



Workplace Relations Alert 27 November 2008

Fair Work Bill 2008: New Discrimination Provisions

The *Fair Work Bill 2008* includes provisions relating to discrimination which have the potential to have a far reaching impact.

Amidst all the fanfare about unfair dismissals, new bargaining frameworks and new minimum standards of employment, the *Fair Work Bill 2008* also includes provisions relating to discrimination which have the potential to have a far reaching impact.

Clause 351 of the proposed new legislation provides that:

'An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'

This is a civil remedy provision, which means that an employee or prospective employee could bring an action against the employer in the Federal Court, Federal Magistrates' Court or State Supreme Court to complain of:

- (a) a refusal to employ
- (b) discrimination in the terms on which the employment is offered, or
- (c) other detriment suffered by the employee

on one of these grounds.

There is a carve-out for an otherwise discriminatory action that is:

- (a) authorised by a State or Territory under discrimination law
- (b) taken because of the inherent requirements of the position, or
- (c) done in good faith to avoid injury to the sensibilities of adherents of an institution conducted in accordance with a particular religion.

The government states in the Explanatory Memorandum that the clause is intended to 'broadly cover' the existing provisions of the *Workplace Relations Act* which make it unlawful to dismiss any employee for discriminatory reasons. However, as the explanatory memorandum somewhat coyly notes, the protection in clause 351 '*has been expanded to prohibit any adverse action*'. In our view, the expansion has significant implications.

For one thing, the proposed provisions will make available for the first time to employees in some jurisdictions the right to claim about, and obtain an enforceable remedy for, discrimination on grounds that might not be covered by State legislation in their home State – and are certainly not covered by the existing Federal discrimination legislation. For example, an employee in New South Wales will now, for the first time, have the right to make a claim arising from discrimination on the ground of religion, political opinion, national extraction or social origin.



The broad list of grounds included in the clause is taken from the International Labour Organisation Convention concerning discrimination in respect of employment. This list has previously been used only in the context of the regulations made under the *Human Rights and Equal Opportunity Commission Act*.

Significantly, the list refers to '*physical and mental disability*', which the case law tells us is more limited than the broad definition of '*disability*' used in the *Federal Disability Discrimination Act* and most State legislation. The list is more limited than legislation in some States, in that it does not include the grounds of transgender or criminal record.

Another issue is that the concept of '*adverse action*' as defined in clause 342 of the Bill is not bounded – at least on its face – by the concepts of direct and

indirect discrimination as those have been developed in existing legislation and the case law. For example, in the case of direct discrimination, '*adverse action*' does not include the familiar concept of a '*comparator*' which exists in most discrimination legislation.

Clause 351 will apply to all employees, not only those who are employed by constitutional corporations.

The practical impact of the proposed change will be that all employees will be able to choose not only between State and Federal discrimination legislation, but also between discrimination legislation and the remedies available under the *Fair Work Act*. This new jurisdiction will allow employees to approach a court of their choice for a very broad range of remedies, including damages (no limit is imposed on damages that can be awarded by the

court), reinstatement and any other order necessary to stop a further contravention of the Act or redress any loss suffered as a result of a contravention of the Act. The Bill makes it clear that it is intended that these claims will be essentially '*no costs*' claims – because the court will only be able to award costs in exceptional circumstances, such as if the claim was made vexatiously.

The government has been promoting the idea of harmonisation of discrimination laws across Australia. While not exactly achieving that result, this proposed new legislation would create a broad set of rights available to all employees across the country; a greater level of harmonisation in this area than there has ever been before.

Jacquie Seemann
+61 2 9020 5757

For more information on this topic please contact:



Jacquie Seemann
Partner
+61 2 9020 5757
jacquie.seemann@thomsonplayfordcutlers.com.au



David Brand
Special Counsel
+61 2 8248 5833
david.brand@thomsonplayfordcutlers.com.au



Lincoln Smith
Senior Associate
+61 8 8236 1139
lincoln.smith@thomsonplayfordcutlers.com.au