1)(r), formerly (1)(ib)  
210(1)(s), formerly (1)(k)

## Unchanged

210(1)(a) and (b)



# New Freedom of Association definition of Industrial Organising Activity: s 209(3)

(3) A member of an industrial organisation is entitled to do the following activities (industrial organising activities)—

- Creates an express statutory entitlement to engage in those activities
- Applies only to “a member” of an industrial organisation
- Closely reflects “industrial activities” listed in s347 of the Fair Work Act 2009 (Cth).

**An industrial organising activity by a member of an industrial organisation includes:**

- organising, promoting, encouraging or participating in a lawful activity for or on behalf of the industrial organisation (a, b)
- participating in industrial action organised or promoted by the industrial organisation (c)
- complying with a lawful request made by or requirement of the industrial organisation (d)
- representing or advancing the view, claims or interest of the industrial organisation (e)
- Paying a fee to or seeking to be represented by an industrial organisation (f, g)



# S 210 (1) (k) has a characteristic protected from Discrimination under the Anti – Discrimination Act

## Victimisation prohibited because a person has a protected characteristic

- Protected characteristics drawn from the *Anti-Discrimination Act 1977 (NSW)*
- Includes characteristics such as sex, race, age, disability, marital or domestic status, homosexuality, transgender status and carers' responsibilities
- Does not include all federal discrimination grounds. Unlike the *Fair Work Act*, does not extend to matters such as religion, political opinion, social origin, breastfeeding or family/domestic violence
- Closer alignment with federal general protections, within a victimisation / *Anti-Discrimination Act* framework

## Statutory limits (s 213A)

- Multiple actions under anti-discrimination laws are not permitted for the same conduct
- No double recovery of compensation



# Expanded Freedom from Victimisation : s 210

## Key features and Early Patterns in Applications before the Commission

### Types of Matters

#### Complaints or inquiries (s 210(1)(l))

- are the most common basis for applications relied on in around two-thirds of matters
- *Gopinath v Health Secretary* [2025] NSWIRComm 1113: construed broadly and not limited to formal or substantiated grievances

#### Workers compensation (s 210(1)(j))

- relied on in approximately one quarter of applications

#### Protected characteristics (s 210(1)(k))

- relied on in a smaller but growing group of matters most commonly illness or injury

#### Industrial organising activity

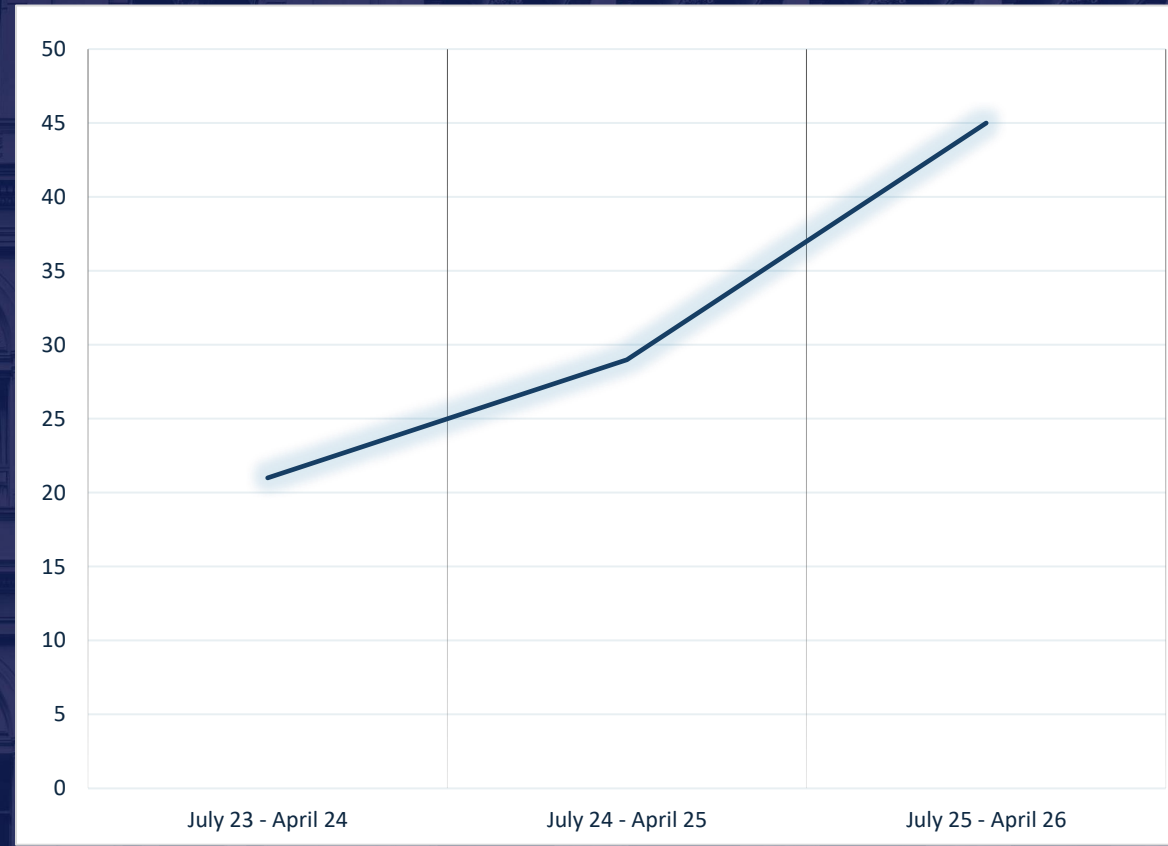
- no applications to date rely solely on this ground

### Representation trends

- self-represented applicants are increasing slightly outnumber represented parties (51% to 49%)
- approximately 51% unrepresented / 49% represented

#### Victimisation and discrimination frameworks

- increasing interaction in pleadings
- doctrinal interaction not yet extensively litigated



# New Reverse Onus – 213(5)

- (5) In proceedings under this section to enforce the provisions of section 210:
- (a) it is **presumed** that an employee or prospective employee **who suffers a detriment** as a result of action by the employer or industrial organisation was victimised because of a matter referred to in section 210 **alleged by the applicant to be the cause of the detrimental action**, and
  - (b) the presumption is rebutted if the **employer** or industrial organisation satisfies the Commission that, **objectively**, the alleged matter **was not a substantial and operative cause of the detrimental action**, and
  - (c) for paragraph (b), the Commission **may have regard to conscious and unconscious factors** for the alleged matter when determining if the alleged matter was not a substantial and operative cause of the detrimental action.





# New Reverse Onus: s 213(5) – Explanatory Memo

Schedule 1[16] of Workplace Protections Bill

“...The proposed amendment is in response to the decision of the High Court of Australia in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, relating to the reverse onus of proof under the Fair Work Act 2009 of the Commonwealth, to the extent to which the matter may inform the interpretation of the reverse onus of proof under the Act. The proposed amendment clarifies that the reasoning of the majority of the Full Federal Court of Australia in *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 is **the preferred test** when determining if the presumption has been rebutted.”



# Barclay v Bendigo Regional Institute of TAFE

## Barclay Email sent 29 January 2010

“**Subject: AEU – A note of caution**

Hi all,  
The flurry of activity across the Institute to prepare for the upcoming reaccreditation audit is getting to the pointy end with the material having been sent off for the auditors to look through prior to the visit in February.

It has been reported by several members that they have witnessed or been asked to be part of producing false and fraudulent documents for the audit.

It is stating the obvious but, **DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/ FRADULENT [sic] DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES.** If you have felt pressured to participate in this kind of activity please (as have several members to date) **contact the AEU and seek their support and advice.**

**Greg Barclay**  
**President**  
**BRIT AEU Sub-Branch”**

## Suspension/Employer’s Show Cause Letter – 2 Feb 2010

“...show cause why you should not be subject to disciplinary action for serious misconduct in your role as Team Leader — Teaching Excellence.”

“It appears to me that such disciplinary action may be warranted because of:

- the manner in which you have raised the allegation, via a broadly distributed email;
- your actions in not reporting the instances of alleged improper conduct directly to your manager or me to enable us to take appropriate action; and
- your refusal or failure to provide particulars of the allegations when asked to do so by your manager.”



# Barclay v Bendigo Regional Institute of TAFE

## Gray and Bromberg JJ



The Court is required to find the “real reason” for the detriment. [28]

“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.” [28]

“...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”. [28]

“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”. [28]

The real reason for imposing a detriment “must be shown to be ‘disassociated from the circumstance’ that the aggrieved person” has a protected attribute or had engaged in a protected industrial activity: [32], [74]

## High Court



The question of why an employer took adverse action against an employee is a question of fact. Absent reference to “objective” or “subjective” in the statutory language, to contrast the two in deciding that question of fact was to adopt an illusory frame of reference. [121], [126].

The text of the FW Act did not warrant “only an objective inquiry into a defendant employer’s reason, including any unconscious reason, for taking adverse action” [44] [124] [146]

It is the reasons of the decision maker at the time the adverse action was taken that is the focus of the inquiry. [127], [45]. As Heydon J put it “Examining whether a particular reason was an operative or immediate reason for an action calls for an inquiry into the mental processes of the person responsible for that action” [140], and “To search for the “reason” for a voluntary action is to search for the reasoning actually employed by the person who acted.” [146]

An employer need not entirely disassociate adverse action from a protected characteristic (here, an employee’s union position or activities). [6], [61], [62], [148]





## New Reverse Onus – s 213(5)

To engage reverse onus, nothing new.

The Applicant must:

- Establish they have suffered a detriment;
- Establish the protected characteristic; and
- Allege there the protected characteristic was a cause of the detriment.

(b) The presumption is rebutted if the employer satisfies the Commission that, **objectively**, the alleged matter was not a substantial and operative cause of the detrimental action, and

(c) In making that finding, “the Commission **may have regard to conscious and unconscious factors for the alleged matter** when determining if the alleged matter was not a substantial and operative cause of the detrimental action”.



# “Objectively” – s 213(5)(b)

## Old Test

What did the decision maker genuinely believe was their reason?

## New Test

Commission’s objective assessment of the real reason based on all the surrounding factors

*Gopinath v Health Secretary re Northern Sydney Local Health District* [2025] NSWIRComm 1113 at [33] – [38], [45] – [53]

47. ...the change from subjective to objective moves the focus from the reason which the decision-maker believes was their reason, including, of course, an assessment of whether the Commission accepts that as their reason, to an assessment by the Commission of all the surrounding facts and for the Commission to objectively determine the real reasons for the decision.





# Conscious and unconscious factors?

- Not unconscious 'reasons'
- Reasons of decision maker will still be a central consideration
- Likely still necessary to call evidence from the decision maker
- Even if decision maker evidence accepted, not necessarily decisive.

*Gopinath* at [53]:

...Presumably "may" is not permissive in the sense [the] Commission may freely choose to have regard to or not to have regard to such matters. Rather it must mean that in matters where the parties raise such issues, or if is otherwise apparent to the Commission that consideration should be given to them, the Commission must do its best to determine, based on the evidence before it, whether such factors are relevant to its determination of the objective reasons for the decision.



# Practical Implications?

- If a delegate misbehaves, address it via the union in the first instance..
- The Commission will need to make a specific finding about whether the relevant conduct by the Applicant was protected conduct, before addressing the reason of the decision maker.
- For an employer, clearly document the decision making process, identifying:
  - ✓ Who made what decisions in the particular decision making process?
  - ✓ What factors were taken into account in making the decision?
  - ✓ Why the decision was taken (ie the reason/s)?



### APPLICATION FOR RELIEF FROM VICTIMISATION

#### COURT DETAILS

Court Industrial Relations Commission of NSW  
Registry 2  
Case number

#### TITLE OF PROCEEDINGS

Applicant

Respondent (Employer)

#### FILING DETAILS

Filed for  
#Representative  
#Representative contact det

Applicant's contact details  
Respondent contact details

#### REMEDY

What orders are you seeking?

If claiming an order for payment, state the amount sought and the grounds including details of how each amount was calculated

#### PARTICULARS OF VICTIM

1 [State briefly but s placed by referenc

2 [ ]

#### DESCRIPTION OF BEHAVIOUR

Indicate which attribute or circumstance under s 210 of the *Industrial Relations Act 1996* (NSW) applies to you. You may tick

The victimisation occurred because

is or was a member or otherwise an elected repre

does not belong to an ind conscientious objection to employees.

engages or proposes to en Act, s 209(3)).

refuses to engage in indust

participates or proposes to exercises or proposes to e

has a role or responsibil instrument.

engages in or proposes to with the performance of the

is entitled to a benefit or industrial relations legislati

is entitled to a benefit or cl the *Workplace Injury Man* entitlements for a workplac

has a characteristic prote 1977.

makes a complaint or inqu about the person's employ employment, or

makes a complaint about a risk to health or exercis Part 5.

informs a person of an legislation or of an industr

informs a person of an *Operations Act 1997* by an

informs a person of or give meaning of the *Rail Safety*

informs a person of or giv the *Dangerous Goods (Fo* that Act, or a provision of i Act or those regulations.

reports a matter relating to the Chief Investigator, with a person employed in the T

assists the Independent Pi

#### OTHER PROCEEDINGS

Are there past or ongoing proceedings under an anti-discrimination law relating to the conduct that is the subject of this application?

If so, state the matter number.

#### LATE APPLICATION (if applicable)

If the application is being filed more than 21 days after the contravention occurred, what are the reasons for the application being filed late?

#### SIGNATURE

Signature of or on behalf of Applicant

Capacity [eg solicitor, authorised officer or industrial organisation]

Date of signature

#### NOTICE TO THE RESPONDENT(S)

1 You are required, under the *Industrial Relations Commission Rules 2022*, to file a notice of appearance at the Industrial Registry within 7 days of service of this notice on you.

2 If you do not enter an appearance, or if there is no attendance by you or your counsel, solicitor or agent at the time and place specified in this notice or as notified to you subsequently, the proceedings may be heard in your absence and an order may be made against you.

# Rules and Forms

- No specific Rules
- New specific form, Form 19
- No practice note, but useful summary of jurisdiction on the IRC website (“My legal problem is” menu, then “Victimisation” tab).

