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# AUSTRALIA'S SOLUTION TO DISABILITY DISCRIMINATION ENFORCEMENT

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## I. Introduction

Until recently, Australian disability discrimination law was similar to that of the United States and much of the rest of the world: it defined disability relatively narrowly, its penalties for noncompliance were relatively paltry, and it depended on enforcement of lawsuits brought by aggrieved private citizens. In 2009, however, Australia adopted the *Fair Work Act* 2009 (*FW Act*). The *FW Act* defined disability much more broadly, increased substantially the penalties for noncompliance, and created a state institution to enforce disability rights. This article analyses the *FW Act*, compares it to the workplace disability law in the United States, and argues that the *FW Act* is a transformational development in the struggle to achieve workplace equality and is an approach that should attract significant international interest.

## II. Background: Australian Anti-Discrimination Laws

### *A. The General Statutory Scheme*

The Australian approach to regulating anti-discrimination through general civil rights statutes is similar to that in the United States. As in the United States, Australian antidiscrimination law prohibits discrimination based on several prescribed attributes (such as race, sex, and disability), and traditionally has relied on private complainants to bring civil suits to enforce these rights.

The Australian anti-discrimination statutes divide discrimination into two categories: direct and indirect. The distinction is similar to the prohibitions against disparate treatment and disparate impact found in some United States antidiscrimination statutes. Direct discrimination exists where a discriminator treats, or proposes to treat, a person with a disability less favourably than people without the disability because of that person's impairment.[1] Indirect discrimination occurs where a policy that appears on its face not to discriminate (a facially neutral policy) contains a condition or requirement that a person with a disability cannot satisfy because of that person's disability. [2]

Traditionally, when a federal (or state) anti-discrimination law is breached, the burden of proof is on the aggrieved party to prosecute a claim by filing a formal complaint. Under the Disability Discrimination Act of 1992 (Commonwealth of Australia) (DDA),[3] the first step in bringing a complaint of disability discrimination is to file a complaint with the

Australian Human Rights Commission (AHRC) [4] (the AHRC is the rough equivalent of the United States Equal Employment Opportunity Commission). The AHRC will investigate and attempt to conciliate the complaint. If conciliation is unsuccessful, then the President of the AHRC will issue a termination notice, which enables the complainant to bring proceedings either in the Federal Magistrates Court or the Federal Court of Australia. Court proceedings are complex and onerous on the complainant. Although the AHRC can provide procedural assistance to the complainant in filing a claim, the complainant has the primary role in prosecuting the claim.[5]

### *B. The Fair Work Act Reforms*

The Australian statute governing workplace disability discrimination is the amended *FW Act*, enacted in 2009, which is a general industrial relations statute with 6 chapters, 800 sections, and associated regulations. This statute governs a wide range of employment issues, including trade union activities, strikes, national employment standards, unfair dismissals, and, most critically for this discussion, workplace disability discrimination.

*FW Act* Chapter 3 deals with the rights and responsibilities of employees, employers, and organizations. Part 3-1 protects against various types of discrimination, such as disability, race, or sex. This Part also prohibits breaches of workplace rights, including freedom of association and involvement in lawful industrial activities.[6]

The protection against disability discrimination in *FW Act* Part 3-1 has three elements.[7] First, the employee, or prospective employee, must have a workplace right. Second, the employee, or prospective employee, must have suffered adverse action, such as a discharge or demotion. Third, the adverse action must have been "because of" the employee's workplace right. Part III will describe these elements in detail, drawing upon existing case law. Because these provisions have not been used to enforce disability discrimination rights, part III will draw from case law pertaining to the workplace right to engage in trade union activities.

## III. Key FW Act Reforms

The *FW Act* expands workplace disability discrimination protection in three significant ways. First, it defines much more broadly who is protected against discrimination, what constitutes an adverse action, and how causation may be shown. Second, it increases the penalties for noncompliance. Third, and most importantly, it creates a state institution to enforce disability rights.

### *A. Definitions*

#### *1. Who Is Protected?*

The *FW Act* § 341 applies to include any person who can make a complaint or inquiry under a workplace law.[8] The drafters of the *FW Act* gave the term "workplace right" a very broad meaning. Section 351 explains that an employer must not take adverse action

against employees, or prospective employees, of that employer because of a person's "race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin." The inclusion of "physical or mental disability" potentially provides significant protection to employees with impairments. Unlike the United States judicial history surrounding the Sutton Trilogy,[9] Australian courts have not narrowed the definition of "disability", and the judicial trend has been to define "disability" broadly to provide the maximum protection. Because of this broad definition, Australian employees with impairments can generally overcome the threshold issue of satisfying the definition of "disability" in anti-discrimination statutes.[10] The disadvantage of this approach is that it makes it relatively easy for nondisabled persons to falsely claim disability. Nonetheless, as described below, this area of discrimination law has had its difficulties as a result of the *Purvis v State of New South Wales (Department of Education and Training)* High Court decision (the Australian High Court is equivalent to the U.S. Supreme Court).[11]

*2. What Is Adverse Action?*

Previous Federal industrial relations legislation protected employees from dismissal only on narrowly proscribed grounds.[12] Today, under the *FW Act* Part 3-1, nearly any negative conduct will be regarded as adverse action. Adverse action includes injuring an employee in employment, altering the position of the employee to the employee's detriment, and discriminating between the employee and other employees of the employer.[13] The employee need not prove he or she has suffered any compensable harm. Accordingly, adverse action under the *FW* Act should be read to include any negative treatment, even if this treatment is not quantifiable. Recent court decisions have confirmed this broad interpretation of adverse action.[14]

*3. Causation*

Section 340 provides that adverse action is unlawful where the action is "because of" the employee's workplace right. The *FW Act* Part 3-1 reverses the usual burden of proof in a way favorable to employees. The duty upon employees is to prove that they have suffered conduct amounting to adverse action and that they have a workplace right. *FW Act* § 361 then reverses the burden of proof and requires employers to prove that they did not take the adverse action because the employee exercised a workplace right.

The DDA uses a "comparator test" to determine whether adverse employment action is "because of" an employee's exercise of a protected right. This test compares how the complainant was treated to how the complainant would have been treated had he or she been a hypothetical employee without a disability.[15]

In the United States, courts also use comparators to measure discrimination.[16] Unlike in Australia, however, in the United States, comparators are actual (rather than hypothetical) employees who do not share the same protected characteristic or protected conduct as the plaintiff but who otherwise are similarly situated. If the plaintiff can show that that the

employer treated the comparator differently than the plaintiff, and the employer cannot show that the comparator was treated differently because of a reason other than the protected characteristic or conduct, then the fact finder may infer that discrimination was the true cause of the adverse employment action.

In one sense, the Australian use of comparators is more favorable to employees than the American use. It can be difficult to find comparators who are similarly situated to a plaintiff-employee in every conceivable respect, such as years of service, rank, disciplinary history, performance evaluations, etc. Charlie Sullivan, for example, points out that American "plaintiffs tend to lose when they cannot point to a comparator",[17] and that "[i]n nearly every case in which the plaintiff has lost out to a competitor, the employer will claim that the competitor is different...."[18] The Australian model obviates the need for finding actual comparators by permitting the use of hypothetical comparators. Nonetheless, even under the Australian model, some complainants have found it difficult to identify hypothetical comparators that courts will accept.

### *B. Penalties*

Workers who have been discriminated against under the *FW* Act can obtain compensation.[19] Workers also can seek reinstatement where the adverse action has resulted in termination of employment. Perhaps most importantly, under § 539, employers found to have discriminated against employees can be fined – i.e., levied a "pecuniary penalty order" – up to $33,000 (Australian dollars, which at the time of writing is roughly at parity with the U.S. dollar) for each act of discrimination.

The *FW Act* has substantially expanded the situations where pecuniary orders – fines – can be made. Previously only dismissals could be fined; now, any adverse action will justify a fine. The *FW Act* thus has substantially increased the likelihood that employers discriminating against an employee with a disability will be investigated and prosecuted by the state, ordered to compensate the employee, and pay a fine.

### *C. Public Enforcement*

Perhaps the most important innovation in the FW Act is public enforcement. Public enforcement has the potential to significantly enhance workplace disability protection in Australia. If used to anywhere near its full potential, it will be unique in the international community.

Under the *FW Act* §§ 365 and 367, employees can bring private suits for a breach of their workplace rights similar to the existing victim enforcement model under the *ADA* or *DDA*. The *FW* Act, regards discrimination as a public concern and accordingly has empowered the Fair Work Ombudsman (FWO) to act as a state enforcer of workplace civil rights.

Critically for the enforcement of disability discrimination, the powers of the FWO include a focus upon monitoring, inquiring into, and investigating breaches and

commencing prosecutions where the *FW Act* is breached.[20] The FWO has power to enter a workplace without any requirement that it suspects or believes a breach has occurred.[21]

Once the FWO has detected unlawful adverse action, and if in its discretion it regards the breach as sufficient to warrant any further action, the FWO then has two main options. First the FWO can accept an "enforceable undertaking" from the employer. An enforceable undertaking is a written deed executed between an employer and the FWO in which the employer (1) admits wrongdoing, (2) agrees to perform specific actions to remedy the wrongdoing (e.g. create a payment plan to rectify underpayments, make an apology, print a public notice), and (3) commits to future compliance measures (e.g. regular internal audits, training for managers and staff, implementing compliance measures, future reporting to the FWO).[22] If the undertaking is breached, the FWO retains the power to prosecute the employer or obtain an order from the Federal Court forcing the employer to comply with the undertaking.[23] The second option available to the FWO is to prosecute the employer in the Federal Court.[24]

## IV. The Impact of Public Enforcement

Australian antidiscrimination law, like antidiscrimination law in the United States, traditionally has relied on victims to act as "private attorneys general" to enforce their rights by bringing civil suits. As discussed above, the *FW Act* provides for public enforcement by the FWO. We believe this will significantly enhance enforcement of antidiscrimination disability laws in Australia.

Reliance upon individual victim enforcement of workplace antidiscrimination laws has at least three problems. First, for some members of the disabled community, their disability itself might make it difficult for them to understand that they have been discriminated against, or to understand what they should to do remedy the discrimination. For example, persons with disabilities restricting their ability to articulate legal arguments in court, or with mental and intellectual impairments, will struggle to represent themselves in court proceedings.

Second, persons with disabilities may not have the economic resources to pursue legal claims. Recent decisions reveal that the initial cost of a first hearing for one party involved in anti-discrimination proceedings in Australia is an estimated outlay of $20,000 to $30,000.[25] For many employees, outlays of this magnitude may preclude them from taking any action to fight discrimination.

Third, some discrimination is "systematic", affecting multiple persons.[26] This type of discrimination is unlikely to be effectively remedied by individual prosecutions. For example, as in the United States prior to the passage of the ADA, many Australian employers place a requirement to drive a work vehicle in the job description in positions where most employees seldom need to drive. It can be difficult for an applicant to ascertain whether driving is an essential element of the job for which the applicant is applying, because the only basis for the applicant's determination of this is the

employer's own job description. The FWO, with its statutory investigative powers, is in a much better position to identify the most egregious cases of discrimination of this kind.

By contrast, under the *FW Act*, an aggrieved employee is required only to lodge a complaint and respond to questions from the FWO.[27] Once the FWO has decided to prosecute a case, it can use its resources and powers to ensure an alleged breach of the *FW Act* is investigated, sufficient evidence is collected when available, and then where appropriate, prosecute the matter. The power of the FWO to prosecute claims is a significant step that, if utilized, has the potential to significantly reduce employment-related disability discrimination in Australia.

## V. Conclusion

The 2009 Australian *FW Act* improves workplace disability discrimination laws in three significant ways. It defines disability discrimination much more broadly, it increases substantially the penalties for noncompliance, and it creates a state institution to enforce disability rights. Of these, this article argues that the latter is the most important. The *FW Act*'s creation of the FWO turns the enforcement of workplace civil rights from a private issue enforced by under-empowered complainants to a public issue enforced and punished by the state. If used to anywhere near its full potential, the FWO would be unique in the international community. Empowering a state institution to enforce disability workplace rights is a transformational development in the struggle to achieve workplace equality and an approach that should attract significant international interest. א

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1. *DDA* § 5.

2. *DDA* § 6.

3. http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264.

4. *Australian Human Rights Commission 1986* (Cth) §§ 46P - 46PO. Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/ahrca1986373

5. *Australian Human Rights Commission 1986* (Cth) §§46PR, 46PT - 46PV.

6. FW Act Part 3-1 - Division 4.

7. This presumes the employee is a national system employee or their employer is a national system employer and accordingly bound by the FW Act generally. See for discussion, FW Act §§ 13 and 14.

8. FW Act, § 341(1)(c).

9. In the *Sutton* Trilogy, the United States Supreme Court significantly narrowed the definition of disability under the ADA. Sutton v. United Airlines, 527 U.S. 471 (1999); Murphy v. United Postal Service Inc., 527 U.S. 516 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

10. NEIL REES, KATHERINE LINDSAY, &SIMON RICE, AUSTRALIAN ANTI-DISCRIMINATION LAW 263-265 (Federation Press 2008).

11. (2003) 217 CLR 92.

12. The first Federal unlawful dismissal provisions were introduced in 1993 in the Industrial Relations Reform Act 1993.

13. FW Act, § 343.

14. See, e.g., Barclay v The Board of Bendigo Regional Institute of Technical and Further Education, [2011] FCAFC 14: http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/14.html.

15. See *Purvis v State of New South Wales (Department of Education and Training*, (2003) 217 CLR 92.

16. See generally Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALABAMA L. REV. 191 (2009); Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006) (rejecting the "slap-in-the-face" test for whether a comparator is sufficiently similarly situated to an employment discrimination plaintiff).

17. Sullivan*, id.,* at 208.

18. *Id*. (footnote omitted).

19. *FW Act*, Chapter 4 Civil remedies Part 4-1 Orders Division 2.

20. FW Act § 682(1)(d) - (f); The FWO also has the functions of an inspector (see section 701).

21. FW Act § 708.

22. *FW Act* § 715(1); see also http://www.fairwork.gov.au/about-us/investigations/pages/enforceableundertakings.aspx (last visited Sept. 26, 2011).

23. *FW Act* § 715(6) and (7).

24. *FW Act* § 682.

25. Assessment of $30,000 in *Clack v Collins* (No 1) [2010] FCA 513 http://www.austlii.edu.au/au/cases/cth/FCA/2010/513.html; $20,000 in *Croker v Department of Education and Training (NSW)* [2009] FCA 350: http://www.austlii.edu.au/au/cases/cth/FCA/2009/275.html.

26. Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

27. Fair Work Ombudsman, 'Making a Complaint': <http://www.fwo.gov.au/Make-a-complaint/pages/default.aspx> at 2 November 2009.