SUPPLEMENT

CHAPTER 4: THE CONCEPT OF UNLAWFUL DISCRIMINATION

Legislative developments

The Victorian legislation

The *Equal Opportunity Act 2010* (Vic), which replaced the *Equal Opportunity Act 1995* (Vic), contains refined definitions of direct and indirect discrimination. Those statutory descriptions of the two components of the concept of unlawful discrimination were not altered by the *Equal Opportunity Amendment Act 2011* (Vic).

The *Equal Opportunity Act 2010* (Vic) retains the structure of the earlier Victorian legislation. Direct and indirect discrimination are unlawful only when performed in the various areas of public life identified in the Act.1

Section 8 of the Victorian Act now defines ‘direct discrimination’ as follows:

1. Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

2. In determining whether a person directly discriminates it is irrelevant—
   a. whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;
   b. whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

This new definition of ‘direct discrimination’ overcomes the ‘causation’ difficulty in the earlier Victorian legislation, identified at [4.2.29] of the book, by the inclusion of the words ‘because of that attribute’ in section 8(1). The definition of ‘direct discrimination’ in the 1995 Victorian Act did not contain any words connecting the respondent’s unfavourable treatment of the complainant with that person’s protected attribute.

The new definition also removes the need to prove ‘differential treatment’ by contrasting the respondent’s treatment of the complainant with that of a real or hypothetical ‘comparator’. While the new definition does not preclude the use of differential treatment as a means of proving ‘direct discrimination’, it does not mandate the use of what is sometimes a highly artificial and unproductive exercise.

Indirect discrimination is defined in section 9 of the Victorian Act as follows:

1. Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—
   a. that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
   b. that is not reasonable.

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1 See the various provisions referred to in s 7(1)(b) of the *Equal Opportunity Act 2010* (Vic).
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Section 9(2) provides that the respondent bears the burden of proving that any requirement, condition or practice is reasonable, while section 9(3) contains a non-exhaustive list of matters such as proportionality, cost and the availability of reasonable adjustments which must be considered when determining the question of reasonableness.

This most important change to the indirect discrimination provisions in the Victorian legislation is the reversal of the onus of proof of reasonableness. Under the 1995 Act the complainant bore the onus of proving that any requirement, condition or practice was ‘not reasonable’.

While section 9(1) of the 2010 Act no longer expressly requires the complainant to present statistical evidence in support of a claim of indirect discrimination—it merely requires proof that the requirement, condition or practice is more easily satisfied by people who do not have the complainant’s protected attribute than it is by people with that attribute—it is difficult to see how the complainant could prove, in most cases, that the requirement, condition or practice had ‘the effect of disadvantaging persons with an attribute’ without providing data about disparate impact.

**Proposed consolidation of Commonwealth anti-discrimination laws**

The *Human Rights and Anti-Discrimination Bill 2012* (Cth) seeks to consolidate and modernise Commonwealth anti-discrimination legislation by combining the five existing Commonwealth statutes—the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Australian Human Rights Commission Act 1986* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth)—and by refining important aspects of the existing body of law, most notably the statutory meaning of the concept of discrimination. The exposure draft of the Bill has been referred to the Senate Legal and Constitutional Affairs Committee for public consultation and report by 21 February 2013.


While the *Human Rights and Anti-Discrimination Bill 2012* (Cth) does not use the terms ‘direct discrimination’ and ‘indirect discrimination’ to define the conduct which it makes unlawful, these concepts are a central feature of the Bill and the drafting of the relevant provisions mirrors modern definitions of ‘direct discrimination’ and ‘indirect discrimination’ such as those found in the *Equal Opportunity Act 2010* (Vic).

The term ‘discrimination by unfavourable treatment’ replaces ‘direct discrimination’. Clause 19 of the Bill provides:

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(1) A person (the first person) discriminates against another person if the first person treats, or proposes to treat, the other person unfavourably because the other person has a particular protected attribute, or a particular combination of 2 or more protected attributes.

(2) To avoid doubt, unfavourable treatment of the other person includes (but is not limited to) the following:
   (a) harassing the other person;
   (b) other conduct that offends, insults or intimidates the other person.

Although clause 19(2) simply reflects case law concerning the conduct that can amount to less favourable treatment under existing Commonwealth legislation, cl 19(2)(b) has generated controversy because of the view that it extends to conduct that subjectively offends the complainant. However, none of the existing case law concerning conduct that can amount to less favourable treatment extends this far.

What has previously been known as indirect discrimination in Australia is referred to as ‘discrimination by imposition of policies’ in the Commonwealth Bill. Clause 19(3) of the Bill provides:

A person (the first person) discriminates against another person if:
(a) the first person imposes, or proposes to impose, a policy; and
(b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and
(c) the other person has that attribute or combination of attributes.

This provision is similar to the first part of section 9(1) of the Equal Opportunity Act 2010 (Vic) where the term ‘indirect discrimination’ is still used to deal with a policy that has a disparate impact on people with a protected attribute.

However, the Commonwealth Bill deals with the exculpatory element of a policy that has a disparate impact in a different way to earlier laws. Australian anti-discrimination legislation has traditionally provided that indirect discrimination is unlawful only when the condition, requirement or practice in question that has a disparate impact upon people with a protected attribute is ‘not reasonable’.

The Commonwealth Bill deals with this issue by providing an exception for ‘justifiable’ conduct. The Bill contains an interesting exception that applies to both types of discrimination in relation to all of the protected attributes. Clause 23(2) provides as follows:

It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.

Clause 23(3)-(6) describes a process for determining whether the conduct in question is ‘justifiable’ which is very similar to that currently followed by courts and tribunals when

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3 See eg Qantas Airways Ltd v Gama [2008] FCAFC 69.
5 See eg Equal Opportunity Act 2010 (Vic), s 9(1)(b); Racial Discrimination Act 1975 (Cth) s 9(1A)(a).
considering whether a condition, requirement or practice that has a disparate impact upon people with a protected attribute is ‘not reasonable’.

The unusual feature of the exception for ‘justifiable’ conduct is that it applies to ‘discrimination by unfavourable treatment’. None of the existing Australian anti-discrimination statutes contains an exception or defence of justification to a complaint of direct discrimination.

The Human Rights and Anti-Discrimination Bill 2012 (Cth) has a similar reach to the existing Commonwealth legislation as discrimination by unfavourable treatment and discrimination by imposition of policies are unlawful only when ‘the discrimination is connected with any area of public life’. In contrast to current Commonwealth, State and Territory anti-discrimination legislation, however, ‘areas of public life’ is not exhaustively defined in the Commonwealth Bill. While the usual ‘areas of public life’, such as work, education, accommodation and clubs are identified in the Bill, it remains open to a creative complainant to identify some new area of public life in which it is unlawful to discriminate against a person on the ground of the various attributes that fall within the Commonwealth Bill.

Notable cases

While it did not break new ground, the decision of the Full Court of the Federal Court in *Qantas Airways Ltd v Gama* is notable because of the conclusion reached by all members of the Court about conduct that could constitute unlawful discrimination as well as the statements made about the standard of proof in discrimination cases.

The Full Court upheld a decision by a Federal Magistrate that Qantas had discriminated against a former employee on the ground of race in contravention of section 9 of the *Racial Discrimination Act 1975* (Cth). The primary evidence in support of this finding was derogatory statements made by the complainant’s supervisor about him in the presence of other workers. Those statements included reference to the complainant’s race. On appeal, Qantas argued that a remark or comment in the workplace could not of itself amount to a contravention of section 9. French and Jacobsen JJ rejected this argument and stated:

Section 9 prohibits a class of acts defined by their attributes and their purpose or effect. To be unlawful under s 9 it is necessary that an act involve “a distinction, exclusion, restriction or preference based on race, colour, dissent or national or ethnic origin …”. The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person’s race, colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person’s race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person’s race then that linkage establishes both the distinction and its basis upon race. That was the present case.

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The second attribute of an unlawful act under s 9(1) is that it have the purpose or effect of nullifying or impairing a person’s recognition, enjoyment or exercise on an equal footing of any “human right or fundamental freedom …”. The denigration of an employee on the grounds of that person’s race or other relevant attribute can properly be found to have the effect of impairing that person’s enjoyment of his or her right to work or to just and favourable conditions of work. The question then is whether two or three racist remarks over a period of time can have such a purpose or effect. That is a matter of fact dependent upon the nature and circumstances of the remarks …

Undoubtedly remarks which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin, are capable of having a very damaging impact on that person’s perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self worth and thereby appreciably disadvantage them in their conditions of work. Much will depend upon the nature and circumstances of the remark. Occasional politically incorrect banter will be unlikely to have the requisite purpose or effect. The judgment which the learned magistrate made was open to him on the facts which he found.

At first instance, the Federal Magistrate found for the complainant after applying what he referred to as the ‘Briginshaw standard’. In his cross-appeal, Mr Gama challenged the use of this standard. Branson J sought to bury the use of the ‘Briginshaw standard’ in anti-discrimination cases:

I agree with the conclusion of French and Jacobson JJ that the Federal Magistrate’s reasons for judgment do not disclose any error in the application of the applicable standard of proof to Mr Gama’s allegations. However, in my view, for the reasons given above, references to, for example, “the Briginshaw standard” or “the onerous Briginshaw test” and, in that context, to racial discrimination being a serious matter not lightly to be inferred, have a tendency to lead a trier of facts into error. The correct approach to the standard of proof in a civil proceeding in a federal court is that for which s 140 of the Evidence Act provides. It is an approach which recognises, adopting the language of the High Court in Neat Holdings, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved – and, I would add, the circumstances in which it is sought to be proved.

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7 [2008] FCAFC 69 [76]-[78]. The third member of the Full Court, Branson J, stated at [122] that she agreed ‘generally’ with the reasons for judgment of French and Jacobsen JJ.
8 Gama v Qantas Airways Ltd (No 2) [2006] FMCA 1767 [10]-[22].
9 [2008] FCAFC 69 [13]. The other members of the Full Court, French and Jacobsen JJ stated at [110] that they agreed ‘generally’ with the comments made by Branson J about the ‘Briginshaw standard’.