BRINGING THE HUMAN RIGHT TO NON-DISCRIMINATION INTO WORKPLACE LAW: TOWARDS SUBSTANTIVE EQUALITY AT WORK IN AUSTRALIA?

Associate Professor Beth Gaze and Dr Anna Chapman

Melbourne Law School

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Introduction: industrial relations law and discrimination law in Australia

Australia has been very reluctant to recognise individual rights to non-discrimination at work as a legitimate element of the system of industrial relations law. Employment discrimination has been treated as a human rights matter and not as a matter of central concern for industrial relations law. As a result, employment discrimination claims must either be characterised as some other sort of workplace claim, or else be relegated to the system for resolving discrimination complaints. This makes it more difficult to combat workplace discrimination, and limits protection for workers vulnerable to discrimination.

In 2009 provisions for 'adverse action' were introduced into Australian industrial relations law that had the potential to bring employment discrimination into the mainstream of employment law, rather than being positioned as part of a separate and weaker human rights system, and therefore as something that is marginal to the industrial relations system. However in light of the interpretations that courts are giving to these provisions after the first few years, it now looks as if this is unlikely to occur and the ongoing marginalisation of employment discrimination within industrial law may continue.[1] This paper examines the context and developing interpretation of these Fair Work Act provisions to analyse whether or not the location of employment discrimination as a poor relation of employment law has changed.

We argue that behind the reluctance to fully include employment discrimination claims is an understanding or insistence that the workplace relations system should continue to cater primarily for paradigmatic workers, who follow the traditionally male pattern of full time work, are available for overtime and to relocate, and have no domestic or community responsibilities. Almost by definition, these workers are less likely to experience discrimination or prejudice. Integrating non-discrimination laws that protect non-

[1] A separate process of consolidation and strengthening Australian anti-discrimination laws has recently reached a stalemate and is unlikely to proceed, leaving anti-discrimination law in a neglected and weak state: see transcript of press conference, 20 March 2013, Hon. Mark Dreyfus SC, Attorney-General http://www.attorneygeneral.gov.au/transcripts/Pages/2013/First%20quarter/20March2013-TranscriptofpressconferenceCanberra.aspx.

paradigmatic workers into an industrial relations system designed largely by and for paradigmatic workers is a challenge in Australia, which is towards the rear of the pack among advanced industrial countries in this regard.[2] We conclude that the developing interpretation of the adverse action provisions is not challenging this position, and that the anti-discrimination law remains firmly marginal to the industrial law system.

Separation of anti-discrimination law from the industrial relations law system

The adoption of anti-discrimination laws in Australia from 1970s onwards was driven by the need to improve protection for human rights. Unlike Europe, where non-discrimination law first protected employment and only later other areas, in Australia, anti-discrimination laws applied to all areas of activity from the start. They have never been enforced through industrial law institutions, and discrimination cases have been heard in specialised tribunals or the ordinary courts.[3] Industrial awards and agreements are protected from interference by exemptions from anti-discrimination and equal opportunity laws.[4] As a result anti-discrimination law impinged very little on the industrial relations system and was treated as entirely separate both legally and institutionally.[5] There was no assumption or expectation that employment discrimination disputes were within the industrial relations system and should be dealt with by the employment system institutions.

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2 It can also be argued that the industrial relations system is primarily designed to deal with disputes between collective players, such as unions and employers, and with abstracted roles, such as employer and employee. AS a result it is strained by dealing with individualised disputes like discrimination claims that specifically challenge the use of generalised legal abstractions.

3 Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis Butterworths, 2009).

4 For example *Sex Discrimination Act 1984* s 40(1)(e) exempts anything done by a person in direct compliance with 'an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment;' see also s 40(1)(g). See also *Disability Discrimination Act 1992* s 47(1), and *Age Discrimination Act 2004* s 39(1) (8). There is no similar exemption in the *Racial Discrimination Act 1975.* These exemptions and the split between the two systems have been the subject of repeated criticism: Margaret Thornton 'Discrimination law/ industrial law: are they compatible?'(1987) 59 Australian Quarterly 162, Sara Charlesworth 'The overlap of the federal sex discrimination and industrial relations jurisdictions: intersections and demarcations in conciliation' (2003) 6 Australian Journal of Labour Economics, 559-577, more recently, Rosemary Owens, Joellen Riley and Jill Murray *The Law of Work* (Oxford University Press, 2nd ed) 441-444. A broader exemption exists in Australian anti-discrimination laws for any action necessary to comply with another Act or regulation, placing anti-discrimination laws clearly at the bottom of the legislative hierarchy.

5 Except for provision in the Fair Work Act providing for discriminatory terms in enterprise agreements or awards to be considered by the Fair Work Commission and eliminated. Non-discrimination is one of the objects of the Fair Work Act : s 3(e).

The transition in Australia during the 1990s and 2000s towards more individualised approaches to ordering industrial relations was accompanied by the introduction of greater protections for some individual rights within that system. During the 1990s protection was adopted against unlawful termination within ILO Convention No 158 on Termination of Employment.[6] One of the groups of grounds on which termination was unlawful was 'race, colour, sex, *sexual preference, age, physical or mental disability*, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin'[7]; all except the italicised grounds were listed in ILO Convention 158.[8] The list is similar to the attributes protected in anti-discrimination law.[9]

Convention 158 acknowledges the difficulty of proving these attributes were the basis for the decision by recognising that the worker should 'not have to bear alone the burden of proving that the termination was not justified' and furthermore, that assistance is required, for example, through the use of a shifting onus of proof.[10] The 1993 Act included such a shifting onus of proof. In Australia, anti-discrimination law provides no such mechanism to require an employer to give evidence about their reasons for a decision, with the result that many direct discrimination cases fail because of inability to prove the basis of the treatment was a prohibited attribute.

The adverse action provisions: intruding anti-discrimination law into the industrial relations system?

When the Fair Work Act 2009 was adopted, it was decided to extend the protection of unlawful termination of employment to conduct occurring during employment and in seeking

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6 *Industrial Relations Reform Act 1993 (Cth)* s 170DE(2).

7 Introduced as *Industrial Relations Reform Act 1993* (Cth) s170DF(1)(f), this provision is now found in the adverse action provisions of the *Fair Work Act 2009*, s351(1).

8 ILO Convention concerning Termination of Employment at the Initiative of the Employer (Convention 158) (Entry into force: 23 Nov 1985, ratified by Australia 26 Feb 1993, entry into force for Australia 26 Feb 1994, A 5(d). The Convention was preceded by R119 Termination of Employment Recommendation, 1963 (No. 119). The Convention is recognised in the *Fair Work Act 2009*, ss 722, 758, 771.

9 In Australia federal anti-discrimination law covers only grounds related to race, sex, disability and age, but many state and territory anti-discrimination laws cover the wider range including sexual preference, religion and political opinion; no Australian anti-discrimination law expressly covers 'social origin' discrimination.

10 ILO Convention 158 (note 7 above), A 9 para 2.

employment as well. This was done through the adoption of the adverse action provisions in Part 3-1 of the Act, entitled General Protections. While the definitions are quite complex, the essence of these provisions is that an employer is prohibited from taking adverse action against an employee or potential employee on three major bases: industrial activities (previously freedom of association), exercise of a workplace right, or an attribute within the protected list, which is the same as the list of attributes protected previously against unlawful termination.[11]

Because this was largely an expansion of the scope of the three pre-existing bases relating to termination to conduct at or preceding work, the reverse onus was expanded as well. This potentially offered a route to bringing a discrimination-type claim in relation to conduct prior to or during employment in industrial relations law. Such a claim would have a substantial advantage over a claim brought in the anti-discrimination jurisdiction because the reverse onus provision requires the respondent to provide some evidence of their motivations.

Thus the discrimination-type claim available in the Fair Work Act from 2009 was potentially broader in scope and much more attractive than either the previous unlawful termination claim or an employment discrimination claim under federal or state anti-discrimination laws. This posed a real challenge to the traditional operation and understanding of the industrial relations system as a system dealing with paradigm employees in a collective labour context. It raised the issue of whether the system was able to take account of unfamiliar claims that were attracting increasing recognition primarily based on a human rights rationale of respect for the individual. The next section of our paper traces the indications that have emerged from the case law so far as to the reaction of decision-makers interpreting these provisions.

What the case law so far indicates about the adverse action provisions

Case law on the adverse action provisions has begun to explore their meaning. We briefly consider interpretations of three aspects of the adverse action provisions: the reverse onus in s 361, the meaning given to the word 'discrimination' in s 342, and the meaning of 'disability' in s 351.

1. The reverse onus

[11] *Fair Work Act 2009 (Cth)*: Adverse action is defined in s 342, the three groups of grounds are defined in Divisions 3-5 of Part 3-1 of the act: ss340-356.

In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,[12] a union branch president in a higher education institution received confidential reports from some union members that they had been asked to sign false documentation in the context of a reaccreditation process. The members did not want to report their experiences to management. Barclay sent an email around to union members through the institution's email system warning them not to sign any incorrect documentation. The email came to the attention of senior management, and Barclay was asked to report the instances to management, but refused to do so on the basis of confidentiality. He was then suspended and his access to the email system closed. His claim was of adverse action under the 'industrial activity' ground in s 346 of the Act, the successor to the union victimisation / freedom of association provisions. He failed at first instance, succeeded on appeal to the Full Federal Court, and then failed again before the High Court.

The central issue was the question of what was necessary for the employer to discharge their burden under the reverse onus provision in s 361 that his treatment was not 'because of' the prohibited reason. The employer maintained that it had disciplined Barclay because he had breached the employee's Code of Conduct, which required misconduct at work to be reported to management, and that any employee would have been treated in this way regardless of union membership status or activity. The Institute's Chief Executive Officer gave evidence that she was motivated only by the breach of policy and not by Barclay's union status or activities in reaching her decision. Barclay's arguments centred on the fact that his activities were engaged in as union branch president, and any action to sanction them could not be separated from the capacity in which he acted. In terms of the burden of proof, he argued that the subjective view of the employer's decision-maker should not be the test of whether the employer had discharged its reverse onus by proving that the decision was not made because of the prohibited attribute. It would allow an unreasonable belief to exonerate an employer.

The High Court, Australia's highest court, held that since the CEO gave credible evidence accepted by the court that she did not consider the prohibited basis in her decision, the Institute had discharged its onus of proof and would not be held liable. We have critiqued this decision elsewhere.[13] Despite having recognised in an earlier disability discrimination case

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12 [2012] HCA 32.

13 Anna Chapman, Beth Gaze & Kathleen Love, 'Adverse Action, Discrimination and the Reverse Onus of Proof: Exploring the Developing Jurisprudence' Australian Labor Law Association Biannual Conference, Canberra, Nov 2012; Kathleen Love, Beth Gaze and Anna Chapman, "'But Why?' 'Just Because!': The Causal Link between Adverse Action and Prescribed Grounds under the Fair Work

that unconscious motives could influence decisions and reasons for activities,[14] the High Court refused to draw on that understanding in Barclay's case. The Court rejected the approach of the Full Federal Court in its majority decision in favour of Barclay, where Gray and Bromberg JJ held that the test required the court to determine the 'real reason' for the conduct based on the objective circumstances as well as the subjective evidence of the decision-maker.

The High Court's decision sets up a system where the assessment of reasons is unrealistic. There is ample evidence from cognitive psychology that unconscious factors influence decision-making – indeed much of the advertising industry is based on this.[15] It allows employer liability to rest on the credibility of employer's own self serving evidence.

2. 'Discrimination'

Several lower court decisions have discussed the meaning of the terms 'discrimination' and 'disability' in the adverse action provisions. 'Discrimination' is one part of the definition of 'adverse action' in s 342. The Act contains no definition of discrimination and it was unclear whether the courts would refer to meanings developed in anti-discrimination law to guide their interpretation of the word in the Fair Work Act. For example would 'discrimination' be regarded as extending to indirect discrimination, or only to direct discrimination, and is intention of some kind a necessary element of proof. Both institutions in the fair work system, the Fair Work Commission and the Fair Work Ombudsman have taken the view, drawing on anti-discrimination law, that the adverse action provisions cover both direct and indirect discrimination.[16] The courts however, have preferred to draw on dictionary meanings of discrimination, but even then they have not been consistent on which dictionary meaning

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14 *Purvis v New South Wales* [2003] HCA 62; 217 CLR 92.

15 Eg Charles Lawrence, 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317; Linda Krieger, 'The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity Employment' (1995) 47 *Stanford Law Review* 1161; Charles Lawrence, 'Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection"' (2008) 40 *Connecticut Law Review* 931..

16 Fair Work Ombudsman, *Guidance Note 6: Discrimination Policy*, 2nd edn, 2011, [5.4]; Fair Work Commission decisions include: *Deng v Inghams Enterprises Pty Ltd* [2010] FWA 8797 (23 November 2010) [55]-[56] where in the context of an unfair dismissal hearing, FWA interpreted the concept of discrimination in Part 3-1 as involving direct and indirect discrimination; *Australian Catholic University Limited T/A Australian Catholic University* [2011] FWA 3693 (10 June 2011) [11]-[14] where 'discriminatory term' under the *FW Act* s 195 was interpreted to mean both direct and indirect discrimination.

to use. In particular, several judges have preferred the now less common older usage meaning 'to distinguish between' to the more recent common meaning of treating someone less favourably on a prohibited or irrelevant ground.

In *Hodkinson v Commonwealth*[17] Cameron FM held that although anti-discrimination law definitions of direct and indirect discrimination 'do not inform' the meaning of s 351 of the FWA, the dictionary meaning of 'being treated less favourably' was appropriate to interpreting 'discrimination' in s 342, requiring that treatment be shown to be prejudicial or unfavourable.[18] A similar approach which requires proof of disadvantage resulting from the distinguishing treatment was used by the Full Federal Court in a case interpreting the word 'discrimination' in s 45 of the *Building and Construction Industry Improvement Act 2005 (Cth)*.[19] In contrast, although also claiming to rely on the dictionary definition, Katzmann J in *Pilbara Iron Company* held that since 'discrimination' in s 342 was not defined, it 'must have its ordinary meaning, which, relevantly, is simply to make a distinction…' thus not requiring proof of disadvantage resulting from the distinction. [20]

Courts are also leaning towards requiring action be intended or at least deliberate in order to amount to discrimination within s 342(1).[21] However, it is not clear what type of intention is necessary: for example must the respondent simply intend to do the action complained of, or must they be aware of the prohibited ground as part of the reason for their choice? Again the courts have deliberately avoided considering any learning from anti-discrimination law, even though it embodies the cumulative developed knowledge about discrimination of the last thirty or forty years. It appears that the imperative to maintain the exclusion of anti-discrimination principles from workplace law remains very strong.

3. 'Disability'

Cases interpreting the attribute 'disability' in s 351(1) of the adverse action provisions raise even greater concerns. Eschewing the anti-discrimination law definitions of disability, and also the prevailing understanding of disability reflected in the development of the social

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17 *Hodkinson v Commonwealth* (2011) 207 IR 129 [2011] FMCA 171.

18 Ibid, at [176]-[178].

19 *Australian Building and Construction Commissioner v McConnell Dowell Constructors (P/L)* [2012] FCAFC 93.

20 *Construction Forestry Mining and Energy Union v Pilbara Iron Company (Services) Pty. L:td. (No. 3)* [2012] FCA 697.

21 *Ramos v Good Samaritan Industries (No. 2)* [2011] FMCA 341, and *Hodkinson*, note 56 above.

model of disability[22] which underpins the Convention on the Rights of People with Disabilities, judges have preferred to look to dictionary meanings of disability. This has led one Federal Magistrate to hold that it refers only to physical or mental impairment and does not include its 'practical consequences,'[23] but another to decide that the objects of the Act indicate that it should include the 'inherent and perceived functional impairments or consequences' in the workplace.[24] One magistrate has even applied the very restrictive definition of 'employee with a disability' in s 12 of the *Fair Work Act, which is used to identify* a person who is sufficiently disabled to qualify for disability support pension to determining the meaning of 'disability,' without any discussion of reasoning in using the definition of a phrase to identify the meaning of one word in it.[25] It is hard to see any warrant in the single word 'disability' or in language of s 351 for use of that definition, or such a narrow interpretation.

These developing interpretations of important terms in the *Fair Work Act* are not promising for those who hoped the adverse action provisions would improve protection for vulnerable employees. It is unfortunate that judges in industrial relations cases have preferred to remain ignorant of the knowledge and understanding of discrimination that has been developed over several decades experience in anti-discrimination law. It underlines a continued unwillingness to deal with anti-discrimination law understandings in industrial relations law, and resistance to taking account of modern approaches to rights. While anti-discrimination meanings may not be adopted, considering the issues they raise is likely to make analysis of the legislation more sophisticated.

Conclusion: bringing non-discrimination into workplace relations law

This paper has reviewed evidence of the strong resistance in Australian industrial relations law to dealing with discrimination issues, which may hamper giving full effect to the potential of the adverse action provisions to protect disadvantaged workers in the Australian workforce. The industrial relations system seems to strongly prefer only to deal with its two

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22 Eg Lee Ann Basser and Melinda Jones 'The *Disability Discrimination Act* 1992 (Cth): A Three Dimensional Approach to Operationalising Human Rights' (2002) *Melbourne University Law Review* Vol 26 (2) 254 –284.

23 Cameron FM in *Hodkinson* at [146].

24 *Stephens v Australian Postal Corporation* [2011] FMCA 448 per Smith FM at [86]-[90].

25 *CFMEU v Leighton Contractors Pty. Ltd.* [2012] FMCA 487, Burnett FM at [159]-[162].

main categories: employers and workers, and their collective organisations. Its assumption that workers, unions and employers are the main conceptual categories conceals the diversity within these groups and fails to take account of the interests of minorities within these groups.

Although the interests of diverse businesses (large and small) now receive some attention, there is still substantial resistance to recognising that workers come in many different genders, ethnicities or cultural contexts, abilities, sexualities and so on. They may have very different experiences and needs. Anti-discrimination law is the only branch of law that takes these factors into account as a primary fact: most of the rest of law is based on abstracting the individual by removing all these particularising attributes. The challenge for workplace law then, is to pay attention to the needs of the particular workers involved as individuals or as people characterised by an attribute and with a right to be treated equally and fairly, rather than as universal workers whose needs are presumed to be those of a stereotypical or paradigm individual.

The indications from the case law on interpretation of the Fair Work Act adverse action provisions so far are not promising for those who hoped that the provision would provide an avenue for industrial law to come to terms with anti-discrimination law as a central element of its business. Whether this is simply a matter of unfavourable legislative interpretation or whether there is a deeper level of incompatibility between the two systems of thought is yet to be explored.