

# **AUSTRALIA'S FAIR WORK ACT AND THE TRANSFORMATION OF WORKPLACE DISABILITY DISCRIMINATION LAW**

PAUL HARPUR\*  
BEN FRENCH\*\*  
RICHARD BALES\*\*\*

## **ABSTRACT**

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 its enforcement depended on lawsuits brought by aggrieved private citizens. In 2009, however, Australia adopted the Fair Work Act (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 an approach that should attract significant international interest.

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\* BBus (HRM), LLB (Hons), LLM, PhD. Solicitor of the High Court of Australia, Post Doctorate Research Fellow with the TC Beirne School of Law, The University of Queensland, on the project entitled "From Ratification to Implementation: The Disability Human Rights Paradigm and the Right to Work in the Convention on the Rights of Persons with Disabilities" and lecturer in labour and occupational health and safety Law. All authors would like to express our gratitude to A/Prof Graeme Orr, A/Prof Heather Douglas and Dr Tarmara Walsh from the University of Queensland, to Ashlea Kellner from Griffith University, Michael Waterstone from Loyola Los Angeles Law School, and Robert Dittman from St. Mary's University School of Law.

\*\* B.Laws (Hons), BBus (IR Major), Grad Dip Legal Prac. Lecturer of Employment Relations & Equal Employment Opportunity Law & Practice, Griffith University Business School, Griffith University Centre for Work, Organisation and Wellbeing. Ben lectures in Employment Relations Law, Discrimination Law and Introductory Business Law in the Griffith Business School and is a Legal Practitioner in Queensland holding a Volunteers Practising Certificate.

\*\*\* Professor of Law and Director of the Center for Excellence in Advocacy, Northern Kentucky University, Chase College of Law. B.A. Trinity University; J.D. Cornell Law School.

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## INTRODUCTION

Many countries have recently reformed their workplace disability laws. In the United States, the Genetic Information Nondiscrimination Act was enacted on May 21, 2008 with its employment provisions commencing on November 21, 2009,<sup>1</sup> and the Americans with Disabilities Act Amendments Act was signed into law on September 25, 2008 and became effective on January 1, 2009.<sup>2</sup> The United Kingdom Parliament, following the Hepple Report<sup>3</sup> enacted the

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<sup>1</sup> Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. No. 110 – 223, 122 Stat. 881 (codified as amended in scattered sections of 29 and 42 U.S.C.) (effective date Nov. 21, 2009) *see generally* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483 (2011) (analyzing the ADAAA and GINA and arguing that the concept of immutability deserves renewed attention in the field of employment discrimination); Genetic discrimination is also an issue in Australia. *See, e.g.*, Margaret Otlowski et al., *Practices and Attitudes of Australian Employers in Relation to the Use of Genetic Information: Report on a National Study*, 31 Comp. Lab. L. & Pol'y J. 637 (2010).

<sup>2</sup> ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (effective Jan. 1, 2009).

<sup>3</sup> *See* BOB HEPPLER ET AL., *EQUALITY: A NEW FRAMEWORK* (2000); BOB HEPPLER, *Equality* (2011).

Equality Act 2010 (UK).<sup>4</sup> The Convention on the Rights of Persons with Disabilities (CRPD) was adopted by the United Nations in 2006 and signed by President Obama in 2009;<sup>5</sup> Article 27 of the CRPD substantially clarifies the rights of persons with disabilities at work.<sup>6</sup>

Following this international lead, the Australian Parliament has enacted major reforms to its domestic anti-discrimination regime.<sup>7</sup> The equivalent legislation in Australia to the Americans with Disabilities Act 1990 (ADA)<sup>8</sup> is the recently amended Disability Discrimination Act 1992 (Commonwealth of Australia) (DDA).<sup>9</sup> Although the reforms to the DDA are significant for Australia, they are far from internationally ground breaking. The workplace discrimination reforms in the Fair Work Act 2009 (Commonwealth of Australia) (FW Act), however, are worthy of significant international attention.<sup>10</sup> This article will analyse the workplace disability provisions in the FW Act.

Legislative schemes in different jurisdictions use different procedural vehicles to enforce anti-discrimination laws. These include

<sup>4</sup> Equality Act, 2010, c.15 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/15/contents>.

<sup>5</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007); for details on signatories to the CPRD, see *Convention and Optional Protocol Signatures and Ratifications*, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>; for a discussion of the CRPD and its development, see Paul Harpur & Richard Bales, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons From the U.S. Experience*, 37 N. KY. L. REV. 363 (2010).

<sup>6</sup> For a discussion how the right to work can be used to judge state conduct, see Paul Harpur, *Developments in Chinese Labour Laws: Enforcing People with Disabilities' Right to Work?*, LAWASIA J., 2009 at 26; Paul Harpur, *Time to be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 3, 1271 (2011).

<sup>7</sup> *The Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (Austl.) was introduced, inter alia, to implement Australia's obligations under the CRPD: Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth), paras 1, 29, 34, 41 and 61 (Austl.); *The Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ddaohrlaa2009660](http://www.austlii.edu.au/au/legis/cth/consol_act/ddaohrlaa2009660); For a discussion on the amendments, see Paul Harpur, *The Convention on the Rights of Persons with Disabilities and Australian Anti-Discrimination Laws: What Happened to the Legal Protections for People Using Guide or Assistance Dogs?*, 29 U. TASMANIA L. REV. 49 (2010); Belinda Smith, *Fair and Equal in the World of Work: Two Significant Federal Developments in Discrimination Law*, 23 AUSTR. J. LAB. L. 199 (2010).

<sup>8</sup> American with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2008).

<sup>9</sup> *Disability Discrimination Act 1992* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/dda1992264](http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264).

<sup>10</sup> *Fair Work Act 2009* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/)

litigation in standard courts, formal adversarial processes in specialized tribunals or before governmentally appointed arbitrators, privately imposed binding arbitration, nonbinding administrative or arbitral processes, and variations on mediation or conciliation.<sup>11</sup> The United States has largely relied upon private enforcement and the private attorney to enforce and advance civil rights.<sup>12</sup> This approach has largely failed to provide an adequate enforcement vehicle for persons with disabilities.<sup>13</sup>

The Australian FW Act has effectively turned the enforcement of prescribed civil rights in Australia from a private action into an action investigated and prosecuted by the state. Where general anti-discrimination laws have often been associated with small damages awards, the FW Act enables courts to award damages and issue fines of up to \$33, 000 AUD per breach<sup>14</sup> and has resulted in large compensation awards and pecuniary penalty orders against employers for discrimination (although not yet for disability discrimination). This article will analyse the introduction of the FW Act regime and the theoretical and practical operation of the public enforcer, the Fair Work Ombudsman (FWO).

This article argues that the FW Act – particularly its broad definition of disability, its significant penalties for noncompliance, and its creation of the FWO to enhance enforcement – is a transformational development in the struggle to achieve workplace equality, and is an approach that should attract significant international interest. Part I of this article provides an overview of anti-discrimination law in Australia. Part II describes the FW Act and explores how the FWO has operated to

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<sup>11</sup> Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1405–06 (2004).

<sup>12</sup> For a discussion of the operation of the ADA and the concept of the private attorney general, see Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 493–94 (2007).

<sup>13</sup> When compared to women, racial minorities and other equity groups, persons with disabilities have had less success when appearing before the United States Supreme Court. Stein, Waterstone and Wilkins argue that one reason persons with disabilities have had such limited success in United States Supreme Court litigation is the lack of a strategic approach. These authors focus on the role of cause lawyers. Cause lawyers are lawyers who spend a “significant amount of their professional time designing and bringing cases that seek to benefit various categories of people with disabilities and who have formal connections with disability rights organizations.” Michael Ashley Stein et al., *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1661 (2010).

<sup>14</sup> At the time of writing the Australian dollar (AUD) is hovering around parity with the United States Dollar. In this article all references to currency will be a reference to the Australian dollar..

stamp out breaches of civil rights in Australia. Part III performs a theoretical analysis to predict the long-term impact of the introduction of the new adverse action provisions and the operation of the FWO on the struggle to ensure workplaces free from disability discrimination.

## I. ANTI-DISCRIMINATION LAWS IN AUSTRALIA

Australia is a federation of states similar to the United States. Two significant differences are that Australia does not have a Bill of Rights, and historically the federal government has relied on its external affairs power to enact international conventions that attempt to guard its citizens' rights.<sup>15</sup> The Australian federal legislature is referred to as the Commonwealth Parliament; the Federal judiciary is referred to as the High Court of Australia, Federal Court Full Court, Federal Court, and Federal Magistrates Court.<sup>16</sup> The powers of the Commonwealth Parliament are regulated by a constitution. Following recent constitutional challenges to the Commonwealth Parliament's power to pass laws regarding industrial relations and corporations, the Commonwealth Parliament can regulate almost all employment relationships in Australia.<sup>17</sup> Now that all states but Western Australia have delegated their industrial relations powers (except over state politicians, public sector employees, judicial officers, law enforcement, and local government employees) to the Commonwealth, the FW Act regulates the private sector in Australia and all employees in the Commonwealth and territory public sectors.<sup>18</sup>

Protection against workplace discrimination appears in both general anti-discrimination laws and in general industrial relations statutes. Traditionally the anti-discrimination protection included in

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<sup>15</sup> ANDREW BYRNES ET AL., *BILLS OF RIGHTS IN AUSTRALIA: HISTORY, POLITICS AND LAW* ch. 3 (2009).

<sup>16</sup> FEDERAL COURT OF AUSTRALIA, <http://www.federalcourt.gov.au/aboutct/aboutct.html> (last visited May 8, 2012).

<sup>17</sup> *Commonwealth of Australia Constitution Act* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/coaca430](http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430); For a discussion of recent constitutional development in the powers of the Commonwealth Parliament to legislate on industrial relations matters, including the critical case *New South Wales v Commonwealth*, see ANDREW STEWART, *STEWART'S GUIDE TO EMPLOYMENT LAW* 23–26 (3rd ed. 2011).

<sup>18</sup> STEWART, *supra* note 17, at 21; these acts include *Industrial Relations (Commonwealth Powers) Act 2009* (N.S.W.); *Fair Work (Commonwealth Powers) Act 2009* (Vict.); *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Queensl.); *Fair Work (Commonwealth Powers) Act 2009* (S. Austl.); *Industrial Relations (Commonwealth Powers) Act 2009* (Tas.).

general industrial relations laws has been quite limited.<sup>19</sup> However, the introduction of the provisions in the FW Act has substantially altered the anti-discrimination landscape in Australia. The below sections will first analyse the role of general anti-discrimination laws, and then analyse the significant reforms introduced by the FW Act.

The Australian approach to regulating anti-discrimination through general civil rights statutes is similar to that in the United States. In the United States, discrimination is regulated by the Equal Pay Act of 1963,<sup>20</sup> Title VII of the Civil Rights Act of 1964,<sup>21</sup> the Age Discrimination in Employment Act of 1967,<sup>22</sup> and the ADA and the Rehabilitation Act of 1973.<sup>23</sup> In Australia, discrimination on the basis of sex is regulated in the Federal jurisdiction by the Sex Discrimination Act 1984,<sup>24</sup> race by the Racial Discrimination Act 1975,<sup>25</sup> age by the Age Discrimination Act 2004,<sup>26</sup> and disability by the DDA. Although there are important differences between these statutory regimes, all of them prohibit discrimination based upon a prescribed attribute in certain circumstances, and then largely rely on private complainants to bring civil suits to enforce their rights.<sup>27</sup>

The Australian anti-discrimination statutes bifurcate the prohibition against discrimination into direct and indirect discrimination. The distinction is similar to the prohibitions against disparate treatment and disparate impact found in some United States anti-discrimination statutes. Direct discrimination exists where a discriminator treats, or proposes to treat, a person with a disability less favourably than a person

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<sup>19</sup> For a comparison of the differences in protections, see Anna Chapman, *Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act*, 32 UNSW L. J. 746 (2009).

<sup>20</sup> Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2011).

<sup>21</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. 21 (2008).

<sup>22</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2008).

<sup>23</sup> Rehabilitation Act of 1973, 29 U.S.C. §§ 793–94 (2008).

<sup>24</sup> *Sex Discrimination Act 1984* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/sda1984209/](http://www.austlii.edu.au/au/legis/cth/consol_act/sda1984209/); *Disability Discrimination Act 1992* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/dda1992264/notes.html](http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/notes.html).

<sup>25</sup> *Racial Discrimination Act 1975* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/rda1975202](http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202)

<sup>26</sup> *Age Discrimination Act 2004* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ada2004174](http://www.austlii.edu.au/au/legis/cth/consol_act/ada2004174)

<sup>27</sup> SIMON RICE, AUSTRALIAN ANTI-DISCRIMINATION LAW 616–22 (2008)..

without the disability because of that person's impairment.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> Under the DDA, a complaint of disability discrimination must be commenced via a complaint lodged with the Australian Human Rights Commission (AHRC).<sup>31</sup> 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.<sup>32</sup> Although the Federal Court remains a court of competent jurisdiction and formal legal technicalities may not be required, proceedings remain complex and onerous on the complainant. Furthermore, although the AHRC can provide procedural assistance to the complainant in filing a claim in the Federal Magistrates Court or Federal Court and the President can adopt an *amicus curia* function, the complainant has the primary role in prosecuting the claim.<sup>33</sup>

Belinda Smith has argued that Australia needs additional regulation to motivate employers to internalise social inclusion

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<sup>28</sup> *Disability Discrimination Act 1992* (Cth) s 5 (Austl.); The social model provides that the concept of disability is a social construct and it is barriers in society that turn a person's impairment into a disability. Thus the focus of should be upon the barriers that cause disablement. For a discussion on the distinction between impairment and disability in the social model, see C. BARNES ET AL., *EXPLORING DISABILITY: A SOCIOLOGICAL INTRODUCTION* (1999); an allied concept is participatory justice. For a discussion on the extent and manner that participatory justice animates the CRPD, see Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice, and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167 (2008).

<sup>29</sup> *Disability Discrimination Act 1992* (Cth) s 6 (Austl.); for a discussion of the potential social justice potential of indirect discrimination, see Titia Loenen, *Indirect Discrimination as a Vehicle for Change*, AUSTL. J. HUM. RTS, 2000, at 77.

<sup>30</sup> CHRIS RONALDS, *DISCRIMINATION LAW AND PRACTICE* 201 (3rd ed. 2008).

<sup>31</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 46P–46PO, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ahrca1986373](http://www.austlii.edu.au/au/legis/cth/consol_act/ahrca1986373).

<sup>32</sup> Now a division of the Federal Court: see *Australian Human Rights Commission Act 1986* (Cth) s 46P; *Information for People Making Complaints*, AUSTRALIAN HUMAN RIGHTS COMMISSION, [http://www.humanrights.gov.au/complaints\\_information/complainants.html](http://www.humanrights.gov.au/complaints_information/complainants.html) (last visited Nov. 16, 2008).

<sup>33</sup> *Australian Human Rights Commission Act 1986* (Cth) §§ 46PR, 46PT–46PV (Austl.).

objectives.<sup>34</sup> To achieve this, Smith has proposed a new role for what then was known as the Human Rights and Equal Opportunity Commission and now is known as the Australian Human Rights Commission (Commission).<sup>35</sup> Under Smith's proposal, the Commission would become more active in enforcement and more proactive in motivating employers to embrace self-regulation.<sup>36</sup> Due to constitutional limitations, the Australian Human Rights Commission has limited power in prosecuting anti-discrimination statutes.<sup>37</sup> The FWO, in contrast, is not a tribunal and does not have the same limitations. The next Part of this article describes how the FW Act and the FWO increase the detection and prosecution of disability discrimination in Australia.

## II. THE FAIR WORK REFORMS

The FW Act is a general industrial relations statute with six chapters, 800 sections, and associated regulations.<sup>38</sup> This statute governs a wide range of employment issues, including trade union activities, strikes, national employment standards, unfair dismissals, modern and enterprise agreement making, powers of the tribunal Fair Work Australia and, most critically for this discussion, workplace disability discrimination.<sup>39</sup> The FW Act does not remove existing rights under existing civil rights laws.<sup>40</sup> This means an employee may elect to use the existing civil rights protections found in Federal, State, or Territory anti-discrimination statutes, or prosecute a complaint under the new provisions in the FW Act Part 3-1.

FW Act Part 3-1 deals with the rights and responsibilities of employees, employers, and organizations.<sup>41</sup> Part 3-1 includes protection

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<sup>34</sup> Belinda Smith, *Not the Baby and the Bathwater: Regulatory Reform for Equality Laws To Address Work-Family Conflict*, 28 SYDNEY L. REV. 689 (2006).

<sup>35</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 6, pt 1 (Austl.), available at <http://www.hreoc.gov.au/about/index.html>.

<sup>36</sup> Smith, *supra* note 34, at 723.

<sup>37</sup> This limitation is caused by the operation of the separation of powers doctrine. For the High Court of Australia case which restricted the functions of the predecessor to the Australian Human Rights Commission, see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (Austl.); for a discussion of this case, see Matthew G. Cowman, *Separation of Judicial Power: Brandy v. Human Rights and Equal Opportunity Commission*, 2 DEAKIN L. REV. 119 (1995).

<sup>38</sup> *Fair Work Act 2009* (Cth) § 3 (Austl.).

<sup>39</sup> See generally *id.* at ch 3-1.

<sup>40</sup> *Id.* at §§ 26-27.

<sup>41</sup> See generally *id.* Part 3-1.



against various types of discrimination, such as disability, race, or sex.<sup>42</sup> Part 3-1 contains eight divisions. Divisions 1, 2, 7, and 8 introduce the Part and describe procedural issues.<sup>43</sup> Part 3-1 Division 3 prohibits breaches of workplace rights. This Division protects all employees' workplace rights, including freedom of association and involvement in lawful industrial activities,<sup>44</sup> and protects employees from discrimination based upon attributes such as age, race, sex, and disability.<sup>45</sup>

The protection against disability discrimination in FW Act Part 3-1 has three elements.<sup>46</sup> First, the employee or perspective employee must have a workplace right. Section 341(3) explains that a prospective employee has the same workplace rights as a current employee.<sup>47</sup> Second, the employee must have suffered adverse action, such as a discharge or demotion.<sup>48</sup> Third, the adverse action must have been "because of" the employee's workplace right.<sup>49</sup> This Part will now describe these elements in detail, drawing upon existing case law. To date, because these provisions have not been used to enforce disability discrimination rights, this Part will draw from case law pertaining to the workplace right to engage in trade union activities.

### A. WHAT IS A WORKPLACE RIGHT?

The FW Act § 341 applies to include any person who can make a complaint or inquiry under a workplace law.<sup>50</sup> Section 12 defines "workplace law" as including any law of the Commonwealth, of a State, or of a Territory that "regulates the relationships between employers and employees."<sup>51</sup> This potentially could include Commonwealth laws that

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<sup>42</sup> *See id.*

<sup>43</sup> Fair Work Act Part 3-1 Division 1 is introductory; Division 2 sets out the circumstances in which Part 3-1 applies; Division 7 sets out rules for the purposes of establishing contraventions of Part 3-1; and Division 8 deals with compliance. In most cases, a general protections dispute that involves dismissal will be dealt with by a court only if the dispute has not been resolved by Fair Work Australia, the Commonwealth employment tribunal.

<sup>44</sup> *Fair Work Act 2009* (Cth) pt 3-1, div 4 (Austl.).

<sup>45</sup> *Fair Work Act 2009* (Cth) pt 3-1, div 5 (Austl.).

<sup>46</sup> This presumes the employee is a national system employee or the employer is a national system employer and accordingly bound by the Fair Work Act generally. For a discussion, *see Fair Work Act 2009* (Cth) §§ 13-14 (Austl.).

<sup>47</sup> *Fair Work Act 2009* (Cth) § 341 (Austl.).

<sup>48</sup> *Id.* at § 342.

<sup>49</sup> *Id.* at § 340.

<sup>50</sup> *Fair Work Act 2009* (Cth) § 341(1)(c) (Austl.); *See also id.* at § 12.

<sup>51</sup> *Id.* at § 12.

regulate conduct between employers and employees regarding such issues as copyright, workers' compensation insurance, employers' obligations to employees in bankruptcy, or many other areas where statutes (perhaps peripherally) regulate the conduct between employers and employees. It would certainly include the regulation of disability discrimination under federal and state anti-discrimination statutes. Although the drafters of the FW Act may not have intended so many Commonwealth laws to be included within the scope of the adverse action provisions, the operation of the intersecting definitions raises the possibility for the imaginative litigator to incorporate many Commonwealth statutory regimes into general protections actions.

The drafters of the FW Act gave the term "workplace right" a broad application. Although the definition of workplace right could be extended to include a range of other statutory regimes, the FW Act Part 3-1 expressly protects certain attributes. Section 351 explains that an employer must not take adverse action against employees, or prospective employees, of that employer because of a persons' "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."<sup>52</sup> 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,<sup>53</sup> Australian courts have not narrowed the definition of "disability." Although the Australian High Court has somewhat narrowed the operation of disability laws,<sup>54</sup> the judicial trend has been to define disability broadly to provide the maximum

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<sup>52</sup> *Id.* at § 351.

<sup>53</sup> 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); See generally Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008); Lawrence D. Rosenthal, *Can't Stomach the Americans with Disabilities Act? How the Federal Courts Have Gutted Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other Hidden Illnesses*, 53 CATH. U. L. REV. 449 (2004).

<sup>54</sup> For a discussion of how the High Court of Australia has adopted technical readings to narrow the application of anti-discrimination laws, see Belinda Smith, *From Wardley to Purvis—How Far Has Australian Anti-Discrimination Law Come in 30 Years?*, 21 AUSTL. J. LAB. L. 12 (2008); Margaret Thornton, *Disabling Discrimination Legislation: The High Court and Judicial Activism*, AUSTL. J. HUM. RTS.

protection.<sup>55</sup> 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.<sup>56</sup> 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)* decision.<sup>57</sup>

## B. WHAT IS ADVERSE ACTION?

Previous Federal industrial relations legislation protected employees from dismissal only on narrowly proscribed grounds.<sup>58</sup> Although the FW Act § 723 contains unlawful dismissal protection, the more significant protection can now be found in Part 3-1. Under the FW Act Part 3-1, nearly any negative conduct will be regarded as adverse action.<sup>59</sup> 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.<sup>60</sup> The employee need not prove she has suffered any compensable harm.<sup>61</sup> Accordingly, adverse action under the FW Act should be read to include any negative treatment, even if this treatment is not quantifiable.

Obiter dicta in *Barclay v. The Board of Bendigo Regional Institute of Technical and Further Education* illustrates that a wide range of circumstances will constitute “adverse action.”<sup>62</sup> This case arose out of

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<sup>55</sup> *Barclay v Bd. of Bendigo Reg’l Inst. of Technical and Further Educ.* (2011) 191 FCR 212, 219 (Austl.).

<sup>56</sup> NEIL REES ET AL., AUSTRALIAN ANTI-DISCRIMINATION LAW 263–65 (2008).

<sup>57</sup> *Purvis v State of New South Wales* (2003) 217 CLR 92 (Austl.); scholars, such as Smith, have been highly critical of the *Purvis* judgment: “This approach makes clear that our direct discrimination laws are underpinned by a formal rather than substantive model of equality, and are thus limited in their capacity to eliminate all but a small subset of discrimination and able to do little more than promote procedural fairness.” Smith, *supra* note 54, at 74.

<sup>58</sup> The first Federal unlawful dismissal provisions were introduced in 1993 in the *Industrial Relations Reform Act 1993* (Cth) § 170DF (Austl.).

<sup>59</sup> *Fair Work Act 2009* (Cth) pt 3-1 (Austl.).

<sup>60</sup> *Id.* at § 342.

<sup>61</sup> STEWART, *supra* note 16, at 263.

<sup>62</sup> *Barclay v Bd. of Bendigo Reg’l Inst. of Technical and Further Educ.* (2011) 191 FCR 212 (Austl.); The appeal in this case was from a judgment of a single judge of the Federal Court. *Barclay v Bd. of Bendigo Reg’l Inst. of Technical and Further Educ.* [2010] FCA 284. Tracey J in that case found against the employee.

an e-mail sent by a trade union official (Barclay) to all staff pertaining to a pending audit of his employer.<sup>63</sup> The employee sent an e-mail stating:

Subject: AEU – A note of caution

Hi all,

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

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

It is stating the obvious but, DO NOT AGREE TO BE PART OF ANY ATTEMPT TO CREATE FALSE/FRAUDULENT [sic] DOCUMENTATION OR PARTICIPATE IN THESE TYPES OF ACTIVITIES. If you have felt pressured to participate in this kind of activity please (as have several members to date) contact the [Australian Education Union] and seek their support and advice.<sup>64</sup>

The employer argued Barclay should have raised the matters in his e-mail with management before e-mailing all staff. When Barclay refused to provide management names of the employees who had witnessed the fraudulent activity, the employer suspended Barclay from duty, suspended his access to the Internet, required him to stay away from his employer's premises, and required him to show cause as to why disciplinary action should not be taken against him. The employer conceded that it had engaged in adverse action by suspending him from duties, suspending his access to the internet, and requiring him not to attend the premises.<sup>65</sup> Justices Gray and Bromberg did not make a finding on whether or not this conduct amounted to adverse action as Justice

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<sup>63</sup> Barclay, (2011) 191 FCR at 224–27.

<sup>64</sup> *Id.* at 224–25.

<sup>65</sup> *Id.* at 229–30.

Tracey at first instance had not made a ruling and simply accepted the employer's concession.<sup>66</sup> The trade union on appeal attempted to amend its pleadings to obtain clarification that these three acts and the act of providing an employee to show cause would constitute adverse action. Due to the lateness of the request to amend, the court refused the amendment and proceeded on the basis that the employer had conceded.<sup>67</sup>

Any of the four actions of the employer in *Barclay* can properly be regarded as adverse action. Other lower court judgments demonstrate the wide range of conduct that has been held to constitute adverse action. In *D H Gibson Pty Limited*, an agreement where an employer would provide employees, "except casuals," with protective gear such as safety footwear and high-visibility clothing was held to constitute adverse action against casuals.<sup>68</sup> In *Australian Licensed Aircraft Engineers Association v. Qantas Airways Ltd & Anor*, an airline company was held to have taken adverse action against a licensed aircraft engineer.<sup>69</sup> In this case the employee said he had worked additional overtime on an overseas posting and requested a rostered day off. When employees worked on domestic routes and worked overtime it was standard practice for them to take rostered days off. The employee's supervisor became aggressive and said that employees based in Brisbane would not be granted any overseas postings in the future until this dispute was resolved. Employees from other Australian cities continued to have overseas postings. Federal Magistrate Raphael found that the employer had stopped overseas postings for employees in Brisbane to punish the employee and to pressure him to waive his workplace rights. This constituted adverse action.<sup>70</sup> To date every judgment has read the term "adverse action" extremely widely. The critical issue for employees will be linking the adverse action to their workplace rights.

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<sup>66</sup> *Id.*.

<sup>67</sup> *Id.* at 230.

<sup>68</sup> *D H Gibson Pty Limited* [2011] FWA 911; Commissioner Cambridge held that the provision of protective gear was a benefit under a workplace law (the Occupational Health and Safety Act 2000 (NSW): [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/ohasa2000273](http://www.austlii.edu.au/au/legis/nsw/consol_act/ohasa2000273)) and therefore the discrimination would amount to adverse action against casuals in breach of § 340(1)(a)(i) of that Act.

<sup>69</sup> *Austl. Licensed Aircraft Eng'r Ass'n v Qantas Airways Ltd. & Anor.* [2011] FMCA 58 (Austl.).

<sup>70</sup> *Id.*

### C. WHEN WILL ADVERSE ACTION HAVE BEEN ENGAGED IN BECAUSE OF A WORKPLACE RIGHT?

Section 340 provides that adverse action is unlawful where the action is “because of” the employee’s workplace right.<sup>71</sup> The FW Act Part 3-1 reverses the usual burden of proof in a way favourable to employees. The duty upon employees (or FWO if it is prosecuting) is to prove that they have suffered conduct amounting to adverse action and that they have a workplace right.<sup>72</sup> 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. This test of linking adverse action to a workplace right is the element that may have the greatest impact upon disability discrimination in Australia.

The DDA uses a “comparator test” to determine whether adverse employment action is “because of” an employee’s exercise of a protected right.<sup>73</sup> The leading High Court of Australia precedent on the operation of the comparator test is *Purvis v. State of New South Wales (Department of Education and Training)*.<sup>74</sup> To determine if direct discrimination is made out on the facts, the comparator test compares how an employer would have treated an employee if the employee did not have the disability. In performing this comparison, the High Court test compares the treatment a complainant received against the treatment a hypothetical person who did not have the complainant’s disability, but manifested the same symptoms, would have received.<sup>75</sup> In *Purvis*, the artificial separating of disability from the impact of that disability meant that a school was lawfully able to expel a student because he could not refrain from performing certain conduct due to his disability. The High Court held that the disability discrimination would only occur if the discriminator treated the student differently because the student had a disability. The school had not treated the student differently because of this disability, but because his disability caused the student to perform certain actions. The school would have treated any student who performed those actions the same.<sup>76</sup> For this reason, the majority of the High Court held the

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<sup>71</sup> *Fair Work Act 2009* (Cth) § 340(1)(a)(i) (Austl.).

<sup>72</sup> *Id.* at § 361..

<sup>73</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/dda1992264](http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264).

<sup>74</sup> *Purvis v State of New South Wales* (2003) 217 CLR 92 (Austl.).

<sup>75</sup> *Id.* at 100–01.

<sup>76</sup> *Id.* at 161.

school had not discriminated against the student based upon his disability.<sup>77</sup>

In the United States, courts also use comparators to measure discrimination.<sup>78</sup> 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-employee but who otherwise are similarly situated to the plaintiff-employee.<sup>79</sup> If the plaintiff-employee can show that the employer treated the comparator differently than the plaintiff-employee, 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.<sup>80</sup>

In one sense, the Australian use of comparators is more favourable 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,”<sup>81</sup> 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 . . . .”<sup>82</sup> The Australian model obviates the need for finding actual comparators by permitting the use of hypothetical comparators.

Nonetheless, the use of hypothetical comparators presents its own problems – the grass is always greener on the hypothetical side of the divide. The *Purvis* judgment has been heavily criticised by people interested in the rights of persons with disabilities<sup>83</sup> and was a topic of serious concern in the submissions to the Standing Committee on Legal

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<sup>77</sup> *Id.* at 100–01, 160–63.

<sup>78</sup> See generally Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. 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).

<sup>79</sup> Sullivan, *supra* note 78, at 193–94.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 208.

<sup>82</sup> *Id.* (footnote omitted).

<sup>83</sup> For a discussion, see Colin D. Campbell, *A Hard Case Making Bad Law: Purvis v New South Wales and the Role of the Comparator under the Disability Discrimination Act 1992 (Cth)*, 35 FED. L. REV. 111, 113 (2007); Harpur, *supra* note 7; Smith, *supra* note 34.

and Constitutional Affairs report.<sup>84</sup> Complainants have encountered substantial difficulties in identifying hypothetical comparators that courts will accept and struggled to prove discrimination suits under an approach that strives for formal equality.<sup>85</sup> If FW Act Part 3-1 was interpreted in a manner that imported a form of the comparator test, then it is likely that these provisions would focus upon formal equality and would fail to provide much substantive protection to employees.

The way in which the FW Act § 351 defines discrimination based upon an attribute differs substantially from the way comparable tests are phrased in the ADA or DDA. The drafting of FW Act § 351 has created judicial division as to whether a comparator should be used to determine if adverse action has been engaged in “because of” a workplace right. The leading authority on the application of the “because of” test is the Federal Court Full Court judgement in *Barclay v. The Board of Bendigo Regional Institute of Technical and Further Education*.<sup>86</sup> In this judgment there was a two-to-one split where Justices Gray and Bromberg held that § 351 did not require use of a comparator to satisfy the section:

The onus cast by § 361 on the person taking the adverse action means that, to succeed, that person has to establish that he or she was not actuated by the attributes or industrial activity which § 346 seeks to protect. . . . The real reason or reasons for the taking of the adverse action must be shown to be “dissociated from the circumstances” that the aggrieved person has or had the § 46 attribute or has or had engaged in or proposes to engage in the § 346 industrial activity.<sup>87</sup>

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<sup>84</sup> STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, DISCRIMINATION AND OTHER HUMAN RIGHTS LEGISLATION AMENDMENT BILL 2008, § 3.39 (2009), available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/disability\\_discrimination/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/disability_discrimination/report/index.htm).

<sup>85</sup> Harpur, *supra* note 7; JULIAN GARDNER, STATE OF VICTORIA DEP'T OF JUSTICE, AN EQUALITY ACT FOR A FAIRER VICTORIA: EQUAL OPPORTUNITY REVIEW (2008), available at <http://www.justice.vic.gov.au/resources/9/0/90008100404a4171a7d2fff5f2791d4a/final+version+-+final+report.pdf>.

<sup>86</sup> *Barclay v Bd. of Bendigo Reg'l Inst. of Technical and Further Educ.* (2011) 191 FCR 212 (Austl.).

<sup>87</sup> *Id.* at 222.



The motivation of the employer under the majority approach uses “objective facts” to reach a determination.<sup>88</sup>

Under the approach of Justices Gray and Bromberg, the subjective intention not to discriminate is not determinative. Under this approach, the tribunal of fact will look to the real reasons behind the conduct. Evidence that the employer engaged in formal equality will not discharge the new test. Employers have the onus of establishing that the adverse action is “dissociated from the circumstances” related to the workplace right.<sup>89</sup> To discharge this test, employers must establish that their conduct was not motivated, directly or indirectly, by a workplace right held by a worker. This new approach greatly strengthens the position of workers. Under this approach, a worker need only establish that s/he is suffering adverse action and has a workplace right. Employers must then prove that there is no connection between the adverse action and the workplace right.<sup>90</sup>

Justices Gray and Bromberg have directed courts to focus on the actual reasons for discrimination.<sup>91</sup> This is not limited to formal equality, but could potentially also require employers to focus more on ensuring substantive equality. In his minority decision in *Barclay*, Justice Lander did not agree that the “because of test” should have such a wide application. Justice Lander agreed with the approach of Justice Tracey in the Federal Court.<sup>92</sup> Justice Lander focused on a much more opaque issue, intent finding that courts must inquire “as to why the person who is said to have contravened the section took the action. That must mean that the Court has to inquire into the subjective intention of the alleged contravener.”<sup>93</sup> The approach of Justice Lander reflects the formal equality approach evinced in the High Court of Australia judgment in *Purvis v. State of New South Wales (Department of Education and Training)*.<sup>94</sup> Through focusing upon the subjective intention of an employer, Justice Lander permits a legal fiction to excuse discrimination. Essentially, if an employer can prove that it has taken adverse action

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Subsequent to *Barclay* justice Barker agreed with and applied the approach of Justices Gray and Bromberg: *Austl. Licensed Aircraft Eng'g Ass'n v Int'l Aviation Serv. Assistance Party Ltd.*, (2011) 193 FCR 526, 575 (Austl.).

<sup>91</sup> *Barclay*, (2011) 191 FCR at 222–23.

<sup>92</sup> *Barclay v Bd. of Bendigo Reg'l Inst. of Technical and Further Educ.* [2010] FCA 284, 285 (Austl.).

<sup>93</sup> *Barclay*, (2011) 191 FCR at 254.

<sup>94</sup> *Id.* at 254; *Purvis v State of New South Wales* (2003) 217 CLR 92 (Austl.).

against a worker because of a facially neutral factor, then the employees' suffering of discriminatory consequences will be held to be immaterial notwithstanding the existence of a workplace right.

It is relevant to observe here that there remains substantial uncertainty about other aspects of the new adverse actions found in FW Act Part 3-1. Additional uncertainty surrounds whether Part 3-1 applies only to direct discrimination or whether adverse action would include facially neutral policies or requirements that have a discriminatory impact.<sup>95</sup> Nor does the statute explain whether an employer must make reasonable accommodations or if an employer can take adverse action based upon an inherent requirement (in the United States, an "essential function"<sup>96</sup>) of the job. Although some of these issues are likely to be implied, to date there has been no such clarification by the courts. As a consequence, there remains a number of considerable uncertainties surrounding the interpretation of "because of" in the FW Act § 351.

#### **D. ENFORCEMENT OF DISABILITY DISCRIMINATION BY THE FAIR WORK OMBUDSMAN**

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.<sup>97</sup> The FW Act has introduced an additional vehicle for enforcing anti-discrimination laws. Rather than treating discrimination as a predominately private affair, the FW Act regards discrimination as a public concern and accordingly has empowered the FWO to act as a state enforcer of workplace civil rights. FW Act § 682 explains that the FWO has the power to promote harmonious, productive, and cooperative workplace relations and compliance with the FW Act.<sup>98</sup> The FWO's functions also include providing "education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best

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<sup>95</sup> ROSEMARY OWENS ET AL., *THE LAW OF THE WORK* 462 (2d ed. 2010).

<sup>96</sup> The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (2008); for discussion, see Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2011).

<sup>97</sup> *Fair Work Act 2009* (Cth) §§ 365, 367 (Austl.).

<sup>98</sup> *Fair Work Act 2009* (Cth) § 682 (Austl.).

practice guides to workplace relations or workplace practices.”<sup>99</sup> Critical to 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.<sup>100</sup>

The powers of the FWO are extensive. The FWO has wide powers to commence investigations on its own, and otherwise be proactive in investigating potential breaches of the FW Act. The FWO has power to enter a workplace without any requirement that it suspect or believe that a breach has occurred.<sup>101</sup> The exercise of this power is contingent only upon the FWO believing that the employer is subject to the FW Act.<sup>102</sup> As a result of the use of the Corporations power under the Australian Constitution and the referral of industrial relations powers by the State governments, all businesses (except those in the State of Western Australia which did not refer its industrial powers) are covered by the FW Act, thereby providing sufficient justification for the FWO to enter premises.<sup>103</sup> Once in the workplace, § 709 empowers the FWO inspector to:

- (a) inspect any work, process or object;
- (b) interview any person;
- (c) require a person to tell the inspector who has custody of, or access to, a record or document;
- (d) require a person who has the custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period;
- (e) inspect, and make copies of, any record or document that:
  - (i) is kept on the premises; or
  - (ii) is accessible from a computer that is kept on the premises;

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<sup>99</sup> *Id.* § 682(1)(c).

<sup>100</sup> *Id.* at § 682(1)(d) – (f); the FWO also has the functions of an inspector (*see* s 701).

<sup>101</sup> *Id.* at s 708.

<sup>102</sup> *Id.* at s 682(1).

<sup>103</sup> All proprietary limited corporations in Australia must include “Pty Ltd” in their company name: *Corporations Act 2001* (Cth) §§ 148–52 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/).

(f) take samples of any goods or substances in accordance with any procedures prescribed by the regulations.<sup>104</sup>

With these extensive powers the FWO has wide powers to detect non-compliance with the FW Act.

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, and future reporting to the FWO).<sup>105</sup> 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.<sup>106</sup> The second option available to the FWO is to prosecute the employer in the Federal Court.<sup>107</sup>

### E. FINES AND COMPENSATION

Workers who have been discriminated against under the FW Act can obtain compensation similar to the ADA and DDA.<sup>108</sup> Such compensation orders aim to compensate for economic loss,<sup>109</sup> but also may include a modest amount for hurt and humiliation.<sup>110</sup> Workers also can seek reinstatement where the adverse action has resulted in

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<sup>104</sup> See also *Fair Work Act 2009* (Cth) §§ 713, 713A and 714 (Austl.) (which deal with self incrimination and produced documents etc.).

<sup>105</sup> *Id.* at s 715(1); see also *Enforceable Undertakings*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/about-us/investigations/pages/enforceable-undertakings.aspx> (last visited Sept. 26, 2011).

<sup>106</sup> *Fair Work Act 2009* (Cth) §§ 715(6), 715(7) (Austl.).

<sup>107</sup> *Id.* at § 682.

<sup>108</sup> See generally *Fair Work Act 2009* (Cth) ch 4 pt 4 – 1 div 2 (Austl.).

<sup>109</sup> *ALAEA v International Aviations Service Assistance Pty Ltd* [2011] FCA 333.

<sup>110</sup> The fact that modest amounts for hurt and humiliation strengthens claims by those discriminated against, such as those with disabilities. Remedies for hurt and humiliation are not available under the unfair dismissal provisions of the *Fair Work Act 2009* (Cth) s 392(4) (Austl.).

termination of employment. In *Stephens v. Australian Postal Corporation*, the power to order reinstatement was read very broadly.<sup>111</sup> In *Stephens*, a worker was on a fixed term contract with only a few days left to run when the worker suffered adverse action resulting in dismissal. The court held that even though the worker's contract had only a few days remaining to run, but for the adverse action the worker would have been offered an extension on the contract.<sup>112</sup> Accordingly, the court ordered the employer to extend the worker's contract.<sup>113</sup>

The remedy that has the potential of transforming discrimination complaints is pecuniary penalties. Prior to the FW Act, there does not appear to be any case where an employer was fined for discriminating against an employee due to disability. Although the general anti-discrimination laws permitted such a sanction,<sup>114</sup> this power was rarely, if ever, used. An equivalent power existed under Australian Federal industrial laws to fine an employer for dismissing an employee for engaging in trade union activities (in the United States, this would be retaliation for protected, concerted activity under the National Labor Relations Act<sup>115</sup>). Whereas penalties were virtually never ordered for discrimination matters under anti-discrimination regimes, such orders are far more common where discrimination has occurred under industrial statutes. Now that disability discrimination is prosecuted within the industrial jurisdiction, this raises the possibility that penalty orders may become more common in cases involving disability discrimination.

Section 807(1)(a) of the now-repealed Workplace Relations Act 1996 (Commonwealth of Australia) (WR Act)<sup>116</sup> enabled a court to fine an employer who terminated a person for trade union activity. In *Rojas v. Esselte Australia Pty Limited (No 2)*, a trade union official was terminated after engaging in a strike.<sup>117</sup> The trade union official was picketing the employer's premises and attempting to aggressively dissuade employees from attending work. Following this strike, the employer dismissed the trade union official for alleged misconduct

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<sup>111</sup> *Stephens v Australian Postal Corporation* [2011] FMCA 448.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> REES, *supra* note 56, at 721.

<sup>115</sup> 29 U.S.C. §§ 157, 158(a)(1).

<sup>116</sup> The WR Act had similar coverage as FW Act.

<sup>117</sup> *Rojas v Esselte Austl. Pty. Ltd. (No 2)* (2008) FCA 1585 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2008/1585.html>

during the strike.<sup>118</sup> Justice Moore believed it to be significant that the employer started gathering evidence against the trade union official during the strike but did not collect such evidence on other employees that engaged in the same conduct during the strike.<sup>119</sup> In addition, the employer denied the trade union official natural justice (procedural fairness) by terminating him and gaining a significant benefit in the labour dispute by doing so.<sup>120</sup> Ultimately, Justice Moore found for the trade union official and ordered him reinstated and compensated. Justice Moore then considered whether the employer should be fined for its conduct.<sup>121</sup> Justice Moore stated that the factors he should consider when deciding to impose a pecuniary penalty included:

- (a) The circumstances in which the relevant conduct took place (including whether the conduct was undertaken in deliberate defiance or disregard of the WR Act);
- (b) Whether the respondent has previously been found to have engaged in conduct in contravention of Pt XA of the WR Act;
- (c) Where more than one contravention of Pt XA is involved, whether the various contraventions are properly seen as distinct or whether they arise out of the one course of conduct;
- (d) The consequences of the conduct found to be in contravention of Pt XA of the WR Act;
- (e) The need, in the circumstances, for the protection of industrial freedom of association; and
- (f) The need, in the circumstances, for deterrence.<sup>122</sup>

The maximum penalty under the old WR Act § 809 was \$33,000. Justice Moore imposed a fine of \$12,000 on the employer.<sup>123</sup>

The FW Act has expanded the applicability of sanctions to whenever an adverse action is taken because of a person's workplace right. FW Act § 539 provides that a court can impose a pecuniary penalty

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at ¶¶ 53, 54.

<sup>120</sup> *Id.* at ¶¶ 58, 59.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at ¶ 64.

<sup>123</sup> *Id.* at ¶ 67.

order against an employer for breaching a civil penalty provision in the Act. Section 539 provides that taking adverse action against a person due to a workplace right under § 350 is a civil penalty provision.<sup>124</sup> This means that an employer in Australia which discriminates against an employee or prospective employee with a disability could be fined up to \$33,000 for each act of discrimination.<sup>125</sup> Recent cases indicate that courts are willing to exercise this power as discussed below.

In *Australian Licence Aircraft Engineers Association v. International Aviations Service Assistance Pty*, Justice Barker adopted the principles of Justice Moore in *Rojas v. Esselte Australia Pty Limited (No 2)* when deciding whether an employer should be fined under the FW Act for taking adverse action against an employee exercising a workplace right.<sup>126</sup> In deciding to exercise discretion to issue a penalty, courts will consider factors including whether the conduct was innocent or inadvertent, the defendant's previous record, the consequences of the non-compliance to individuals, and whether a penalty would deter future non-compliance.<sup>127</sup> Overall, it is up to the court to carefully consider the circumstances of the particular case before it and determine whether a penalty is appropriate and its size.<sup>128</sup>

In *Australian Licence Aircraft Engineers Association*, an employer required an employee to work overtime to service an aircraft.<sup>129</sup> The employee asked if he would be paid overtime to complete the task, but the employer refused, whereupon the employee refused to do the work and was suspended.<sup>130</sup> The employer ultimately reinstated the employee and paid his back pay, but nonetheless provided an adverse performance appraisal about the employee due to his refusal to perform

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<sup>124</sup> See *Fair Work Act 2009* (Cth) ss 539, 350 (Austl.).

<sup>125</sup> A table of the penalties may be found in *Fair Work Act 2009* (Cth) § 539(2) (Austl.). For further discussion of the introduction of penalties under the FW Act, see Stewart, *supra* note 15, at 171–172; The maximum monetary amount has not altered with the introduction of the FW Act.

<sup>126</sup> *Austl. Licensed Aircraft Eng'r Ass'n v Int'l Aviations Service Assistance Pty. Ltd.* [2011] FCA 333 (Austl.), [464], available at <http://www.austlii.edu.au/au/cases/cth/FCA/2011/333.html>.

<sup>127</sup> *Rojas v Esselte Austl. Pty. Ltd. (No 2)* (2008) FCA 1585 at 63–69 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2008/1585.html>.

<sup>128</sup> *Australian Ophthalmic Supplies Pty. Ltd. v McAlary-Smith* (2008) 165 FCR 560 at 12 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/8.html>.

<sup>129</sup> *Australian Ophthalmic Supplies Pty. Ltd. v McAlary-Smith* (2008) 165 FCR 560, 40 (Austl.).

<sup>130</sup> *Id.* at 45.

unpaid overtime.<sup>131</sup> This performance appraisal subsequently resulted in the employee's layoff.<sup>132</sup>

After finding against the employer, Justice Baker awarded the employee \$85,000 damages and found that "the imposition of pecuniary penalties is appropriate in this case."<sup>133</sup> The trade union suggested a range of \$15,000 to \$20,000 for each breach, of which there were several. Justice Baker has reserved his decision on the quantum of the penalties.<sup>134</sup>

Under the old statutory regime, courts had a history of imposing pecuniary orders on employers that had terminated employees due to their trade union activities. The FW Act has substantially expanded the situations where pecuniary orders can be made. Previously it was only dismissals that attracted such orders.<sup>135</sup> Under the FW Act any adverse action will justify pecuniary orders. Previously the protection under the general industrial statute was only afforded to freedom of association issues. Under the FW Act, any employee who has a workplace right now is protected by pecuniary orders. The FW Act 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 pecuniary order. Will these reforms achieve the desired result of achieving a fairer workplace?

### III. THE IMPACT OF FWO INVESTIGATIONS AND PROSECUTIONS: POSITIVE OR NEGATIVE?

Calls for public enforcement of anti-discrimination laws have been occurring for some time. Michael Waterstone has observed that:

The current decline of the private attorney general's ability to fairly and consistently enforce our civil rights laws strengthens the argument for a renewed emphasis on the various enforcement apparatuses of the federal government. When the United States takes a strong stand to protect the civil rights of its citizens, it sends a

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<sup>131</sup> *Id.* at 78, 111.

<sup>132</sup> *Id.* at 112.

<sup>133</sup> *Id.* at 465.

<sup>134</sup> *Id.*

<sup>135</sup> *Workplace Relations Act 1996 (Cth)* (repealed) s 807.



symbolic message and expresses the will of the people in a way that cannot and should not be completely outsourced.<sup>136</sup>

Beyond symbolism, what are the practical advantages and disadvantages of state enforcement of civil rights? A useful starting point for such analysis is the ten barriers to resolving workplace discrimination disputes identified by Jean Sternlight:

1. Laws Prohibiting Discrimination Tend to Be Quite Complex
2. Facts Pertinent to Claims of Discrimination Are Often Highly Contested and Confusing
3. Disputes Regarding Employment Discrimination Tend to Involve Significant Non-legal as Well as Legal Interests
4. Society Has a Need for Correct Determinations
5. Society Has a Need for Clear and Public Precedents to Deter Future Wrongdoers and Let tPersons Know What Conduct Is Permissible
6. Victims of Discrimination Must Be Adequately Compensated
7. Many Societies Have a Further Interest in Punishing Wrongdoers
8. Alleged Victims of Discrimination Must Have Adequate Access to a Procedural Mechanism That Allows Them to Assert Their Claims
9. Employment Discrimination Claims Must Be Resolved Quickly in Order to Permit All Persons Involved to Get On with Their Lives and Business
10. Alleged Victims of Discrimination Tend to Have Fewer Resources Than Do Alleged Perpetrators of Discrimination.<sup>137</sup>

The foregoing ten points could be summarised into four broad topics:

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<sup>136</sup> Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 436 (2007)

<sup>137</sup> Sternlight, *supra* note 9, at 1468–81.

1. Points 1, 2, 8, and 10 effectively concern problems with prosecuting alleged breaches of disability discrimination laws;
2. Points 3, 4, and 5 concern the need to provide precedents to regulate future conduct;
3. Points 6 and 7 concern achieving justice in the case; and
4. Points 3 and 9 concern the non-legal side of resolving workplace discrimination disputes.

#### **A. HOW THE FWO CAN ASSIST IN IMPROVING THE PROSECUTION OF DISABILITY DISCRIMINATION DISPUTES: A STATE ENFORCER**

Regulatory frameworks, which depend heavily upon complainant enforcement, have been identified as a barrier to justice. Michael Stein and Michael Waterstone have noted that according to Article 15 of the Convention on the Rights of Persons with Disabilities, people with disabilities have the right to be free from all forms of exploitation, violence, and abuse.<sup>138</sup> They also have stated that this Convention was being breached because of, among other things, a reliance upon individual victim enforcement: "At the heart of this shortcoming is reliance on negative rights and private enforcement."<sup>139</sup>

Reliance upon individual victim enforcement 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 do to remedy the discrimination. For example, persons with disabilities restricting their ability to articulate legal arguments in court, or with a reduced capacity to construct arguments, will struggle to represent themselves in Anti-Discrimination Commissions/Tribunals and court proceedings. Persons with mental and intellectual impairments may confront additional barriers caused by misunderstandings and prejudices.<sup>140</sup>

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<sup>138</sup> Michael Stein & Michael Waterstone, *Finding the Gaps: A Comparative Analysis of Disability Laws in the United States to the United Nations Convention on the Rights of Persons with Disabilities*, HARVARD PROJECT ON DISABILITY, <http://www.hpod.org/publications/academic/finding-the-gaps> (last visited May 8, 2012).

<sup>139</sup> *Id.* at 16 (emphasis added).

<sup>140</sup> Deirdre M. Smith, *The Paradox of Personality: Mental Illness, Employment Discrimination, and The Americans with Disabilities Act*, 17 GEO. MASON U. C.R. L.J. 79, 117 (2006).

Second, persons with disabilities may not have the economic resources to pursue legal claims.<sup>141</sup> In a report published by the Australian state of Victoria, Julian Gardner criticized the reliance upon victim enforcement by a group which is often socially and economically isolated, and found that some complainants found “daunting” the process of lodging and pursuing a complaint under the Equal Opportunity Act 1995 (Vic).<sup>142</sup>

Third, some discrimination is “systematic,” affecting multiple persons. As the report appropriately found, this type of discrimination is unlikely to be effectively remedied by individual prosecutions.<sup>143</sup>

Ultimately, Gardner concluded that:

[a]t present, the law makes certain conduct unlawful, but provides virtually no law enforcement mechanism other than requiring the aggrieved individual to make a complaint. Relying on complaints is not an effective way to eliminate discrimination.<sup>144</sup>

Although Gardner found that complaint-driven enforcement continued to play an important role in the enforcement of anti-discrimination laws and recommended retaining this model,<sup>145</sup> Gardner also recommended the creation of a public regulator with the power to take action in a variety of circumstances independent of a complaint.<sup>146</sup>

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 to \$30,000.<sup>147</sup> For many employees, outlays of this magnitude may preclude them from taking any action to fight discrimination. Unlike in the United States, lawyers in Australia are

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<sup>141</sup> Gardner, *supra* note 85, at 54.

<sup>142</sup> *Id.* at 84.

<sup>143</sup> *Id.*

<sup>144</sup> Beth Gaze & Rosemary Hunter, *Access to Justice for Discrimination Complainants: Courts and Legal Representation* 33 U.N.S.W. L. J. 699, 699 (2009).

<sup>145</sup> Gardner, *supra* note 85, at 52.

<sup>146</sup> *Id.* at 34.

<sup>147</sup> Assessment of \$30,000 in *Clack v Collins (No. 1)* (2010) FCA 513 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2010/513.html>; \$20,000 in *Croker v Dep't of Educ. and Training (NSW)* (2009) FCA 350 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2009/275.html>.

prohibited from taking matters on a contingency fee basis.<sup>148</sup> Attorneys in Australia can enter conditional cost agreements where clients pay legal fees only if the matter reaches a successful outcome.<sup>149</sup>

The difficulty with contingency and conditional cost fee agreements is that they require attorneys to be reasonably confident in the merits of the case. After all, if the client loses, the lawyer does not get paid. This is a substantial problem with anti-discrimination cases as the complainants' "evidence is usually circumstantial and elusive" to obtain.<sup>150</sup> Consequently, workers with disabilities often rely upon disability-person organizations or their own resources. This is out-of-reach for most persons with disabilities; disability-rights organizations do not have the resources to take every case that comes in the door, and the minimum-wage income of many employees with disabilities does not permit them to self-finance their own litigation.<sup>151</sup> Moreover, in Australia, plaintiffs who bring suit in the Federal Magistrates Court or Federal Court run the risk of an adverse cost order. This is because, unlike the United States,<sup>152</sup> in Australia an unsuccessful litigant normally is required to pay the legal fees of the successful litigant in addition to his or her own legal fees.<sup>153</sup> Therefore such employees would confront serious challenges in prosecuting their claims without the assistance of the FWO.

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<sup>148</sup> E.g., the State of Queensland (each state and territory has analogous legislation): *Legal Profession Act 2007* (Qld) § 325 (Austl.). ("(1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates."), available at [http://www.austlii.edu.au/au/legis/qld/consol\\_act/lpa2007179/s325.html](http://www.austlii.edu.au/au/legis/qld/consol_act/lpa2007179/s325.html).

<sup>149</sup> *Legal Profession Act 2007* (Qld) § 323 (Austl.), available at [http://www.austlii.edu.au/au/legis/qld/consol\\_act/lpa2007179/s323.html](http://www.austlii.edu.au/au/legis/qld/consol_act/lpa2007179/s323.html).

<sup>150</sup> Eleanor Holmes Norton, Justice and Efficiency in Dispute Systems, 5 OHIO ST. J. ON DISP. RESOL. 207, 221 (1990).

<sup>151</sup> Minimum wage in Australia is \$15.00 per hour; a full-time employee working a 38-hour week would earn \$569.90 per week. See *National Minimum Wage*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/pay/national-minimum-wage/Pages/default.aspx> (last visited May 9, 2012). This may seem quite a high minimum wage by American standards, but the cost of living in Australia is more expensive.

<sup>152</sup> The default rule in the United States is the "American rule" by which, absent a statute to the contrary, each litigant "bear [his] own attorney's fees." See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 602, 603 (2001) (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994)).

<sup>153</sup> *Bouras v Grandelis* [2005] NSWCA 463 at 44 (Austl.).

Under the FW Act, an aggrieved employee is required only to lodge a complaint.<sup>154</sup> 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.<sup>155</sup> 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. Statistics from the FWO state that in 2009-2010, of 804 workplace discrimination cases lodged, the FWO commenced civil penalty litigation only fifty-three times (6.5 percent).<sup>156</sup> Litigation resulted in \$2.019 million in court ordered penalties<sup>157</sup> (By contrast, in the United States, the Equal Employment Opportunity Commission received in fiscal year 2010 25,165 charges of disability discrimination<sup>158</sup> and filed suit in forty-one cases raising an ADA claim.<sup>159</sup>).

However, most of the Australian cases were in regard to underpayment of wages.<sup>160</sup> Litigation was only commenced when there was failure to comply or where there were serious or repeated offences.<sup>161</sup> Of the 804 complaints made, approximately 44 percent were outside the FWO's jurisdiction, with only 140 (17.5 percent) of the remaining "within jurisdiction complaints" proceeding to the investigation stage as discrimination matters.<sup>162</sup> Of the 804 original complaints made, physical and mental disability discrimination was the most common complaint,

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<sup>154</sup> *Making a Complaint*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/complaints/making-a-workplace-complaint/pages/default.aspx> (last visited May 9, 2012).

<sup>155</sup> *Investigations*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/about-us/investigations/pages/default.aspx> (last visited May 9, 2012).

<sup>156</sup> *Annual Report*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2009-10.pdf> (last visited May 9, 2012).

<sup>157</sup> *Id.* at 34.

<sup>158</sup> *See Charge Statistics FY 1997 Through FY 2011*, U.S. EQUAL EMPLOYMENT COMMISSION, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 26, 2011).

<sup>159</sup> *See EEOC Litigation Statistics, FY 1997 through FY 2011*, U.S. EQUAL EMPLOYMENT COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Sept. 26, 2011).

<sup>160</sup> *See generally Annual Report 2009-2010*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/Publications/Annual%20report/Fair-Work-Ombudsman-Annual-Report-2009-10.pdf> (last visited May 9, 2012).

<sup>161</sup> *Id.* at 23.

<sup>162</sup> *Discrimination Overview 2009-10*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/employment/discrimination/pages/fwo-discrimination-overview-09-10.aspx> (last visited May 9, 2012).

with 109 in total, accounting for 14 percent of the complaints.<sup>163</sup> Of these disability discrimination complaints, thirty-seven (26.5 percent) were able to be investigated but failed to be litigated at the time.<sup>164</sup> None of the litigated offences involved an alleged breach of the discrimination provisions of the FW Act.

Nonetheless, the FWO's "Overview of discrimination function 2009-2010" document states that the FWO "filed proceeding in court in relation to one discrimination matter. A further three matters were identified for potential penalty proceedings and two have since been filed in court. An Enforceable Undertaking is also being negotiated with an additional matter."<sup>165</sup> Since the release of the "Overview document," one matter has been successfully litigated, although producing relatively small fines in the amount of \$3,600 against the company and its sole director.<sup>166</sup> In *Fair Work Ombudsman v. Drivecam Pty Ltd & Ors*,<sup>167</sup> the magistrate, finding violations both of the FW Act and of a wage-hour failure to keep proper payslips,<sup>168</sup> also awarded economic loss compensation of \$1,320 to the physically disabled complainant who had suffered a long-term injury from a bike accident.<sup>169</sup> Again, however the primary focus of the case was an underpayment-of-wages claim as a result of the respondent attempting to pay the disabled worker at a lower rate because of his injury.<sup>170</sup>

As demonstrated by the above case, the FWO's full ability to use the new discrimination sections is yet to be fully tested. The *Drivecam* case discussed above did not involve true discriminatory intent by the employer, so the case did not provide a genuine test case of the Act's ability to be the "pandora's box" that many disabled potential and current employees have long awaited.<sup>171</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> Some of these may have been settled out of court.

<sup>165</sup> *Discrimination Overview 2009-10*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/employment/discrimination/pages/fwo-discrimination-overview-09-10.aspx> (last visited May 9, 2012).

<sup>166</sup> *Fair Work Ombudsman v Drivecam Pty*. [2011] FMCA 600 (Austl.).

<sup>167</sup> *Id.*

<sup>168</sup> See *Fair Work Act 2009* (Cth) §§ 535, 536 (Austl.).

<sup>169</sup> *Fair Work Act 2009* (Cth) §§ 342, 351 (Austl.).

<sup>170</sup> *Id.*

<sup>171</sup> For further discussion of the potential for the General Protections under the *FW Act* to become the Pandora's Box of the FW Act see generally BEN FRENCH ET AL., A PANDORA'S BOX OF GENERAL PROTECTIONS UNDER THE FAIR WORK ACT 2009 (2011); ABBOTT ET AL., (eds), FAIR WORK ACT: REVISION OR RESTITUTION (forthcoming 2012).

Strong test cases have not appeared before the FWO in part because confusion over the comparator test makes it difficult to prosecute discrimination claims. Following a conference presentation by two of the authors,<sup>172</sup> the authors were able to raise this issue with the Fair Work Ombudsman, Mr Nicholas Wilson. Mr Wilson indicated that his office had received a number of complaints from workers pertaining to disability discrimination. Without providing any particulars, Mr Wilson indicated that there were three cases with merit, but whether these were more likely to settle out of court or would proceed to prosecution had not been determined.<sup>173</sup> On the basis that no matters have proceeded to the courts, it appears these matters were either discontinued or settled.

Direct disability discrimination under Section 5 of the DDA will be established only if the employee was treated less favourably than the employer would have treated a person without the employee's disability, in circumstances that were the same or not materially different.<sup>174</sup> It is difficult for employees to obtain sufficient evidence from their employer or their fellow employees to prove that they were treated comparatively less favourably. Although the evidential burden remains the same for the FWO, unlike an employee, it has legislative powers to enter and inspect workplaces, require employers to provide documents, make and keep copies of documents, record evidence, and force employers and their employees to assist with an investigation including interviews.<sup>175</sup> Significantly, employers may not refuse to provide documents on the basis of self-incrimination.<sup>176</sup> Thus, these powers allow the FWO to prosecute non-compliance with the FW Act such as a breach of workplace rights and discrimination. This should allow for a greater enforcement of the victim's rights, subject to the continued availability of resources being provided.

The FWO's powers place it in an advantageous position to investigate and take action to reduce systematic discrimination in the

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<sup>172</sup> Paul Harpur & Ben French, *New Regulatory Vehicles for the Enforcement of Disability Discrimination Law*, (presented at Australian Labour Law Association 5th Biennial Conference, 19 and 20 November 2010, Adelaide), available at <http://hq.ssrn.com/GroupProcesses/RedirectClick.cfm?partid=1380517&corid=649&runid=5059&url=http://ssrn.com/author=1380517>.

<sup>173</sup> We have provided the conference date and the fact we chatted with the FWO during questions at this conference following the presentation. However, there is no transcript for the conference.

<sup>174</sup> *Purvis v State of New South Wales* (2003) 217 CLR 92 (Austl.).

<sup>175</sup> See *Fair Work Act 2009* (Cth) §§ 707–714.

<sup>176</sup> See *Fair Work Act 2009* (Cth) § 713(Austl.).

workplace. The FWO performs audits and community education programs in regard to issues such as payment of wages.<sup>177</sup> Hence, the FWO could also consider performing similar audits for discrimination matters. An example of disability discrimination public interest litigation is *Corcoran v. Virgin Blue Airlines Pty Ltd.*<sup>178</sup> This case concerned a private civil action commenced by two plaintiffs challenging the legality of Virgin Blue Airlines' independent traveller policy for passengers with disabilities desiring to travel without paying the travel costs of a caregiver. The plaintiffs successfully sought an order to limit the extent of the plaintiffs' adverse cost order if they lost. The application was granted on the basis that the litigation was, inter alia, in the public interest and not for the recovery of damages.<sup>179</sup>

The FWO could substantially assist in public interest litigation by prosecuting disability discrimination actions involving novel questions of law and actions involving systemic workplace discrimination. Of course, the FWO has budgetary constraints. Nevertheless, it has substantially more resources than most plaintiffs and also has the greater statutory power to obtain evidence.

## B. FWO AND NON-LEGAL ISSUES

Whenever litigation is proposed, a range of non-legal issues arise. In employment disputes, one critical problem is the issue of trust. Does an aggrieved employee trust his or her employer such that the employee feels comfortable raising and attempting to resolve an employment problem internally? Or must the employee instead turn first to the legal system?

The issue of trust has been discussed extensively in relation to workplace health and safety.<sup>180</sup> Neil Gunningham and Darren Sinclair have described trust as "the lubricant for open and frequent safety communication."<sup>181</sup> If employees do not trust the organisation, they will not raise issues with management. If issues are not raised with

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<sup>177</sup> *Investigations*, FAIR WORK OMBUDSMAN, <http://www.fairwork.gov.au/about-us/investigations/pages/default.aspx> (last visited May 9, 2012).

<sup>178</sup> *Corcoran v Virgin Blue Airlines Pty. Ltd.* [2008] FCA 864 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2008/864.html>.

<sup>179</sup> *Id.* at 45–48.

<sup>180</sup> See generally Neil Gunningham & Darren Sinclair, *Organizational Trust and the Limits of Management-Based Regulation*, 43 LAW & SOC'Y REV. 865 (2009).

<sup>181</sup> *Id.* at 871.



management, the potential problems cannot quickly and expeditiously be resolved internally. For workplace health and safety problems, this can mean an increased instance of workplace accidents. For anti-discrimination problems, this can mean increased instances of exclusionary conduct reducing social inclusion. The issue of trust is critical to reducing anti-discrimination cases in Australia.

It appears the primary vehicle the FWO has employed to build trust is similar to the approach of the existing Australian Human Rights Commission. One of the limitations with the current model is that it is difficult to protect complainants from victimization.<sup>182</sup> The DDA Section 42 provides employees with disabilities formal retaliation protection against victimisation.<sup>183</sup> This victimisation protection is enlivened if the complaint is made to a court, government agency, or internally.<sup>184</sup> While on-paper protection against disability harassment or victimisation exists, in practice it can be difficult for a complainant to present sufficient evidence to the court to discharge the burden of proof. For example, in *McCormack v. Commonwealth of Australia*, an employee who had been diagnosed with cancer claimed, inter alia, that his employer had engaged in disability harassment in breach of Section 35 of the DDA.<sup>185</sup> The employer did not stop fellow employees from repeatedly ringing the employee pertaining to his work performance, a death at work, and making reference to the employee's disability.<sup>186</sup> Although the court found that the employee had been harassed, the court found the harassment was insufficiently linked to the employee's disability to satisfy Section 35 of the DDA.<sup>187</sup>

While formal protection against victimisation exists, proving disability harassment is more difficult than proving other forms of harassment,<sup>188</sup> and prosecuting any form of harassment is challenging. The Australian Human Rights Commission 2009-2010 Annual Report reported states that out of the 2,354 complaints under the DDA, just over 1 percent concerned victimisation and one quarter of a per cent

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<sup>182</sup> Beth Gaze & Rosemary Hunter, *Access to Justice for Discrimination Complainants: Courts and Legal Representation*, 32 U. NEW S. WALES L. J. 699, 707 (2009).

<sup>183</sup> *Disability Discrimination Act* (1992) § 42 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/dda1992264/](http://www.austlii.edu.au/au/legis/cth/consol_act/dda1992264/).

<sup>184</sup> See *id.*

<sup>185</sup> *McCormack v Commonwealth of Australia* [2007] FMCA 1245 (Austl.).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 74, 175–77.

<sup>188</sup> For a comparison of the ability to claim sex discrimination see a recent successful sexual harassment case: *Tan v Xenos* (No. 3) (2008) VCAT 584 (Austl.).

concerned harassment.<sup>189</sup> The Annual Report does not discuss whether the low numbers of victimisation and harassment complaints are caused by these issues not frequently occurring in the community or because of potential complainant's awareness of the difficulties in prosecuting such claims or lack of awareness of their rights generally. Although spread across numerous federal (and state anti-discrimination Acts), the FWO adopts a similar victimisation model as the AHRC, it is arguable that levels of trust will not substantially alter.<sup>190</sup>

### C. HOW CAN FWO ASSIST IN THE DEVELOPMENT OF LIFE CHANGING LEGAL PRECEDENTS?

How can the FWO assist in developing the precedent value of its prosecuted cases? The FWO has a statutory obligation to resolve any complaint lodged with its offices.<sup>191</sup> Nonetheless, when acting on its own behalf, the FWO should focus upon bringing actions that combat systemic and structural discrimination, especially in the areas of recruitment and physical barriers.<sup>192</sup> These types of discrimination have wide application and are especially difficult for complainants to prosecute individually.<sup>193</sup>

Discrimination in employment recruitment and selection cases are extremely difficult to prove. It is difficult for a discriminated-against job applicant to prove that s/he is able to perform a job better than the person that was appointed. Although the employer's intention is largely irrelevant in proving unlawful discrimination, it is still difficult to prove discrimination has occurred. The employer that has discriminated may not have consciously excluded the person with disabilities. The employer could have simply acted on inherent biases and assumed the person with a disability was the inferior candidate. Alternatively, the employer may consciously or unconsciously have created unnecessary selection barriers

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<sup>189</sup> 2009-2010 Annual Report, THE AUSTRALIAN HUMAN RIGHTS COMMISSION at 84, [http://www.hreoc.gov.au/pdf/about/publications/annual\\_reports/2009\\_2010/AHRC2009\\_2010\\_complete.pdf](http://www.hreoc.gov.au/pdf/about/publications/annual_reports/2009_2010/AHRC2009_2010_complete.pdf), (last visited May 9, 2012).

<sup>190</sup> Under the WR Act it was unlawful to discriminate in employment, however, traditionally claims of this type were taken via the relevant State or Federal anti-discrimination Acts where explicit processes and remedies were provided. These causes of action continue under the *FW Act* and are enhanced by the General Protection provisions under Part 3 – 1.

<sup>191</sup> See *Fair Work Act 2009* (Cth) ch 5 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/).

<sup>192</sup> Gardner, *supra* note 85, at 110–136.

<sup>193</sup> See Waterstone, *supra* note 12, at 437.

that exclude individuals with disabilities when developing the recruitment and selection criteria.

A common example of this occurs with the requirement for driving licenses as part of jobs where in reality employees may never actually be required to drive a vehicle.<sup>194</sup> 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 drive a work car once a month at most.<sup>195</sup> If a person who is unable to drive is prevented from working a job where driving is an insignificant part of the job, and therefore not a “genuine inherent requirement” of the position, then it is probable that reasonable accommodation laws would require such employers to see if other arrangements are possible to employ the applicant and not require driving as a requirement.<sup>196</sup> This could be achieved either by permitting the employee to use taxis or public transport, or by giving the driving duties to other employees. Whether the exclusion is lawful or not will depend upon each case. It is difficult for an applicant to gain sufficient information to firstly determine if discrimination has occurred and secondly prove her/his case. The FWO with its statutory powers to obtain responses and evidence is in a better position to identify the most egregious cases of discrimination of this kind.

#### D. ACHIEVING JUSTICE IN THE CASE

Employees aggrieved by discrimination deserve justice. The FWO, when it reasonably believes a violation of the FW Act has occurred, may seek enforceable undertakings as an alternative to filing a civil suit or issuing a compliance notice.<sup>197</sup> Where a person has been found to have engaged in disability discrimination under the FW Act, the

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<sup>194</sup> In the United States, the ADA defines a qualified individual with a disability as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). “Essential functions” are job tasks that are fundamental and not marginal. 29 C.F.R. § 1630.2(n)(1) (1996). The legislative history gives an example of an employer requiring that, to qualify for a job, applicants must have a drivers license even though every job does not involve driving. H.R. REP. No. 101-485, pt. 3, at 55 (1990).

<sup>195</sup> For a discussion of this problem see *Results and Observations from Research into Employment Levels in Australia*, VISION AUSTRALIA, 3.2.5, [http://www.visionaustralia.org.au/docs/news\\_events/Employment\\_Overview.doc](http://www.visionaustralia.org.au/docs/news_events/Employment_Overview.doc), (last visited May 9, 2012).

<sup>196</sup> *Id.*

<sup>197</sup> See *Fair Work Act 2009* (Cth) § 715 (Austl.).

Federal Court has the power to impose a penalty of \$6,600 for an individual and \$33,000 for a corporation per breach.<sup>198</sup> This penalty is enforced as a civil penalty in the same way as a breach for any adverse action under the FW Act.

Prior to the FW Act, the focus primarily remained on compensatory victim enforcement. Most regulatory reforms have targeted empowering "own motion" investigations by anti-discrimination commissions. For example, the Gardner Report in Chapter 6 proposed a new regulatory framework.<sup>199</sup> These proposed amendments empowered the Commission to posit guidelines on compliance, keep a register of voluntary action plans by public or private organisations, perform own-motion investigations and research into any breaches of the Act, use enforceable undertakings or compliance notices, and report to Parliament on any investigations.

The focus upon compensation and victim enforcement turns the issue of the exclusion of persons with disabilities from work into a private legal issue. Under the compensatory victim enforcement regime discrimination is treated more like a breach of contract than an unlawful act. The penalty provisions in the FW Act have altered this position substantially. Now, a breach of the anti-discrimination provisions can be enforced by the state regulator, FWO, and can attract substantial penalties. Compensatory damages can also be awarded for economic and non-economic loss.<sup>200</sup> Unfortunately, compensation for non-economic loss under anti-discrimination regimes has traditionally been very moderate, and in some jurisdictions, such New South Wales, Western Australia, and the Northern Territory, it has been capped.<sup>201</sup> This may have reduced employers' motivation to comply with the laws. The existence of possible large penalties under the new FW Act provisions, in addition to state enforcement and continuing compensation orders, substantially increases the incentive for employers not to discriminate. In effect, the FW Act has altered disability discrimination from a private issue to be enforced by individuals to a public issue to be enforced and punished by the state. In doing so it is hoped that new awareness of these

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<sup>198</sup> See FW Act § 12 & Crimes Act 1914 (Cth), § 4AA: [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca191482/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/).

<sup>199</sup> Gardner, *supra* note 85, at 54.

<sup>200</sup> REES, *supra* note 56, at 714.

<sup>201</sup> *Id.*

enforcement measures will deter more employers from discriminating against prospective and current employees with disabilities.

## CONCLUSION

Over the last few years there have been a number of domestic and international developments to promote workplace equality. These developments include the introduction of the CRPD at the international level and a range of new statutory mechanisms to define discrimination to enforce non-compliance.<sup>202</sup> In the United States, the primary vehicle for enforcement remains victim enforcement. Until recently all Australian civil rights statutes employed an enforcement regime that was relatively similar to the United States. Both jurisdictions prohibited discrimination in a similarly broad way and then required victims to bring suit if their rights were violated. This article has analysed a new statutory regime in Australia that has substantially altered the civil rights enforcement paradigm.

The first part of this article analysed the operation of the general anti-discrimination regimes in Australia and compared them to analogous regimes in the United States. This paper then analysed the operation of the FW Act. The FW Act is a general industrial relations statute that covers a wide range of workplace relations issues, ranging from strikes, unfair dismissals, agreements, and also anti-discrimination. The anti-discrimination provisions and the enforcement mechanisms are arguably ground-breaking provisions.

Under the FW Act, employers are prohibited from taking adverse action against an employee or prospective employee because that employee or prospective employee has a workplace right. The definition of workplace right is interpreted extremely broadly to include discrimination based upon a person's disability. Unlike courts in the United States before enactment of the Americans with Disabilities Act Amendments Act of 2008,<sup>203</sup> Australian courts have not adopted a narrow reading of what constitutes disability. Consequently, most employees

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<sup>202</sup> Paul Harpur, *Embracing the New Disability Rights Paradigm: The importance of the Convention on the Rights of Persons with Disabilities*, 27 *DISABILITY & SOC'Y* 1, 1–14 (2012); see Paul Harpur, *Time to be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 *VAL. U. L. REV.* 3, 1271 (2011); Paul Harpur, *Developments in Chinese Labour Laws: Enforcing People with Disabilities' Right to Work?* *LAWASIA J. J. L. ASS'N. FOR ASIA AND PAC.* 26–43 (2009).

<sup>203</sup> 42 *USCA* § 12101.

with an impairment will likely satisfy the definition of disability. Similarly, Australian courts interpret "adverse action" broadly as including any negative treatment, not just discharge or treatment causing direct economic injury. Once it has been established that an employee has a workplace right and has suffered adverse action, the burden of proof is reversed and the employer is required to prove that it did not take the adverse action because of the employee's workplace right. There are two judicial trends on how this "because of" test should be interpreted. The leading authority adopts an approach that provides employees extensive protection; a minority approach focuses more upon formal equality and, if adopted, would significantly reduce the potential of FW Act Part 3-1.

The fact that the FW Act does not define disability discrimination in terms of direct and indirect discrimination is significant. Even though Canada has moved away from the direct and indirect definitions,<sup>204</sup> many jurisdictions, including all other Australian anti-discrimination statutes, continue to adopt the bifurcated approach to defining discrimination.

While this move is significant, the most remarkable aspect of the FW Act is the introduction of a state enforcer for civil rights at work. The FWO has the power to inspect alleged breaches, perform own-motion investigations, and to prosecute employers for breaches of workplace rights. If an employer is found to have taken adverse action against an employee because of a workplace right, then that employer can be required to compensate the employee and can face fines up to \$33,000 per breach.

The introduction of the FWO turns the enforcement of workplace civil rights from a private issue enforced by complainants, to a public issue enforced and punished by the state. The FWO can audit industries where systematic discrimination is prevalent. The FWO can act proactively, systematically, and structurally to introduce social inclusion issues into employers' business decisions. This article argues that empowering a state institution to enforce disability workplace rights

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<sup>204</sup> For a discussion of the Canadian approach to defining discrimination, see Human Rights Commission and O'Malley v Simpsons-Sears Ltd [1985] 2 SCR 536; (1985) 23 DLR (4th) 321 at [18]; for discussion of the situation in Canada and for a comparison to the United States see: Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108 (1998); Claire L'Heureux, *Feminist Justice, at Home and Abroad: It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363 (2002).

is a transformational development in the struggle to achieve workplace equality and an approach that should attract significant international interest.