FEDERAL COURT OF AUSTRALIA

Rumble v The Partnership trading as HWL Ebsworth Lawyers [2019] FCA 1409

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| File number: |  |
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| Judge: | **PERRAM J** |
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| Date of judgment: | 3 September 2019 |
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| Catchwords: | **INDUSTRIAL LAW** – adverse action – where applicant casual employee of law firm – where applicant made repeated public criticisms about government agencies – where government agencies clients of law firm – where applicant dismissed by managing partner – where applicant did not attend Christmas party or receive Christmas gift card – whether actions taken because of applicant’s political opinion – whether dismissal otherwise not unlawful in place where action was taken  **CONTRACTS** – whether implied term of duty to co-operate in employment contract – whether implied term breached  **STATUTES** – *Fair Work Act 2009* (Cth) s 351(2)(a) – meaning of ‘not unlawful’ – meaning of ‘place where the action is taken’ |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 340, 341, 342, 351, 545  *Anti-Discrimination Act 1977* (NSW)  *Discrimination Act 1991* (ACT) ss 7, 8, 10 |
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| Cases cited: | *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196  *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; 253 CLR 243  *Insight Vacations Pty Ltd v Young* [2011] HCA 16; 243 CLR 149  *Kay’s Leasing Corporation Pty Ltd v Fletcher* [1964] HCA 79; 116 CLR 124  *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; 327 ALR 460 |
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| Date of hearing: | 3-7, 10-11 and 20 December 2019 |
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| Category: | Catchwords |
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| Counsel for the Applicant: | Ms R Francois |
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| Solicitor for the Applicant: | Employment Lawyers Australia |
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| Counsel for the Respondent: | Mr M Kimber SC with Mr G Fredericks and Mr S McIntosh |
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| Solicitor for the Respondent: | HWL Ebsworth Lawyers |

ORDERS

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|  | | NSD 678 of 2017 |
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| BETWEEN: | GARY RUMBLE  Applicant | |
| AND: | THE PARTNERSHIP TRADING AS HWL EBSWORTH LAWYERS  Respondent | |

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| JUDGE: | PERRAM J |
| DATE OF ORDER: | 3 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

1. The application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRAM J:

## 1. Introduction

1. The applicant is Dr Gary Rumble, a solicitor. The respondent, the Partnership trading as HWL Ebsworth Lawyers (‘the Firm’), is a firm of solicitors practising nationally. On 22 July 2011, Dr Rumble accepted an offer of casual employment as a consultant to the Firm in its Canberra office. It was determinable by either party on three months’ notice. His employment was to commence on a mutually convenient date which, as events transpired, was in October 2011. Under his written contract, Dr Rumble was to perform up to 60 hours of promotional work for the Firm each year in return for which he would be paid an annual retainer of $30,000. For additional work done outside the scope of that retainer, such as any billable work, the Firm also agreed to pay him $250 per hour. In addition to these entitlements, he was to receive the statutorily mandated contribution to his nominated superannuation fund of 9%. Both his hourly rate and his retainer payment were to be increased by 5% on 1 May of each year.
2. After some years working as a consultant for the Firm Dr Rumble received, late on the evening of Monday 20 February 2017, an unwelcome email from the managing partner of the Firm, Mr Juan Martinez. This email told Dr Rumble that his employment was terminated and that the Firm would pay out the three month notice period to which he was entitled so that its effect was immediate.
3. Dr Rumble contests the legality of this action. By his proceeding in this Court, he alleges that he was unlawfully dismissed for querying why the Firm had failed to increase his retainer payment or his hourly rate by the agreed annual rate of 5%. He also alleges that the Firm dismissed him from its service because of his political opinion and that this was unlawful. Dr Rumble further contends that prior to his termination, the same impermissible discrimination against him because of his political opinion had led the Firm to take other unlawful action against him: *first*, by decreasing the amount of work which it gave him; *secondly*, by instructing him not to attend the Firm’s 2016 Canberra Christmas Party; and, *thirdly*, in singling him out by not giving him a $299 gift card which he alleges was given to all other employees as a Christmas gift the same year.
4. Each of these allegations is pursued as a statutory claim for compensation under the provisions of the *Fair Work Act 2009* (Cth) (‘the Act’) for taking what the statute terms ‘adverse action’ against him for unlawful reasons. The alleged proscribed unlawful reasons were discrimination because of his political opinion and the fact of his having made an inquiry as to what had become of his 5% annual remuneration increase.
5. Dr Rumble also brings a common law claim. He alleges that the same factual constellation described above means that the Firm breached an implied term of good faith in his employment contract by terminating his employment, in failing to provide him with work opportunities and in failing to implement the annual 5% uplift in a timely manner.
6. Dr Rumble claims compensation for hurt feelings and also for economic loss largely said to flow from the damage done to his reputation by the fact of his dismissal by the Firm.
7. The Firm rejects these allegations. Its primary defence is that it did not dismiss him either for his political opinion or for querying why it had failed to honour the 5% annual remuneration increase to which he was entitled. It says it was entitled to terminate him without cause which was what it had done. Although it initially contended that his employment was terminated because there was insufficient work for him to do, it emerged later that it had terminated the employment relationship because it had a policy in place that required employees not criticise clients of the firm. The actions which Dr Rumble now relies upon as expressions of his political opinion were in fact criticisms of, inter alia, the Department of Defence and the Department of Veterans’ Affairs, both of whom were clients of the Firm. His criticisms stemmed from an inquiry he had conducted (with two other lawyers from the Firm) on behalf of the Department of Defence into historical sexual assault in the military. Dr Rumble felt that the Government was not doing enough to implement the inquiry’s recommendations and he made a number of public remarks to that effect.
8. These actions irritated Mr Martinez and Dr Rumble was told to desist from public criticism of the Firm’s clients. Further, in 2014 the Firm put in place a written policy requiring its partners and staff not to engage in criticisms of the Firm’s clients without the permission of Mr Martinez. Dr Rumble believed that he was entitled to make these comments publicly without Mr Martinez’s approval and he therefore continued to do so from time to time. The Firm says that it was this that eventually caused Mr Martinez to press the send button on the email he sent Dr Rumble at 10.57 pm on Monday 20 February 2017 terminating his employment. It also says that it did not have enough work for him.
9. In relation to Dr Rumble’s querying of the Firm’s failure to honour its agreement to increase his remuneration by 5% each year, the Firm accepted that it had not originally paid him the 5% increase in some, but not all, of the years alleged by Dr Rumble. It denied, however, that Dr Rumble’s inquiries as to why he had not been paid the 5% increase had anything to do with its subsequent decision to terminate his employment. In any event, it had since accepted its liability to him for the increase and had paid what was due.
10. So far as the Christmas Party was concerned, the Firm denied that Dr Rumble had been instructed not to attend but, even if it did, it said that had nothing to do with his political opinion. It said that the joint head of its Canberra office, Mr Will, had asked him to reconsider whether he would attend the Christmas Party because Mr Martinez had said that if Dr Rumble was going to attend then he was not going to attend. It was in that circumstance Dr Rumble who had chosen not to attend. Mr Martinez’s position that he would not attend if Dr Rumble did was said to be driven by the fact that Mr Martinez found Dr Rumble most aggravating given that he had defied his authority that very day by again criticising two of the Firm’s clients, the Department of Defence and the Department of Veterans’ Affairs. But so to regard him was not to be seen as discrimination against him on the basis of his political opinion.
11. As a fall-back position in relation to Dr Rumble’s political opinion case, the Firm submitted that in fact it was not unlawful to terminate Dr Rumble’s employment because of his political opinion even if it had done so. This was because at the time Dr Rumble was terminated, he was living in New South Wales at Nambucca Heads. Under the *Anti-Discrimination Act 1977* (NSW) (‘the NSW Act’) it was not unlawful to discriminate against a person because of their political opinion. Whilst the *Fair Work Act 2009* (Cth) made it unlawful to discriminate against a person because of their political opinion there was an exemption from its operation where the relevant conduct was lawful under the law of the place ‘where the action is taken’. Although the Firm accepts that Dr Rumble was employed as a consultant in the Firm’s Canberra office, it submitted that his employment had been terminated at Nambucca Heads in NSW. Consequently, even if it had terminated him because of his political opinion, it was not unlawful for it to do so.
12. So far as Dr Rumble’s claim for breach of contract was concerned, the Firm denied that there was an implied term of good faith but said that even if there were it could not have the effect of circumscribing its right to dismiss Dr Rumble without cause on three months’ notice. It also denied that a term of good faith could require it to give him work but submitted that it had not, in any event, failed to give him work as he alleged.
13. So far as damages were concerned, the Firm submitted that the claim for economic loss did not withstand scrutiny. *First*, assuming against it that one of its reasons for terminating had been a proscribed purpose, it had lawful reasons for terminating Dr Rumble’s employment which had also actuated it. So, for example, if it really was the case that one of its reasons for terminating his employment had been because he had inquired about his 5% pay increase, it had also been lawfully entitled to act on his failure to comply with its media policy. In assessing his damages this meant that he had suffered little or no loss because even if the proscribed purposes were excised it was still entitled to terminate his employment and would have done so on 20 February 2017 or shortly thereafter. *Secondly*, even if that were not so the fact was that he had removed himself to Nambucca Heads in semi-retirement. Any damages to which he was entitled needed to take account of that fact and, so it was submitted, to the extent that Dr Rumble’s reputation had been damaged this needed to be put in its correct context, namely, Dr Rumble’s own actions in damaging his own reputation in government circles.
14. For the reasons which follow I conclude as follows: *as to Dr Rumble’s termination,* I conclude that he was not terminated because of his political opinion as to which the Firm was at least indifferent and quite possibly in fact sympathetic. It terminated him because he repeatedly disobeyed a reasonable direction to cease from criticising the Firm’s clients. The Firm did not require any legal basis to terminate Dr Rumble’s employment which it could do without cause. There was nothing therefore unlawful in the Firm’s dismissal of Dr Rumble because he refused to cease from criticising the Firm’s clients. Nor do I accept Dr Rumble’s contention that the Firm dismissed him for inquiring about his 5% pay increase. Although his final inquiry in relation to that topic was what finally spurred Mr Martinez in terminating his employment it was not the actual reason Mr Martinez had for doing so. The inquiry merely brought him back to Mr Martinez’s attention.
15. *As to the reduction in the work provided to him*, I accept that Mr Martinez and Mr Will had come to the conclusion in around 2014 that they did not favour Dr Rumble being given more work and, to a limited extent, took steps which did reduce the amount of work he did. But other partners of the Firm continued to use Dr Rumble. I estimate that the actions of Mr Martinez and Mr Will reduced Dr Rumble’s workflow by around 30%. That said, the reasons that Mr Martinez and Mr Will took these steps did not relate to his political opinion or the fact that he inquired from time to time about his 5% pay increase. It related to his continued criticism of the Firm’s clients and a question mark about his value to the Firm.
16. *As for the 2016 Christmas Party*, I conclude that Dr Rumble was instructed not to attend the Christmas Party. However, I do not accept that this occurred because he had expressed political opinion. It occurred because he had infuriated Mr Martinez on the day of the Christmas Party by again disobeying his instruction not to criticise the Firm’s clients. Nor was Mr Martinez actuated by Dr Rumble’s inquiries about his 5% pay increase. Accordingly, I conclude that there was nothing unlawful about Dr Rumble being told to stay away from the 2016 Christmas Party.
17. *As to the gift card*, in the year in question the Firm had decided only to give the gift card to full time employees. The reason Dr Rumble did not receive a gift card was because he was a casual employee. It had nothing to do with his other activities.
18. *As to the contract case*, making the assumption that there was implied in the employment contract a term of good faith, I would not conclude that that term was breached.
19. Dr Rumble’s case therefore fails and his application should be dismissed.

## 2. The Evidence at Trial

1. The trial was conducted over eight days between 3 December 2018 and 20 December 2018. Dr Rumble was represented by Ms Francois of counsel and the Firm was represented by Mr Kimber SC who appeared with Mr Fredericks and Mr McIntosh of counsel.
2. The first witness in the case was *Dr Rumble* himself. He swore three affidavits. There was an affidavit of 17 August 2017 and a correcting affidavit of 15 June 2018. After receipt of the Firm’s evidence Dr Rumble swore a third affidavit in reply dated 7 October 2018. There were no objections to Dr Rumble’s affidavits. He testified at the trial and was cross-examined on Tuesday 4 December and Wednesday 5 December 2018 at T144-207 and T212-297. Dr Rumble’s views of the facts in this case are clouded by his perception of the wrongdoing which has been done to him. I accept his evidence as honestly given and save where I indicate to the contrary I accept it.
3. The second witness was *Mr Darryl Kevin Swindells* who is a chartered accountant. He swore an affidavit dated 26 September 2018 and was cross-examined on Monday 3 December 2018 at T65-91. On a number of assumptions he gave evidence as to the quantum of the economic loss suffered by Dr Rumble. I accept Mr Swindells’ arithmetic on the assumptions that he made.
4. The Firm called evidence from six witnesses. The first of these was *Professor Dennis Pearce*. He swore an affidavit dated 15 June 2018 and was cross-examined on Thursday 6 December 2019 at T304-354. Professor Pearce’s evidence showed that had not been entirely frank in his dealings with Dr Rumble. In particular, he plainly found Dr Rumble a difficult man to work with but did not feel that it was useful for him to tell Dr Rumble what he really thought. Unfortunately, Professor Pearce was placed in several situations where he needed to convey his actual views about Dr Rumble to third parties. During the course of the trial Professor Pearce disclosed his true opinion about Dr Rumble. Professor Pearce and Dr Rumble were at one time quite good friends and have had a long association. For example, Professor Pearce spoke generously about Dr Rumble at the latter’s birthday party. No doubt, the course of Professor Pearce’s revelations have been hurtful to Dr Rumble and, I do not doubt, discomforting for Professor Pearce. Despite that I do not think these events have any impact on the credibility of either Dr Rumble or Professor Pearce. This was one of those unfortunate situations which, from time to time, come upon people unsought and unavoidable. Both men handled it with dignity. I accept Professor Pearce’s evidence.
5. The next witness was *Mr Juan Martinez*, the managing partner of the Firm. He swore an affidavit dated 10 October 2017. He was cross-examined in broken periods over the days commencing on Thursday 6 December 2018 (T355-407), Friday 7 December 2018 (T464-495) and Monday 10 December 2018 (T548-586). My impression of Mr Martinez was that he was man who enjoys being in charge. Mr Martinez gave evidence about the circumstances of Dr Rumble’s engagement with the Firm and also the circumstances in which he decided to terminate that employment. With some exceptions, I accept most of Mr Martinez’s evidence. The first of the exceptions relates to Mr Martinez’s evidence that one of the reasons he terminated Dr Rumble’s employment was because he did not think he was bringing in sufficient fees to the Firm. I do not accept, however, that this was actually one of Mr Martinez’s reasons at the time of the decision. It is certainly an available view that Dr Rumble was not bringing in much in the way of fees, but I think Mr Martinez’s evidence to that effect involved a degree of hindsight reconstruction.
6. Although Dr Rumble submitted that Mr Martinez was not a witness of credit I did not find the attacks upon him showed much more than that he was abrasive and, perhaps, determined in his dealings with Dr Rumble. In particular, I do not find that there was anything improper in the manner in which the Firm went about drafting Dr Rumble’s letter of termination. It was entitled to terminate him without cause and it had no obligation to formulate its reasons for doing so. An attempt to show that the Firm’s manoeuvrings on its reasons for terminating him once these proceedings were commenced does not show dishonesty on Mr Martinez’s part although it showed that he was not to be trifled with. There are some aspects of his evidence which I have not accepted but save where I indicate that to be so I otherwise accept his evidence.
7. Then the Firm called *Mr Alexander Norman Holcombe*, a Canberra partner of the Firm. He swore two affidavits of 9 October 2017 and another of 14 June 2018. He was cross-examined on Friday 7 December 2018 at T416-463. Mr Holcombe was originally recruited from Minter Ellison to the law firm Phillips Fox by Dr Rumble (when Dr Rumble was a partner of that firm). Once Dr Rumble became an employed special counsel, Mr Holcombe was his supervising partner. He gave evidence about the circumstances of Dr Rumble’s employment, the course of his work and the circumstances of his departure. Largely, I accept his evidence.
8. The next witness was *Mr Michael Jonathan Will*, another one of the Canberra partners. He swore two affidavits of 26 October 2017 and 21 September 2018. He was cross-examined on Monday 10 December 2018 at T499-547. Mr Will, together with Mr Marques, is the joint head of the Canberra practice group of the Firm. He gave evidence, inter alia, about Dr Rumble’s work on the review of allegations of sexual and other abuse in Defence, the Firm’s media policy, the termination of Dr Rumble’s employment, the work opportunities afforded to Dr Rumble and the events at the Firm’s 2016 Christmas Party. I accept his evidence although I differ from him on the question of whether any reduction in Dr Rumble’s workflow was client driven or driven by Mr Martinez and Mr Will. I did not think his evidence about this was other than candid and the difference is easily explained simply by a difference in perception.
9. The Firm also called *Mr Richard Thomas Garnett*, another partner of the Firm. He affirmed an affidavit of 15 June 2018 and was cross-examined on Tuesday 11 December 2018 at T592-597. His evidence was of limited scope. He was aware of the discussions leading to Dr Rumble’s termination and was of the view that he brought little work in.
10. The last witness called to testify at the trial was *Mr George Kevin Marques*, also a Canberra partner of the Firm. He swore an affidavit dated 18 June 2018 and was cross-examined on Tuesday 11 December 2018 at T597-602. It related to the circumstances of Dr Rumble’s termination, his perception of Dr Rumble’s contribution to the Firm and the demand that might exist for his services. I accept his evidence.

## 3. The Facts Relating to Dr Rumble’s Dismissal

1. Dr Rumble was admitted to practise in 1975 whilst working as an associate to the late Sir Kenneth Jacobs, then a Justice of the High Court. Because Dr Rumble’s reputation as a lawyer is to some extent entangled in the issues which this case presents, it is useful to note that he has a substantial background in public law and holds a doctorate in constitutional law from the Australian National University. He has worked in academic as well as professional circles. I intend him no disrespect if I do not set out the full details of his career. It is sufficient that I accept that in Canberra Dr Rumble was a well-regarded public lawyer with a particular speciality in constitutional law.
2. In early 2002 he became a partner of the firm formerly known as Phillips Fox (later renamed DLA Phillips Fox) in its Canberra office. He specialised in working for Commonwealth agencies and Departments. Again, that speciality is of significance for the purposes of his case when it later comes time to consider whether the actions of the Firm have harmed him in his employment opportunities and, if so, what the extent of that harm might be.
3. On 1 May 2011 the DLA Phillips Fox partnership became part of DLA Piper, a global law firm with which it had previously but been in an alliance. Dr Rumble had decided in February 2011 that he did not wish to be a partner of DLA Piper and had arranged that after the merger he would be retained by DLA Phillips Fox in its Canberra office as an employee with the title of special counsel. This was a casual employment position and its terms were regulated by a written contract made on 17 February 2011 with the new position to commence on 1 May 2011, the day of the merger. Subsequently, Mr Holcombe, as one of the DLA Phillips Fox partners, supervised Dr Rumble. Originally, it was Dr Rumble who recruited Mr Holcombe from Minter Ellison in around 2005 so the two were well-known to each other.
4. After Dr Rumble had signed on as special counsel to DLA Phillips Fox and whilst he was still a partner of that firm, he was approached by the Department of Defence to conduct a review into allegations of sexual and other abuse in the military (‘the 2011 Defence Review’ or ‘the Review’). Dr Rumble deposed in this proceeding that, prior to being approached to conduct the 2011 Defence Review, it had been his intention to move to working part-time. This fact is of some importance when it comes to considering what income he has lost if he be right in his contention that he was unlawfully dismissed.
5. The 2011 Defence Review itself was announced by the Minister for Defence on 11 April 2011. His press release at the time said, in part:

This past week has also seen a large number of public or private allegations of sexual or other forms of abuse drawn to the attention of my office, as well as to the attention of the Department of Defence and the media.

These allegations are of concern and must be dealt with methodically and at arms length from Defence. The Secretary of the Department of Defence will engage an independent legal firm to review each allegation raised to determine the most appropriate way for these complaints to be addressed and whether further independent action is required to deal with any such matters.

1. Dr Rumble was aware that he would soon cease to be a partner of DLA Phillips Fox and therefore arranged for another partner of DLA Phillips Fox in Melbourne, a Mr Abrams, to open a file for the 2011 Defence Review and to be the responsible partner. A telephone conference with the Minister occurred on 21 April 2011 and it was agreed by the participants that Dr Rumble would lead the 2011 Defence Review and would be assisted by Professor Pearce and Ms McKean. Ms McKean was a Canberra partner of DLA Phillips Fox. Professor Pearce is a well-known lawyer best known for a work he co-authors with Professor Geddes called *Statutory Interpretation in Australia*. He was also employed by DLA Phillips Fox as a special counsel.
2. Dr Rumble gave evidence that he knew that DLA Phillips Fox had entered into a contractual retainer with the Department of Defence for the conduct of the 2011 Defence Review. Although he himself had not seen the contract, Dr Rumble thought that Ms McKean had. In any event, it was not suggested by either the Firm or Dr Rumble that DLA Phillips Fox had not been retained to conduct the 2011 Defence Review.
3. When 1 May 2011 arrived there was a development. Most of the Canberra partners of DLA Phillips Fox (including Ms McKean) decided not join DLA Piper and instead to become partners of HWL Ebsworth (i.e., the Firm). This defection from DLA Piper seems not to have been instantaneous but rather spread over a few months. As a result of this development, Dr Rumble decided to become instead a consultant to the Firm to which most of his former Canberra partners had either decamped already or would soon so decamp.
4. The contract under which he was eventually employed by the Firm was signed by Dr Rumble on 22 July 2011. It referred to Dr Rumble as a consultant, but he understood himself to be in the position of special counsel, a title he thereafter used without demur from the Firm. I return to this contract below in some detail. As I explain shortly, it appears that, until at least October 2011, Dr Rumble worked under the auspices of DLA Piper (pursuant to his agreement with DLA Phillips Fox which was, I assume, novated to DLA Piper somehow), and apparently as DLA Piper’s special counsel (rather than the Firm’s). Dr Rumble’s undisputed evidence is that he did not take up his role with the Firm until October 2011 even though his employment contract was dated 22 July 2011. This was consistent with the evidence of Mr Will and Mr Martinez.
5. On 21 June 2011, the Minister issued formal terms of reference for the 2011 Defence Review. Most of the terms of reference have no direct bearing on this case, but there are some parts to which attention should be drawn. The terms stated that ‘an external law firm would be engaged by the Secretary of Defence to review the allegations of sexual or other forms of abuse’. The review was to be conducted in two phases. The first phase would involve a review of all of the allegations of sexual misconduct and would ‘make an initial assessment of whether the matters have been appropriately managed and to recommend further action to the Minister’. The terms of reference stated that ‘DLA Piper has been engaged by the Secretary of Defence to conduct Phase 1 of the Review’. Whether the Department was aware that most of the Canberra partners of DLA Phillips Fox had joined the Firm rather than continue with DLA Piper is not clear but probably does not especially matter. As I have already noted, Dr Rumble himself appears to have continued to work on the 2011 Defence Review until October 2011 as a special counsel to DLA Piper.
6. In any event, Dr Rumble’s evidence about the nature of the Firm’s retainer was at [48] of his first affidavit. It was his understanding that ‘as each of us who had been working on the review moved from DLA Piper to the Canberra office of [the Firm], we continued to work on the Review in accordance with sub-contract arrangements between DLA Piper and [the Firm]’. This is consistent with the terms of reference and indicates that the Department engaged DLA Piper for Phase 1 and that firm, when the personnel conducting the Review left its employ, engaged the Firm on a sub-contracted basis to do the work of the Review on its behalf. Dr Rumble’s evidence was that it was not only Ms McKean, Professor Pearce and he who worked on the review at the Firm. Two other partners of the Firm, Mr Will and Mr Garnett, and a senior lawyer, Ms Howlett, had also worked on it. Mr Will confirmed this in his evidence.
7. Volume 1 of the Review’s report was delivered in October 2011. It bears on its front page the names of Dr Rumble, Ms McKean and Professor Pearce. The executive summary contains this statement:

Dr Gary Rumble, partner, DLA Phillips Fox, was appointed to lead the Review and Ms Melanie McKean, partner, DLA Phillips Fox and Professor Dennis Pearce, AO, Special Counsel with DLA Phillips Fox were appointed as co-leaders.

1. This was accompanied by a footnote which observed:

Shortly after the Review was appointed, DLA Phillips Fox joined the international firm DLA Piper and now continues to function as DLA Piper Australia. Dr Rumble and Ms McKean ceased to be partners of DLA Piper after the Review commenced. The two firms worked together to support the Review.

1. At this point, it is necessary to mention an incident which took place early in the life of the Review. Prior to 21 June 2011, it appears the three reviewers received complaints (which also appeared in the media) that the Review was to be a cover up and that the Department of Defence’s legal team would be writing the report. The three reviewers issued a press release on DLA Piper letterhead to respond to these suggestions:

Allegation this is a cover-up exercise

The members of the Review have met with the Minister.

The Minister expects the Review to provide our own honest assessment and recommendations, regardless of whether or not doing so may involve criticism of Defence’s response to allegations.

The Review members would not be participating in the Review if we thought it was a sham.

Allegations that Defence Legal is writing the Report

The Report will contain and will only contain assessments, conclusions and recommendations of the Review members – Dr Rumble, Professor Pearce and Melanie McKean.

Defence Legal is not writing the Report.

1. Dr Rumble alleges, and no one appears to deny, that these statements were made with both the Minister’s knowledge and the approval of the Firm. One of the issues in this case is whether the independence implied by these statements extended to permit Dr Rumble, after completion of the 2011 Defence Review and delivery of the report, to criticise the government of the day’s implementation of the report’s recommendations.
2. I do not accept that these statements meant any more than that the Review was to be conducted independently. I am unable to glean from that material any further role for the reviewers after the review process was complete. In any event, whilst Dr Rumble was specifically sought by the Department of Defence to conduct the review, Dr Rumble was not himself commissioned by the Minister to carry out the Review. The terms of reference seem to make clear that DLA Piper was to conduct the Review. In fact, the terms of reference do not mention Dr Rumble, Ms McKean or Professor Pearce. All that the terms of reference said was that ‘DLA Piper has been engaged by the Secretary of Defence to conduct Phase 1 of the Review’. I was not taken to any evidence of an individual retainer of Dr Rumble by the Secretary or his commission by the Minister under some form of instrument. There is, so far as I can see, only the terms of reference.
3. Nevertheless, I accept that regardless of the terms of reference, the Review was to be conducted by Dr Rumble, Professor Pearce and Ms McKean and that it was to reflect their independent views and not the views of anyone else including DLA Piper (and the Firm). This was the manner in which it was expected on all sides that the review would be conducted. That understanding was reflected in disclaimers which eventually appeared on the front page of the report. But the retainer was of DLA Piper. It was that firm’s obligation to procure Dr Rumble, Professor Pearce and Ms McKean to arrive at their independent views and to assist them in that process. This was not denied by the Firm and is consistent with common sense.
4. In his evidence Dr Rumble testified that he had been designated as the review leader and that in performing that function he was to be assisted by Professor Pearce and Ms McKean. The origins of this understanding appear to be in a telephone conference with the Minister on 21 April 2011 where Dr Rumble says that the Minister said as much. I accept this to be so. However, I do not accept that by virtue of this that Dr Rumble, Professor Pearce or Ms McKean had any additional contractual role themselves. It was simply a statement, common to the retainer of many firms, that whilst DLA Piper was to be retained, the persons at DLA Piper who would be conducting the Review were those three nominated individuals.
5. I do not accept that this structure or the statements made in the press release about the Review’s independence clothed the reviewers with any additional authority beyond the conduct of the Review itself.
6. The Court has not been provided with a copy of the actual retainer under which either DLA Piper (or for that matter the Firm) conducted the Review. Dr Rumble said he was aware of its existence but had not seen it. Be that as it may, I am prepared to assume it is likely that the DLA Piper retainer identified Dr Rumble, Professor Pearce and Ms McKean as the principal participants, most likely with Dr Rumble being designated as the leader. Making that assumption in Dr Rumble’s favour, this entails that all of Dr Rumble’s rights and obligations in relation to the report were derived from his employment relationship with the firm (or, maybe, firms) conducting the review. At times Dr Rumble’s evidence seemed almost to approach the contention that hehimself had been retained and that he had personally been given functions by the Minister. If this was intended by Dr Rumble (and I am not sure that it was), however, it is not a correct characterisation of the legal effect of what the Minister did. In strict terms, the legal obligation to conduct the Review lay on the firms conducting it; Dr Rumble’s role arose from his duties as their servant and not from the Minister’s terms of reference. No doubt, the leadership role which the Minister expressed a desire for Dr Rumble to perform was apt—especially given his seniority—to obscure the legal reality of the relationship. And, no doubt too, the potential opacity occasioned by the Firm’s role as a subcontractor to DLA Piper was unlikely to dispel that obscurity. But however much these matters may have tended to obscure the legal reality, they could not, and did not, alter it.
7. Thus I do not accept the correctness of Dr Rumble’s analysis at [44] of his first affidavit to the extent that it suggests that he himself had an entitlement of any kind:

At all times, I understood, based on my discussions with Mr Cunliffe and Dr Lloyd around 19 and 20 April 2011 and around 21 April 2011 with Minister Smith when the Defence Review was being established, that the basis upon which I, Ms McKean and Professor Pearce, undertook the Defence Review was that we were entitled, and required, to:

(a) form independent judgments and express independent views about the subject matter of the Review; and

(b) report our own assessments, conclusions and recommendations regardless of whether doing so involved any criticism of Defence.

1. Dr Rumble thought that Ms McKean and Professor Pearce shared his views on this issue. Professor Pearce in fact denied this and Ms McKean was not called to give evidence. Assuming in Dr Rumble’s favour that he is correct about what Ms McKean believed, this does not alter the situation since her views are no more relevant to this issue than Dr Rumble’s.
2. It is convenient at this juncture to return to Dr Rumble’s contract with the Firm signed on 20 July 2011. As I have already mentioned, it is not in dispute that Dr Rumble did not begin to work under this contract until sometime in October 2011 after he had completed the production of volume 1 of the 2011 Defence Review.
3. For reasons to which I shall return, Dr Rumble submitted that the proper law of the contract was the law of the Australian Capital Territory. This was not contested by the Firm. I am satisfied that this is correct. Where the parties have not disclosed either expressly or by inference any intention in relation to the issue of what law should govern their bargain, it is usual to determine this issue by inquiring which legal system has the closest and most real connection with the contract. There are some nice questions about this area usefully surveyed, with respect, by Edelman J in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 at [71]. But those issues are of little moment in the present case. As I explain shortly, we are concerned here with an employment contract formed in the ACT to work for the Firm’s Canberra partners as a solicitor and in respect of which they were bound to pay for him to obtain an ACT practising certificate. It is true, as Mr Holcombe observed in his evidence, that the contract did not actually require Dr Rumble’s work to be done the ACT but neither did it suggest it was going to be done anywhere else. The obligations of the Firm in relation to the practising certificate are a strong indicator that the contract was concerned principally, if not necessarily exclusively, with the performance of work with an ACT flavour.
4. The proper law of the contract is, therefore, ACT law. No other jurisdiction plausibly presents itself for consideration. Although this is a conclusion which is probably of marginal significance it has some relevance, limited perhaps, to the Firm’s contention that it dismissed Dr Rumble from its employment in Nambucca Heads rather than in the ACT. I return to this issue much later at [144].
5. There were several terms of the contract to which attention should now be drawn. Dr Rumble was to be employed in ‘the position of Consultant on a casual employment basis in the Canberra office’ and he was to report and be responsible to the partners of the Firm in its Canberra office. Next, Dr Rumble was to be paid a retainer of $30,000 per annum in return for which:

In return for the retainer payment, HWL Ebsworth will be entitled to receive to receive the benefit of up to 60 hours work on promotional material per year. Promotional material includes material such as tenders, presentations to staff or clients and firm publications. Promotional material does not include matter for which a client may be billed.

1. As I understood, these promotional activities related to non-billable matters such as seminars for clients and so forth. In relation to work which could be billed the contract provided:

Your rate of pay will be $250.00 per hour for every hour (or pro rata for each part thereof) that you work outside the entitlement provided to HWL Ebsworth under the retainer. Your hourly rate of pay does not include the 9% Superannuation (paid in accordance with Superannuation Guarantee legislation).

1. Both the retainer payment of $30,000 and the hourly rate of $250 per hour for billable work were subject to an annual increase of 5%:

The annual retainer and the hourly rate will be subject to an annual increase of 5% on each anniversary commencing 1 May 2012.

1. The contract expressly dealt with termination conferring on both parties a right to terminate the contract without cause on three months’ notice:

You will provide HWL Ebsworth with 3 months within [sic] notice of your intention to resign from your employment with the firm.

HWL Ebsworth may terminate your employment by providing 3 months written notice to you. The firm has a right of immediate dismissal in cases of serious misconduct.

1. The Firm also agreed to pay for Dr Rumble’s practising certificate fee in the ACT:

HWL Ebsworth will pay for your practising certificate during your employment with the firm.

1. It was under the terms of this contract that Dr Rumble began to work for the Firm in October 2011. It will be recalled that Dr Rumble had delayed his commencement with the Firm until October 2011 to allow the completion of the report for Phase 1 of the 2011 Defence Review. That report was due under the original terms of reference before the end of August 2011 but for various reasons this was not possible. Indeed, because of the large number of complaints of sexual misconduct that were received by the inquiry it became impossible to deliver the entire report even in October 2011. It was decided by the three reviewers that they would deliver volume 1 of their report together with a first tranche of volume 2. Volume 1 and the first tranche of volume 2 appear to have been produced under some tight time constraints and, I am prepared to infer, not some little pressure. On the morning of 11 October 2011 Dr Rumble, Ms McKean and Professor Pearce took volume 1 of the report and the first tranche of volume 2 to the Minister and delivered them personally.
2. At some point between August and October 2011 it seems that Dr Rumble and Professor Pearce had some cross words. Their accounts of this disagreement differ both as to their content and timing. I have struggled to find a reason why this debate—which is uncomfortable for both men—needs to be resolved. It does not bear on any of the direct issues in Dr Rumble’s claims and, given the many years that separate the events in question from the giving of their evidence at the trial, I do not think that even if I did accept one of their accounts over the other it could reflect on the other’s credit. I do not determine this issue.
3. It is useful then very briefly to say something about the recommendations that were contained in the report because they provide some of the explanatory background to the steps which Dr Rumble then took and which eventually brought him into conflict with Mr Martinez. The subject matter of the report was confronting. It concluded that from the 1950s to the 1980s a substantial number of young men and boys in the Australian Defence Force had been sexually abused by other boys and also by older military personnel. Some of these assaults were very serious. One particular concern was a widespread culture of rape at the Australian Defence Force Academy prior to reforms implemented after 1998 and the fact that many of the persons who had been involved in that culture were now in senior positions in the military. The reviewers recommended, inter alia, that a Royal Commission be established into these matters.
4. Having completed volume 1 and the first tranche of volume 2, Dr Rumble then began work on completing volume 2. Professor Pearce did no more on the report after November 2011 and formally withdrew from the Review in February 2012. At the time Professor Pearce told Dr Rumble that this was because of health issues. In fact, this was not a complete explanation. Professor Pearce gave evidence that at that time he was finding it increasingly difficult to deal with Dr Rumble. He thought Dr Rumble was resistant to his recommendations and disagreed with him about what the Review should be saying. Professor Pearce, who to my observation is a mild man, was also uncomfortable with the manner in which the report was expressed. He took no substantive part in the completion of volume 2. He did not say any of this to Dr Rumble at the time and couched his decision to leave the Review in terms which related only to his health.
5. Dr Rumble carried on his work on volume 2. He was assisted by employees of both DLA Piper and the Firm. He says that he was working extensively on the Review at this time and billing around 60 hours per week.
6. On 7 March 2012 the Minister publicly released redacted extracts of the executive summary and key findings of volume 1. Subsequently, volume 2 was delivered to the Minister on 12 April 2012. Volume 2 consisted of some 23 folders. It has never been publicly released. The Minister publicly released volume 1 on 10 July 2012. Dr Rumble estimated that the total amount billed on the Review was around $2 million. I have no reason to doubt that estimate. It is apparent that the Review involved a great deal of work not only by Dr Rumble but also by lawyers at both DLA Piper and the Firm.
7. In June 2012 Dr Rumble and his wife moved to a house in Nambucca Heads, a fact of which he notified the national office of the Firm.
8. Following the public release of volume 1 by the Minister on 10 July 2012, it seemed to Dr Rumble by 3 October 2012 that the Government was not moving fast enough. On that day, with the agreement of Ms McKean, he wrote to the Minister a letter on the letterhead of the Firm. It is not necessary to set out the details of the letter; it suffices to say that it expressed concerns about the Minister’s delay in responding to the report. It also offered the Minister some advice on how he might go about responding to the report. The letter was signed by Mr Will on Dr Rumble’s behalf. Dr Rumble says, and I accept, that the Minister did not respond to this letter.
9. The Senate then became involved. On 10 October 2012 it referred to the Senate Foreign Affairs, Defence and Trade Committee an inquiry entitled ‘The Adequacy of the Government’s Response to the DLA Piper Report’. After that referral, Dr Rumble again wrote to the Minister on 19 November 2012. This letter raised with the Minister’s office whether it was accurate to claim in the media, as one of the Government’s ministers had apparently done, that the Review was ongoing. It also suggested to the Minister that he might want to consider the relationship between the subject matter of the 2011 Defence Review and the then newly minted Royal Commission into Institutional Responses to Child Sexual Abuse. The letter was signed by Mr Will on Dr Rumble’s behalf. Dr Rumble did not receive a response to this letter either.
10. On 26 November 2012 the Minister released the Government’s response to, inter alia, the DLA Piper Review. Two important elements in that response were an apology by the Minister delivered in Parliament to the persons who had been abused and the establishment of an independent taskforce to assess the individual complaints and any systemic issues. The task force was to be headed by the Honourable Len Roberts-Smith QC, a former Justice of the Supreme Court of Western Australia, a Major General in the army reserve and a former Judge Advocate General. The task force was known to be known as the Defence Abuse Response Taskforce (‘the DART’).
11. Dr Rumble was not satisfied with the Government’s response. On 17 December 2012 he wrote a letter to the Minister outlining what he saw as the deficiencies in the response. The letter was 18 pages long. It asked the Minister to respond to four separate allegations that the Government was not responding adequately to the report. At around the same time Dr Rumble wrote to Mr Roberts-Smith QC and offered to meet with him to provide what he referred to as a handover briefing, but Mr Roberts-Smith QC declined this invitation.
12. While Dr Rumble was waiting for a response to that letter Professor Pearce, Ms McKean and he were invited by the Senate Foreign Affairs, Defence and Trade Committee to appear before it and make submissions in relation to its recently announced inquiry into the adequacy of the Government’s response to the 2011 Defence Review. This appears to have occurred in late 2012 or early 2013. Professor Pearce and, ultimately, Ms McKean declined the invitation but, because of a number of concerns he had, Dr Rumble did not.
13. Dr Rumble appeared before the Committee sometime in March 2013 having provided a written submission to it earlier in 2013. Ms McKean was consulted about this submission and did not dissent from it. Dr Rumble was critical of the Government in his remarks to the Committee including one statement to the effect that he regretted saying that he had confidence in the Review process. These remarks were covered in the press.
14. Shortly before Dr Rumble was to appear before the Committee, the Minister responded to his letter of 17 December 2012 by letter dated 8 March 2013. Dr Rumble provided the Minister’s letter to the Committee. Dr Rumble appears to have been satisfied, for a time, by the Minister’s assurances which appeared to him to show that the process was heading in the right direction. However, by August 2013 he had become dissatisfied with the way Mr Roberts-Smith QC was conducting the DART process and thought that the Minister was not living up to what he had suggested in his letter of 8 March 2013.
15. Consequently, on 27 August 2013, 11 days prior to the 2013 Federal election, Dr Rumble wrote two further letters. These were sent to the Minister and the Attorney-General. Dr Rumble also provided them to the respective shadow ministers. One of the letters expressed dissatisfaction with the DART process and the prospects of a Royal Commission; the other with the degree to which the Minister was living up to the contents of his letter of 8 March 2013. Both of these letters were written on Dr Rumble’s personal letterhead.
16. On 17 October 2013 Dr Rumble met with Mr Roberts-Smith QC but this meeting did not allay Dr Rumble’s concerns about the direction of the DART process. On 29 October 2013 Dr Rumble wrote to Mr Roberts-Smith QC. This letter was two pages long but enclosed a 26 page background paper and a series of 22 questions which Dr Rumble desired to have Mr Roberts-Smith QC answer. Without dwelling on all its details the letter expressed dissatisfaction with the DART process and said that Dr Rumble would be taking the matter further including with Senate Committee, the Shadow Minister for Defence and the Attorney-General. Mr Roberts-Smith QC did not reply to this letter.
17. After the change in government as a result of the 2013 Federal election there was a change of Minister. On 8 November 2013 Dr Rumble emailed the chief of staff for the new Minister outlining his views about the deficiencies in the DART process and the Government’s response to the 2011 Defence Review. He also provided copies of the long letter and questions he had earlier sent to Mr Roberts-Smith QC on 29 October 2013 and the two letters of 27 August 2013.
18. It was at this point that the Firm first appears to have become interested in Dr Rumble’s activities. On 7 November 2013 an article appeared on the news.com.au website. To give the flavour of the piece it is necessary to set out only a short portion of it:

**THE lawyer who led a high-level review into sexual abuse in the Defence Force has called for a Royal Commission to expose rapists and abusers in the military’s senior ranks.**

Dr Gary Rumble from law firm HWL Ebsworth has written to the government requesting a sweeping Commission of Inquiry to investigate whether serving ADF officers took part in sexual assaults when they were cadets.

Defence has been subjected to numerous inquiries following the skype-sex scandal and is reeling from revelations about homosexual initiation or “hazing” rituals by the ADFA rugby team led by the man who filmed and skyped the sex act, Daniel McDonald.

Dr Rumble is calling for an inquiry into “whether there are officers in the ADF [Australian Defence Force] who – when they were Cadets at ADFA [Australian Defence Force Academy] … – may have committed rape or other serious sexual assault on other Cadets.”

He also wants it to investigate whether any officers “stood by during rape or other serious sexual assault on other Cadets without intervening or reporting that rape”.

1. It is apparent that the author of the article had access to Dr Rumble’s letters to the Minister regarding the prospects of a Royal Commission. As will be recalled those letters had been sent to the Minister, the Attorney General and the respective shadow ministers. The source of the leak has never been identified. The appearance of the Firm’s name in this article excited, however, the attention of Mr Will who was in charge of the Canberra office. An email exchange ensued. Mr Will asked for Mr Martinez to be provided with a copy of the submission and Dr Rumble assured him he was not responsible for the appearance of the article. He also provided Mr Martinez with the two letters of 27 August 2013. It should be noted that Dr Rumble confirmed to Mr Will that in writing the letters he had been acting in his ‘private capacity’. This might suggest that he was not acting in pursuance of his employment relationship with the Firm on the retainer it held from the Secretary to conduct the review. That view would be consistent with Dr Rumble’s criticism of the accuracy of the Government’s statement that the Review was ongoing after the report had been delivered. There is a certain tension between Dr Rumble’s criticism in that regard and his view that he retained a role which obliged him publicly to assess the adequacy of the Government’s response.
2. Over the period 5 December 2013 to April 2014 Dr Rumble pursued various avenues to express his views about what the Government’s response to the 2011 Defence Review should be. He corresponded with the new Minister’s office and, indeed, met with the new Minister. But he was not satisfied with that office’s actions either. He also again communicated with the Senate Committee on Foreign Affairs, Defence and Trade, this time in a closed session. That Committee had begun another inquiry entitled ‘Processes to Support Victims of Abuse in Defence’. The Minister’s office suggested that this second inquiry should satisfy Dr Rumble’s concerns but he was not persuaded of the correctness of that proposition. By April 2014 it is apparent that Dr Rumble remained dissatisfied with the Government’s response to the 2011 Defence Review.
3. It is at is this point that Dr Rumble made the decision to contact Mr Laurie Oakes, a well-known political journalist, and to offer a television interview about the adequacy of the Government’s response to the 2011 Defence Review. Dr Rumble was interviewed by Mr Oakes on 27 April 2014 on the Seven Network’s ‘Weekend Sunrise’ program. During the interview, he criticised the Department of Veterans’ Affairs and the Department of Defence.
4. On 1 May 2014, a few days after the interview, Dr Rumble was telephoned by Mr Will and Mr Mailler, the National Marketing Manager of the Firm, who wished to discuss Dr Rumble’s foray onto national weekend breakfast television. Their call was the consequence of a request to them from Mr Martinez. They told Dr Rumble that one of the special counsel in the Canberra Office, Mr Tony Reilly, received work from the Department of Veterans’ Affairs and that Dr Rumble’s remarks were, in that context, unhelpful to that client relationship. Mr Will says that he also told Dr Rumble that the Department of Defence was a client and his criticisms of that department were also unacceptable to the Firm. As for Mr Martinez, it appears most likely that he did not actually see the interview but I do not think that this matters. He was certainly aware that Dr Rumble had publicly criticised the Departments of Defence and Veterans’ Affairs.
5. Mr Will endeavoured in that circumstance to have Dr Rumble undertake not to speak to the media again without first obtaining the Firm’s permission. Dr Rumble declined to give any such undertaking.
6. Dr Rumble’s disinclination to give that undertaking brought him, once again, to the attention of Mr Martinez. Mr Martinez sent him an email on 2 May 2014 the essential features of which were a suggestion that the Firm’s policies bound Dr Rumble to obtain his or Mr Mailler’s approval before speaking to any media outlet and, even where approval was granted, not to criticise the Firm’s clients. Dr Rumble did not accept that he was bound in this way. He replied the same day explaining why he thought this to be so. In broad terms, this explanation related to the press release dated 21 June 2011 (set out above at [43]) in which the three reviewers indicated that theirs would be an independent review. In the last sentence of his email Dr Rumble said:

I am happy to consider some kind of arrangement which would enable the firm to protect its interests but which does not involve any requirements for prior approval or vetting of content of media interviews by me on Report related issues.

1. In his response of 5 May 2014 Mr Martinez dissented from this view and ventured to suggest that Dr Rumble’s employment might well be terminated if he did not change course:

In your last sentence I am not sure what you are contemplating but if you have something in mind please put it otherwise I think the best interests of all concerned at this stage is for your formal position with the firm to be terminated and we may revisit it once these issues are no longer in play, assuming there is mutual interest in doing so.

1. Dr Rumble responded the next day, demurring, but suggesting that if he were to be terminated then his payout would need to include recognition of the substantial work he had brought to the Firm, viz, the Review itself and another project (to which I return later) concerning bullying at the CSIRO which Dr Rumble believed he had brought to the Firm.
2. Following this email, nothing further seems to have been done about Dr Rumble’s termination and both parties proceeded on the basis that his employment had not been terminated. Mr Will’s view at the time was that there were grounds on which Dr Rumble’s employment could be terminated. He discussed the matter with the other Canberra partners and the prevailing view was that Dr Rumble should not be terminated.
3. Mr Martinez gave evidence that the Firm had long had a media policy which had been regularly communicated to lawyers and staff of the Firm. That policy was in evidence as part of Exhibit 12. In terms, it did not, however, actually prohibit Dr Rumble from commenting in the way that he had.
4. As it happens, just as Mr Martinez was dealing with the implications of Dr Rumble’s interview with Mr Laurie Oakes on 27 April 2013, the Firm implemented another media policy on 2 May 2014. It was drafted by Mr Mailler and approved by Mr Martinez and was produced at least in part in response to Dr Rumble’s activities. The relevant portion of this policy said:

Partners and members of staff are required to obtain the prior approval of Juan Martinez (Managing Partner) or Russell Mailler (National Marketing Manager) before proceeding with any media interview.

A condition of such approval will be that the partner or staff member will not be permitted to make any negative or critical comments in relation to any existing clients, past clients, potential clients, government departments or entities, regulatory bodies, or any existing or proposed legislation or regulations.

This policy applies to all material published or broadcast by the legal press, mainstream media, industry groups and associations. Television, radio, magazines, newspapers and the internet are all included in this policy.

1. In his email of 2 May 2014 to Dr Rumble, Mr Martinez summarised this new media policy and, as noted above, required Dr Rumble’s adherence to it.
2. Unbowed, Dr Rumble then gave evidence to a further Senate Committee inquiry. He made extensive written submissions to it in June 2014 and appeared before it to testify in August and September 2014. The Committee tabled its report in October 2014. Dr Rumble’s activities with the Senate Committee did not elicit any further reaction from the Firm or Mr Martinez. Without expressing any developed view, this uncharacteristic passivity on the part of Mr Martinez may have derived from the possibility that it might have been a contempt of the Senate to dismiss Dr Rumble for giving evidence to the Senate Committee, a matter which Mr Martinez acknowledged in his evidence. Apart from that, Dr Rumble made no further public statements about the matter in 2014.
3. In the meantime, in July 2014, the Firm had offered Dr Rumble, and he had accepted, a secondment to the Department of the Environment. This position had been arranged by Mr Holcombe and was to last until the end of the 2014/15 financial year. It took place under the auspices of contract between the Firm and the Department of the Environment. In August 2014 Dr Rumble leased an apartment in Canberra so that he could work in this seconded position. During the life of the secondment he worked during the week principally in Canberra albeit he did return to Nambucca Heads on some occasions.
4. In March 2015 Dr Rumble decided he did not wish to renew this secondment in the following 2015/16 financial year because he did not wish to be in Canberra three days per week. In June 2015 he returned permanently to Nambucca Heads. In April 2016, he also declined a secondment to the Joint Health Command for a period of around 12 months.
5. During this period, Dr Rumble continued to contact a range of politicians to advance his view that the Government was not doing enough or responding appropriately to the 2011 Defence Review. These politicians included then Senator Nicholas Xenophon. But his actions were to no avail and Dr Rumble remained dissatisfied with the Government’s response.
6. Dr Rumble’s contact with Senator Xenophon sufficiently discombobulated Mr Will that he contacted Mr Cunliffe, the head of Defence Legal. His discussions with Mr Cunliffe allayed his concerns that the Department of Defence might hold Dr Rumble’s conduct against the Firm.
7. At around the same time Mr Martinez requested a copy of Dr Rumble’s contract so as to permit a discussion of his future. Mr Will suggested to Mr Martinez that Dr Rumble’s employment should be terminated. However, this did not occur at this time. It appears that Dr Rumble had support within the Canberra office no doubt due to his long association with the partners there.
8. On 21 October 2016 Dr Rumble decided that he again needed to speak to the press about the matter and wrote to Mr Martinez (and the Canberra partners) asking for the Firm’s approval for him to do so and also to say that the Government’s response was ‘a national disgrace’ and that ‘I propose to say so and call on Ministers to take ownership of these issues and to advance them to a positive conclusion’. In what may be described as a largely fruitless email correspondence between the two men, Mr Martinez indicated that no such approval would be forthcoming, that if Dr Rumble was to do as he suggested he should resign and that the Firm reserved the right to terminate his employment if he did not do so. Dr Rumble reiterated his position.
9. Subsequently, Dr Rumble was in contact with a journalist at the *Sydney Morning Herald*, a Mr Wroe, who on 12 November 2016 published a piece which included statements directly attributed to Dr Rumble. At the time Dr Rumble had given these statements to Mr Wroe he had insisted that the article be accompanied by an endnote to the effect that the views expressed were Dr Rumble’s and no one else’s. The night before the article was published Dr Rumble informed the Firm that this would occur. Mr Martinez responded saying ‘No good telling me now’.
10. The next day the article appeared without the agreed note which Mr Wroe explained on the basis that it had been removed by a sub-editor. Dr Rumble was quick to make this clear to the Firm however Mr Martinez responded saying ‘Doesn’t help’.
11. At this point, Mr Will made contact with two of the Firm’s secondees to the Department of Defence to gauge how well Dr Rumble’s remarks had gone down with that department. One of those secondees told Mr Will that they were ‘mightily pissed off’. I accept that this was said. Mr Will immediately passed this intelligence on to Mr Martinez.
12. It is now necessary to take a slight detour through the topic of Dr Rumble’s entitlement to an increase in his retainer and hourly rate of 5% on 1 May of each year. Mr Martinez gave evidence that he had ultimate authority to approve changes in the remuneration of employees. However, whilst that may well be true, the fact is that the Firm had agreed in the employment contract to increase Dr Rumble’s remuneration by 5% each year and there was nothing discretionary about that obligation. Indeed, it was Mr Martinez himself who had made that very offer to Dr Rumble in his original letter of offer.
13. A more legally correct characterisation of Mr Martinez’s evidence, therefore, would be that he had the ultimate authority to decide whether he would cause the Firm to commit a breach of Dr Rumble’s contract and thereby also contravene s 323(1) of the Act, a civil penalty provision, by not meeting its contractual obligation to pay the 5% annual increase. In that attenuated form, I would accept Mr Martinez’s evidence. Correspondingly, I would reject as legally misconceived Mr Martinez’s suggestion that he had ‘approved’ the increase for Dr Rumble in 2015 but would accept that evidence if instead it was taken to mean that Mr Martinez had ‘honoured’ the Firm’s legal obligation to do so. It is implicit in that statement that I accept that Dr Rumble was paid the increase in the 2015 year.
14. On the assumption that this increase should occur on the anniversary of the date of the contract (1 May 2011) and not the anniversary he began in employment (October 2011), Dr Rumble said that he had not received the 5% increase on any of 1 May 2014, 2015 or 2016. For 2014 and 2015, whilst the uplift did not occur on 1 May of those years, he was back-paid the increased remuneration by the Firm in December 2015.
15. On 21 June 2016, he emailed Ms Miselowski, the Firm’s National Human Resources Manager, about the increase for the 2016 year and concluded with this question: ‘Can you please let me know whether the 5% uplift has happened and—if not—when that will occur’. He received no response and renewed his question on 1 August 2016 (‘Can you please let me know what is the status of my annual uplift?’) to which Ms Miselowski responded the same day that she would look into it and get back to him. According to Mr Martinez, she did not raise this with him until 25 October 2016. This seems a little surprising since the request had been made earlier. The most likely conclusion is that Dr Rumble’s most recent activities on 21 October 2016 had, once again, brought him to the attention of Mr Martinez who had then spoken with Ms Miselowski. This would have provided the opportunity for her to mention the matter to Mr Martinez.
16. In any event, this episode provoked further emails between Mr Martinez and Dr Rumble in November 2016. According to Mr Martinez, this was to allow him to assess whether Dr Rumble should be paid his increase. Again, this reflected an erroneous understanding on Mr Martinez’s part of straightforward contractual obligations. By an email dated 13 November 2016 Mr Martinez told Dr Rumble that he understood he had been chasing up the 5% uplift that was due to be implemented on 1 May 2016. Mr Martinez told Dr Rumble that he needed verification ‘that you have complied with the minimum obligations/requirements provided for in the agreement’. Dr Rumble (correctly) responded the next day that he had performed all of his obligations. Mr Martinez then sought further details of Dr Rumble’s non-billable (promotional) work but as Dr Rumble pointed out in response he was only obliged to do that work when requested and, further, that he had not been asked to record time for non-billable work. This exchange then concluded with Mr Martinez saying he would consider the issue.
17. Mr Martinez did not communicate any decision about this matter to Dr Rumble. In his evidence, however, Mr Martinez did say that he had decided that an increase in Dr Rumble’s remuneration was not warranted. He also said that Dr Rumble’s breaches of the media policy were not material to this decision. There was no evidence that Mr Martinez ever instructed Ms Miselowski to respond to Dr Rumble that he would not be receiving the 5% increase. Consequently, I do not accept Mr Martinez’s evidence about this. If he had made such a decision, it would have been communicated to Dr Rumble. He did not, at that time, decide that the Firm would not pay the 5% increase either. Rather, the evidence is more consistent with the proposition that no decision was made at all and the matter was left dangling (as it had previously been). Mr Martinez knew that the 5% uplift for 2016 would not be paid until he decided that it should be so a certain inefficiency on his part in resolving the matter was not prejudicial to his perception of the Firm’s position.
18. The correspondence about the 5% increase payable from 1 May 2016 took place in November 2016. At that time Dr Rumble remained dissatisfied with the way the Government was handling the issues arising from the review. He wrote an article about the issue which he intended to publish in the *Sydney Morning Herald*. It agreed to publish the article on 9 December 2016. On 8 December 2016, Dr Rumble informed the Firm that the article would be published the next day. That day it was published online by the *Sydney Morning Herald* and appeared in print the next day in the *Canberra Times*.
19. Dr Rumble contended that these articles did not technically contravene the media policy because they did not involve an interview. I reject that submission.
20. The same day the article appeared in print Dr Rumble was, at it happens, in Canberra and was planning to attend the Canberra office’s annual Christmas Party. Mr Martinez was planning to attend that Christmas Party as well which is unsurprising given he was the managing partner of the Firm. It is reasonable to infer that Mr Martinez would have been irritated by the publication of Dr Rumble’s article that day. He told Mr Will, who was responsible for the Canberra office, that if Dr Rumble attended the Christmas Party then Mr Martinez would not.
21. There is dispute between Mr Will and Dr Rumble as to what happened next. Dr Rumble recollects that he was told by Mr Will via telephone not to come (‘I think it would be most uncomfortable if you attend. I think it would be better if you do not attend’). Mr Will’s version is less dogmatic. He denies actually disinviting Dr Rumble but admits that he told Dr Rumble that his attendance would be uncomfortable and asked Dr Rumble to reconsider. He says that if Dr Rumble had attended he would not have stopped him.
22. In truth, these two different versions are simply honest recollections of the same event from differing perspectives. To be told that one’s presence at a Christmas Party would be uncomfortable and being then asked to reconsider one’s attendance at it would, I think, be understood by many people as being tantamount to being told not to come. I do not think it surprising Dr Rumble took it that way. That said, I accept that is it likely that Mr Will was careful not to tell Dr Rumble he could not attend (who, after all, would wish to be the bearer of that Yuletide message?) but however expressed I think it was reasonably understood by Dr Rumble as a cancellation of his invitation.
23. In the event, Dr Rumble took the hint and did not attend. Mr Martinez denied that he had ever instructed that Dr Rumble not be invited but given Mr Martinez’ stature within the Firm he, like Henry II, can have been under no illusion about what his statement to Mr Will would mean or what the consequences for the turbulent Dr Rumble were likely to be. I do not think that Mr Martinez intended to suggest to Mr Will for one moment that there was there was a potentially acceptable outcome in which Mr Martinez did not come to the party and in which Dr Rumble did. It was Mr Martinez’s Firm and he was its managing partner. Mr Martinez knew this and so did Mr Will. Dr Rumble was not to come to the Christmas Party. How Mr Will saw to this outcome was his problem but Mr Martinez had spoken.
24. The following week, on 20 December 2016, Mr Martinez wrote an email to all staff nationally to tell them that all ‘permanent employees’ would be receiving a Coles/Myer gift card to the value of $299. On its face, Dr Rumble was not covered by this gift since it is not in dispute he was a casual employee and not a permanent one. Nevertheless, Dr Rumble wrote to Mr Holcombe thanking him for the card and asking him to keep it until the next time he was in Canberra. Mr Holcombe agreed. In subsequent emails passing between the two Mr Holcombe told Dr Rumble he had been in error about this and that all consultants on retainer were not receiving the gift card (which is, after all, what Mr Martinez’s email had said). It is true that in previous years the email had been in similar terms and that in those years Dr Rumble had received a gift card nevertheless. However, in 2016 it was not proven by Dr Rumble that he was treated differently to the other consultants. The only evidence about the other consultants related to Professor Pearce and Mr Alan Rose to the effect that they did not receive the gift card either. In that circumstance, it is not shown that the denial of the gift card to Dr Rumble was any more than the application of the Firm’s announced Christmas gift policy other than on its own terms.
25. Events now took their inevitable course. Although Mr Martinez had told Dr Rumble that he was considering the issue of his 5% increase for the 2016 year, nothing had been forthcoming on that front by 16 January 2017. As I have said, I do not think that Mr Martinez had made a decision on this issue which was most likely lingering somewhere on one of Mr Martinez’s less pressing lists of things to do. But it was on 16 January 2017 that Dr Rumble wrote to Ms Miselowski chasing the matter up. He again received no response and on 6 February 2017 he forwarded the exchange to Mr Holcombe and asked him what he should do.
26. What happened next—perhaps unsurprising to those schooled in the ordinary course of human affairs—is that Mr Martinez fired Dr Rumble. This he did by means of the email dated 20 February 2017 to which reference has already been made. The email of 20 February 2017 did not emerge out of the ether but was the result of internal communications between some of the partners. This process began on 7 February 2017 when Mr Martinez emailed Mr Will and asked him to prepare a letter terminating Dr Rumble’s employment. It will be noted that this was the day after Dr Rumble had raised his entitlement to the 5% increase for 2016 once more with Mr Holcombe.
27. What was in Mr Martinez’s mind when he decided that Dr Rumble’s employment was to be terminated? Here one enters upon the field of human psychology. Mr Martinez says that he had two reasons in mind when he took this decision. The first was Dr Rumble’s continuing breach of the Firm’s media policy. I accept Mr Martinez’s evidence to that effect and also his corresponding evidence that he did not make the decision because of Dr Rumble’s political opinion about the Government’s stance on the 2011 Defence Review. Mr Martinez did not appear to care about the politics of the situation and in fact described Dr Rumble’s activities as a ‘worthy cause’ under cross-examination. This is not necessarily an answer to Dr Rumble’s case for it is still necessary to deal with this submission that one cannot separate the expression of his political opinion from the breach of the media policy. But at the level of the facts I am abundantly persuaded that Mr Martinez’s concern was the media policy and Dr Rumble’s continued defiance of it. Indeed, I rather suspect that the real driver was not so much what Dr Rumble was doing but rather that he was not doing what Mr Martinez was telling him to do. Mr Martinez’s actions in this case and his evidence before me tended to suggest that he is a man accustomed to instinctive obedience. Dr Rumble to my observation lacks that instinct. Unsurprisingly, Dr Rumble’s attitude was quite unacceptable to a person such as Mr Martinez.
28. The second reason that Mr Martinez put forward as being the basis of his decision was that he thought there was insufficient demand for Dr Rumble’s services. I accept that Mr Martinez thought this although I question the logic. If Dr Rumble had been an ordinary salaried employee this might have made sense. But the nature of his appointment as a consultant meant that he was not on the full-time pay roll and the usual necessity for an employee to earn fees did not apply. I have in mind particularly that the Firm only had to pay him $30,000 (subject to a 5% annual uplift) by way of retainer and this was expressly said to be not for billed work but promotional activities. So far as billable work was concerned, it made no difference to the Firm how much or how little he brought in except that the more he brought in the more profit it would make. But there was no corresponding downside. He was not costing the Firm anything as a result of his low billing profile.
29. I therefore do not consider that the purported low demand for Dr Rumble’s services was an independent reason for Dr Rumble’s termination. Rather, I think the two reasons put forward by Mr Martinez are inextricably linked, i.e. that Mr Martinez did not consider Dr Rumble valuable enough to the Firm to justify the repeated disobedience of his orders.
30. What then of Dr Rumble’s inquiry about the 5% uplift for the 2016 year? Mr Martinez’s decision to terminate the contract occurred on 7 February 2017. But Dr Rumble’s forwarded email to Mr Holcombe inquiring about his 5% pay increase occurred the day before on 6 February 2017. I do not think that Mr Martinez really cared that much about the 5% pay increase issue. However, it was a topic which had crossed his desk in November of the previous year and it had provoked him in to ascertaining just how much Dr Rumble was bringing in to the Firm. Dr Rumble, in Mr Martinez’s perception, had then flouted his authority yet again by writing the piece in the *Sydney Morning Herald* and *Canberra Times* in December 2016. That occurred where, as a result of the events of November 2016, I do not doubt that Mr Martinez was already far from favourably disposed towards Dr Rumble. For Dr Rumble even to contemplate attending the Firm’s Canberra Christmas Party on the same day that he had thumbed his nose at Mr Martinez would have been, to Mr Martinez, intolerable. Mr Martinez’s threat that as managing partner he would not attend the Christmas Party if Dr Rumble was there shows the depth of the anger. But Mr Martinez took it no further then. Perhaps this was because there was no decision currently on his agenda concerning Dr Rumble; perhaps it was the time of year.
31. But when Dr Rumble then reappeared on Mr Martinez’s horizon on 6 February 2017 seeking, in Mr Martinez’s legally flawed perception, an inconceivable pay rise this brought matters to a head. As Mr Martinez knew, Dr Rumble’s contract was determinable at will and, from his perception, there was really no reason to suffer Dr Rumble a moment longer.
32. I therefore conclude that Dr Rumble’s inquiry about the 5% pay increase was at least the sine qua non for the timing of Mr Martinez’s decision. But does that mean Mr Martinez terminated his employment because of that request as a matter of substance? Not necessarily, for there are various ways the event can be viewed. One version of events would see Dr Rumble’s request as having the effect of reminding Mr Martinez to terminate Dr Rumble’s employment; another would see Mr Martinez provoked by the request into the termination. The former would not be a termination *because* of the request but the latter would be.
33. Although the question is not necessarily an easy one, I have come to the conclusion that the former characterisation better fits the facts. Dr Rumble had been inquiring about the 5% uplift for the 2016 year for a long time by then and if it was an actuating motive in Mr Martinez’s mind it is difficult to understand why he did not act on it sooner. The fact that he did not suggests that it was not something which he thought was a reason for terminating his employment. Mr Martinez’s concerns were more pedestrian. He held a perception that Dr Rumble was not bringing in much in the way of profit and he was infuriated by Dr Rumble’s refusal to comply with the media policy. What occurred therefore is that Dr Rumble’s inquiry to Mr Holcombe of 6 February 2017 brought Dr Rumble back to Mr Martinez’s attention and caused him now to act on what he regarded as insubordinate behaviour by an employee who was not, to his understanding, profit enhancing. The termination would not have happened at the time that it did without Dr Rumble’s inquiry (although it would surely have happened very soon afterwards) but to say that is not to say that the inquiry was the cause of the termination. Rather, it was the occasion.
34. I therefore conclude that Mr Martinez was actuated by three matters in reaching his decision to terminate Dr Rumble’s employment: Dr Rumble’s disobedience to the media policy (and the not-to-be-questioned authority of Mr Martinez), Mr Martinez’s perception that he was not making the Firm much in the way of fees and the fact that the Firm was entitled to end the relationship on three months’ notice without any reason.
35. Returning then to events leading to the email of 20 February 2017, Mr Martinez, who is not to my observation a collaborative leader, did not share any of this with Mr Will who was not informed of his motives. Not knowing of Mr Martinez’s actual reasons for the decision he set out about drafting the letter of termination. He discussed the draft letter with Mr Holcombe, Mr Garnett, Mr Marques and a Ms Nand who were all Canberra partners. Mr Garnett says he did not see the draft which I accept.
36. Mr Holcombe referred to the fact that there was not really enough work around for Dr Rumble and it was this idea which found its way into the initial draft written by Mr Will. The draft contained two points which did not find their way into the final form of the letter. These were:

* a reference to the fact that the Firm’s work in the Canberra office had dropped off so that he was no longer needed; and
* a section still be inserted but foreshadowed to deal with the 5% uplift issue.

1. This draft was sent to Mr Martinez who thought that the reference to the drop off in work might be taken to suggest that Dr Rumble was being made redundant and should be removed. The final form of the notice of termination sent by Mr Martinez on 20 February 2017 via email contained no reference to either of these matters. Mr Will did not give evidence of having prepared the final version and neither did Mr Martinez. But there are no further emails and it seems likely that the ultimate author of the final version was Mr Martinez, not Mr Will. In any event, regardless of who produced the draft, the final version bears Mr Martinez’s signature and is undoubtedly his document. The fact that Mr Martinez did not set out his reasons for terminating Dr Rumble in the letter is unsurprising since the contract was determinable without cause. I detect nothing sinister in that.

## 4. Was Dr Rumble Dismissed Unlawfully?

1. I think the answer to this question is no. It is trivial that dismissing Dr Rumble was adverse action within the meaning of s 342 of the Act. Section 340(1) provides:

**340 Protection**

(1) A person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised a workplace right; or

(iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or

(b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

1. A ‘workplace right’ is defined in s 341(1) in these terms:

**341 Meaning of workplace right**

(1) A person has a workplace right if the person:

(a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or

(b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or

(c) is able to make a complaint or inquiry:

(i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

(ii) if the person is an employee—in relation to his or her employment.

1. Section 361 places the onus on the Firm to prove that the reason for the adverse action was not a prohibited reason: *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2014] HCA 41; 253 CLR 243 (‘*BHP Coal*’) at 248 [6] per French CJ and Kiefel J; 253 [27] per Hayne J; 260 [55] per Crennan J.
2. Dr Rumble was able to make an inquiry of Ms Miselowski in relation to his employment with respect to his contractual entitlement to an annual 5% uplift. Consequently, it follows that he had a workplace right under s 341(1). However, the Firm has discharged the onus of proving that Mr Martinez did not determine the relationship because Dr Rumble exercised that right as I have explained at [121] above.
3. I also do not accept that Dr Rumble’s employment with the Firm was terminated because he expressed a political opinion. It is true that s 351 prohibits the taking of adverse action because an employee’s political opinion. Section 351(1) provides:

**351 Discrimination**

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer 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.

Note: This subsection is a civil remedy provision (see Part 4-1).

1. But no one at the Firm cared about Dr Rumble’s political opinion about the adequacy of the Government’s response to the 2011 Defence Review. What Mr Martinez (and Mr Will) very much cared about was Dr Rumble’s conduct in criticising the Firm’s clients which they obviously regarded as a threat to its business. He had been directed not to do this and he continued to do so. Whilst the Act proscribes dismissing a person because of their political opinion there may be some issues as to whether the Act thereby also proscribes dismissing an employee for *expressing* their political opinion. Mortimer J held in *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27; 327 ALR 460 at 493-496 [166]-[177] that it did. I would prefer to express no view about that issue until it is raised squarely for consideration. In this case, I will assume this issue in Dr Rumble’s favour.
2. However, what that then gives rise to is a question of fact vizwhether Mr Martinez terminated Dr Rumble because he was expressing his political opinion or because he was criticising the Firm’s clients in breach of the Firm’s media policy. No doubt the same actions on Dr Rumble’s part are involved in both cases because his breach of the Firm’s media policy was constituted by his expressions of political opinion. But so to observe runs the risk of drifting away from the statutory language. The question is not what Dr Rumble did but rather why Mr Martinez terminated his employment. Once Mr Martinez’s subjective mental state is identified as the correct focus of inquiry then it is necessarily follows that the fact that the Dr Rumble’s conduct is capable of multiple characterisations (expression of political opinion, breach of the media policy) merely then gives rise to a factual question about which of them was it that actuated Mr Martinez’s thinking.
3. This orthodoxy of this analysis, although once controversial, is now well-established as *BHP Coal* demonstrates. In that case, the person responsible for terminating the employee’s employment gave evidence that his reason for dismissing the employee was because he had been waving an offensive sign (with the word ‘scab’ on it) and *not* because the employee was engaged in a lawful protest. The Court held that that that finding of fact was determinative and that the employee had not been terminated for exercising a workplace right. That is indistinguishable from the present situation. Mr Martinez could have decided to terminate Dr Rumble’s employment because he had expressed a political opinion but that is not, as a matter of fact, what Mr Martinez did. He dismissed Dr Rumble because he disobeyed instructions and a policy not to discuss the Firm’s clients in public without first getting permission.
4. Ms Francois, counsel for Dr Rumble, sought to distinguish *BHP Coal* on the basis that in that case the policy did not prevent the expression of the political opinion constituted by the word ‘scab’ outside the context of the workplace. In this case, on the other hand, the particular nature of Dr Rumble’s political opinion as being about the Firm’s clients had the consequence that the policy excluded him from expressing his political opinion at all. I accept that this is a factual difference between the two cases but it does not provide a basis for the distinguishing *BHP Coal*. The critical reasoning in *BHP Coal* is unrelated to that difference and simply requires one to accept that the question of whether action has been taken for a proscribed purpose is a factual one. In that context, whether the policy which explains why the action was taken involved a blanket prohibition of the expression of political opinion or not does not matter. The question remains: why did Mr Martinez dismiss Dr Rumble?
5. I also reject the submission that the media policy was unlawful because it infringed ss 10(2)(a) and/or (d) of the *Discrimination Act 1991* (ACT) (‘the ACT Act’). It provides:

(2) It is unlawful for an employer to discriminate against an employee—

(a) in the terms or conditions of employment that the employer affords the employee; or

…

(d) by subjecting the employee to any other detriment.

1. It was submitted that the media policy discriminated against Dr Rumble because it discriminated against him because of his political convictions. Under s 7(o) of the ACT Act the holding of a political conviction is a protected attribute. Under s 8 a person discriminates when they discriminate directly or indirectly on the basis of a protected attribute. So s 10 does outlaw discrimination, whether direct or indirect, on the basis of political convictions. But the media policy does not do this. It requires all employees not to comment adversely on the Firm’s clients. It may be accepted that this involves indirect discrimination against those members or employees of the Firm who have the political opinion that the Firm’s clients should be criticised because it disadvantages them as compared to those who do not. However, the prohibition is a reasonable one having regard to the Firm’s interests in deriving revenue from the performance of legal services for clients by regulating or prohibiting employees from publicly criticising the Firm’s clients. This matters because s 8(4) provides:

**8 Meaning of discrimination**

…

(4) However, a condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances.

1. It is not to the point that in fact Dr Rumble’s activities may not have upset Mr Cunliffe or the Firm’s clients too much. The legality of the media policy is to be judged at the time of its inception.
2. Consequently, the media policy does not constitute an act of discrimination against Dr Rumble.
3. I therefore find as a fact that Dr Rumble was not terminated for having or expressing a political opinion. Mr Martinez gave evidence to that effect and was extensively cross-examined on this issue. Although there were reasons to reject other parts of Mr Martinez’s evidence, I am satisfied that this aspect of his testimony was correct. In truth, Mr Martinez did not care about Dr Rumble’s views on the Government’s implementation of his recommendations to which he was most likely indifferent. What he did care about was the earning of fees and the elimination of insubordination.
4. Although it does not arise, I would have rejected the Firm’s alternative contention that it was entitled to dismiss Dr Rumble from its employ because of his political opinion. This contention was premised on the proposition that Dr Rumble’s employment had been terminated in New South Wales because Dr Rumble was in Nambucca Heads when he received Mr Martinez’s email terminating his employment. This was said to be significant because the prohibition in s 351 against taking adverse action against an employee because of their political opinion is subject to an exception that the action is not unlawful under specified anti-discrimination laws in the place where it occurred. That list includes the NSW Act and the ACT Act. The exact terms of s 351(2) are the following:

**351 Discrimination**

…

(2) However, subsection (1) does not apply to action that is:

(a) *not unlawful* under any anti‑discrimination law in force in the *place where the action is taken*; or

…

(emphasis added)

1. The NSW Act does not contain a prohibition on discrimination on the basis of political opinion but the ACT Act does. Consequently, on one view, if the termination occurred in New South Wales then it may fall within the carve-out in s 351. This turns on the meaning of ‘not unlawful’ and ‘place where the action is taken’ in s 351(2). As this issue does not ultimately arise I will dispose of it briefly.
2. I do not accept Dr Rumble’s submission that ‘not unlawful’ is limited to actions which are specifically permitted under an anti-discrimination law as opposed to where the relevant anti-discrimination law is silent on the issue. Such a construction does not sit with the plain meaning of ‘not unlawful’. If an action is not proscribed by any anti-discrimination law then plainly the action is not unlawful. Nor does it sit with the supplementary explanatory memorandum to the Fair Work Bill 2008 (Cth), which explained an amendment changing the wording in s 351(2) from ‘authorised by’ to ‘not unlawful’ in the following terms (at [220]):

Paragraph 351(2)(a) of the Bill (together with paragraph 342(3)(a)), currently provide that action is not discriminatory if it is authorised by or under a Commonwealth, State or Territory anti-discrimination law. This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word ‘authorised’ may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorise the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.

1. The use of phrase ‘not unlawful’ is expressed to capture actions beyond express statutory exemptions. As dismissal for political opinion is not unlawful under any anti-discrimination law in NSW, I consider that if Dr Rumble had been dismissed in NSW then that action would not have contravened s 351 of the Act.
2. With respect to the ‘place where the action is taken’, I do not accept Dr Rumble’s submission that this is to be determined according to the proper law of the contract. The effect of such a construction would mean that parties could potentially contract out of statutory prohibitions against discrimination: see *Insight Vacations Pty Ltd v Young* [2011] HCA 16; 243 CLR 149 at 160 [31] per French CJ, Gummow, Hayne, Kiefel and Bell JJ, citing *Kay’s Leasing Corporation Pty Ltd v Fletcher* [1964] HCA 79; 116 CLR 124 at 142-144 per Kitto J. However, neither do I accept the Firm’s submission that the ‘place where the action is taken’ is the place of receipt of the termination notice. That would also produce a result where parties could attempt to avoid statutory prohibitions against discrimination by, for example, terminating employees whilst at a staged interstate work retreat.
3. The ‘place where the action is taken’ must turn on what the alleged action is. In this case, that action is the termination of the employment relationship between Dr Rumble and the Firm. That relationship is defined by the employment contract but is separate to the contract. Everything about that relationship was centred on the ACT. Dr Rumble’s contract provided that he was responsible to the ‘Partners in the Canberra Office’ and the Firm paid for his Practising Certificate in the ACT. Dr Rumble may have been working from Nambucca Heads in NSW but he was working pursuant to an employment relationship based in the ACT. I therefore find that the place where the dismissal took place in the ACT where the employment relationship was based.
4. For completeness, I note two final matters. *First*, I reject Dr Rumble’s submission that the pleading history of this matter indicates that the dismissal was not for lawful reasons. Whilst I accept that the media policy only came to light late in this litigation, I do not think it has any bearing on Mr Martinez’s credibility. *Secondly*, I note, without expressing any concluded view, that had the case been pursued as a claim for wrongful dismissal under Pt 6-4 Div 2 rather than under the General Protections provisions of Pt 3-1, then the carve-out in s 351 would appear to have no analogue in s 772(1)(f). Of course, both actions cannot be pursued simultaneously (s 723), but the anomaly nevertheless appears idiosyncratic.

## 5. A Reduction in Dr Rumble’s work?

1. There is no doubt that by May 2016 Mr Martinez had developed a view that he wished to reduce the amount of work Dr Rumble was doing. During some internal email discussions of the desirability of using Dr Rumble on a proposal by the Department of Agriculture and Water Resources to review its levy system, Mr Martinez made it reasonably clear that he did not favour expanding Dr Rumble’s role within the Firm. In response to a suggestion from Mr Will that Dr Rumble would be suitable for the work Mr Martinez responded by email by asking sarcastically ‘What is this unique talent’ and then in a subsequent email ‘I told them my strong preference was not to use [Dr Rumble] at all moving forward unless it was unavoidable’. However, the question of whether Dr Rumble would work on this project did not ultimately matter because the work did not proceed. I accept that Mr Martinez had by this time determined that, generally speaking, the work of Dr Rumble was to be decreased if possible. This was also the view of Mr Will although it does not appear that he actively took steps to keep Dr Rumble off particular tenders. For example, in response to a question from Mr Martinez as to whether the Firm was getting value for money from Dr Rumble (sent on 2 May 2014), Mr Will said:

On your second question I do not think we do, but others probably have a different view based on including [Dr Rumble] in tenders and bids, but my take on that is that his significance on that front is waning, and may even be a negative.

1. This tends to suggest that Mr Will was happy to see Dr Rumble’s workflow decrease although I would not read this as involving the suggestion that Mr Will was going to take active steps in that regard.
2. I therefore accept that it is likely that Dr Rumble’s name was not included (with one exception) from around 2014 in tenders and that the billable work he did do principally related to matters where clients specifically asked for him. It is not correct however that he was offered no work. He was asked to work on a matter for Clubs ACT in 2016, he was offered a renewal of his secondment to the Department of Environment (which he declined), a secondment to the Joint Health Command in April 2016 (which he also declined) and in April 2016 he agreed to be put on the panel in an advisory role for the Department of Immigration and Border Protection (to the dismay of Mr Martinez). However, it seems to me likely that but for Mr Martinez’s and Mr Will’s views, Dr Rumble would most likely have received more work.
3. Dr Rumble initially submitted that he had been excluded from working on a review for the CSIRO as a result of the Firm’s views. However, it emerged during the trial that the actual reason he had been excluded from this review was because Professor Pearce, who was working on it, had indicated he did not wish to work with Dr Rumble.
4. I nevertheless accept that there was a diminution in his work. An assessment of this effect is necessarily somewhat impressionistic. If it were necessary to put a figure on it I would find that the reduction was in the order of 30%.
5. Because this diminution in Dr Rumble’s work was not for any of the proscribed purposes in s 351, it provides no basis for compensation under the Act. It has a relevance to his contract case however (which I deal with below).

## 6. The Christmas Party Dis-invitation and the Ungiven Gift Card

1. The definition of adverse action in s 342 includes a situation where an employer ‘discriminates between the employee and other employees’. I am prepared to infer that everyone was invited to the Christmas Party except Dr Rumble. It is difficult to avoid the conclusion, in that circumstance, that he was discriminated against. However, I do not accept that the Firm contravened s 340 in doing so. At this time, Mr Martinez was actuated by his annoyance at Dr Rumble for flouting the media policy that very day. Although Dr Rumble had previously chased up the 5% uplift for 2016 this had not resulted to that point in his termination. I do not think that Mr Martinez is at all likely to have been thinking about Dr Rumble’s 5% uplift entitlement when he heard that Dr Rumble would be at the Christmas Party. A much more likely scenario—and the one which I find—is that Mr Martinez was enraged by Dr Rumble’s breach of the media policy. For the reasons I have given this did not involve any discrimination against Dr Rumble on the grounds of political opinion.
2. I assume in Dr Rumble’s favour that not giving him a gift card could be adverse action. However, it is obvious that the reason he was not given the card was because he was not a permanent employee and was not eligible for it. His non-receipt of the card had nothing to do his political opinion or the fact that he had inquired about his 5% increase.

## 7. Statutory Claims

1. On the conclusions I have reached, the Firm did not contravene by s 340(1) by terminating Dr Rumble’s employment for inquiring about his entitlement to the 5% uplift for 2016 or s 351 by discriminating against him on the basis of his political opinion.
2. Although there was likely some drop off in his work as a result of the negative attitude of Mr Martinez and Mr  Will, that negative attitude was not the result of Dr Rumble’s political opinion or because he inquired into his 5% pay increase. Consequently, it is not actionable under the Act.
3. Although I accept he was, in effect, turned away from the Christmas Party as a result of Mr Martinez’s actions (and certainly as Mr Martinez intended), this was because he had not complied with the media policy and for no other reason. And the reason he did not receive the gift card was because he was not eligible for it that year as he was not a permanent employee.
4. The question of economic loss does not therefore arise. If it had s 340 is declared to be ‘a civil remedy provision’ by s 539. Consequently, ss 545(1) and (2)(b) gives this Court power to award ‘compensation for loss that a person has suffered because of the contravention.’
5. The words ‘because of’ in s 545(2)(b) require a causative connexion between the loss claimed and the contravention. The losses claimed by Dr Rumble are as follows:

* economic loss on the basis of the work Dr Rumble would have received had he not been terminated;
* damage to his reputation resulting from the termination; and
* dislocation to his life, and stress and anxiety consequent upon the termination.

1. I would accept that if I were wrong in my conclusions about the contraventions then the 30% drop-off is recoverable as past economic loss. But in relation to future economic loss I conclude that any losses he will have suffered have been caused by his own actions given the per billable hour pay structure of his contract. Dr Rumble decided to move to Nambucca Heads and to decrease the amount of work he was doing as he himself said.
2. To the extent that there has been a reduction in Dr Rumble’s attractiveness in the Canberra legal market—there is no easy way to say this—a realistic appraisal of the cause of that reduction must surely be Dr Rumble’s ill-advised decision publicly to criticise the Minister, the DART, and the Departments of Defence and Veterans’ Affairs after the completion of his report. Professor Pearce warned Dr Rumble about the folly of this and in this he was surely correct. The view that one ought not to bite the hand that feeds loses none of its truth just because the biter believes himself to be acting on a principled basis. This is the way of the world.
3. That said, I do not think that there has been any reduction in market’s views as to Dr Rumble’s competence as a lawyer which remains untarnished. What has been damaged is Dr Rumble’s reputation for judgment and the person who has damaged it is Dr Rumble, not the Firm.
4. In areas of law not calling for the exercise of judgment or circumspection, which will include much advice work, my perception is that Dr Rumble remains perfectly employable. So even if Dr Rumble could establish liability on the part of the Firm, I would not accept that the Firm has caused him any future economic loss. The cause of any such loss is Dr Rumble.
5. Turning to Dr Rumble’s claim for general damages for dislocation to his life, anxiety, distress and humiliation I would award Dr Rumble $10,000 for being barred from the Christmas Party and $10,000 for his termination. The predominant harm here is humiliation.

## 8. The Breach of Contract Case

1. This part of Dr Rumble’s case depends, as was explained in his written submissions, upon the existence of a duty to co-operate in achieving the contractual objects of the employment contract and to comply with honest standards of contract. I am prepared to assume in his favour that such a term could be implied although that proposition is perhaps contestable. Dr Rumble contends that this term was breached because he was dismissed and because he was excluded from work.
2. However, he was dismissed lawfully for failing to comply with the Firm’s media policy. Co-operation is two-way street and Dr Rumble was not co-operating. I do not think that any implied term would require the Firm to co-operate with Dr Rumble by not terminating his employment when he was not co-operating with it by directly breaching repeated instructions not to criticise the Firm’s clients publicly. This part of Dr Rumble’s case seems to me to be wholly unrealistic.
3. So far as the reduction in his work is concerned, Dr Rumble was a casual employee with no specified work. The contractual objects did not include providing Dr Rumble with any particular work. The term, even if it existed, was not breached.
4. With respect to the failure to implement the 5% annual uplift in a timely manner, I consider this does not require an implied term to found a breach of contract; the Firm breached an express term of the contract. The Firm has back-paid the uplift so I do not need to consider this further.

## 9. Conclusion

1. The Application will be dismissed. Because the matter arises under the Act there will be no order as to costs.

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| I certify that the preceding one hundred and sixty-nine (169) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram. |

Associate:

Dated: 3 September 2019