

Chapter 1

Introduction

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Introduction

1.1 Nature and Scope of this Publication

Federal Discrimination Law provides an overview of significant issues that have arisen in cases brought under:

- the *Racial Discrimination Act 1975* (Cth) ('RDA', see Chapter 3);
- the *Sex Discrimination Act 1984* (Cth) ('SDA', see Chapter 4); and
- the *Disability Discrimination Act 1992* (Cth) ('DDA', see Chapter 5).

It also considers the provisions of the *Age Discrimination Act 2004* (Cth) ('ADA', see Chapter 2) in relation to which, at the date of publication, there have only been a limited number of cases.

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act') establishes the regime for making complaints of unlawful discrimination.¹ Chapter 6 provides an overview of this regime as well as detailing the principles that have been applied by the Federal Court and Federal Magistrates Court ('FMC') to matters of procedure and evidence in federal unlawful discrimination cases. The issue of costs is discussed in Chapter 8.

Damages and remedies are considered in Chapter 7. That chapter sets out the principles that have been applied by the Federal Court and FMC when considering granting remedies in federal unlawful discrimination cases. It also contains comprehensive tables of damages awards made since the function of hearing federal unlawful discrimination matters was transferred from the Human Rights and Equal Opportunity Commission ('HREOC') to the Federal Court and the FMC on 13 April 2000.

It should be noted that *Federal Discrimination Law* does not aim to be a textbook, or a comprehensive guide to discrimination law in Australia.² It does not consider all aspects of the RDA, SDA, DDA or ADA and does not deal specifically with State and Territory anti-discrimination laws. Rather, the publication provides a guide to the significant issues that have arisen in cases brought under federal unlawful discrimination laws, including matters of practice and procedure, and analyses the manner in which those issues have been resolved by the courts. In some areas, context is provided from cases decided in other areas of law, but this coverage is not intended to be exhaustive.

1.2 'HREOC' and the 'Australian Human Rights Commission'

Since 4 September 2008, the public name of the Human Rights and Equal Opportunity Commission has been the Australian Human Rights Commission. The

¹ See HREOC Act Part IIB – Redress for unlawful discrimination.

² Readers should also note that this publication is not intended to be (and should not be) relied upon in any way as legal advice. Readers should obtain their own advice from a qualified legal practitioner.

legal name of the Commission is still the Human Rights and Equal Opportunity Commission and it is therefore still referred to as 'HREOC' in this publication.

1.3 What is 'Unlawful Discrimination'?

1.3.1 'Unlawful discrimination' defined

'Unlawful discrimination' is defined by s 3 of the HREOC Act as follows:

unlawful discrimination means any acts, omissions or practices that are unlawful under:

- (aa) Part 4 of the *Age Discrimination Act 2004*; or
- (a) Part 2 of the *Disability Discrimination Act 1992*; or
- (b) Part II or IIA of the *Racial Discrimination Act 1975*; or
- (c) Part II of the *Sex Discrimination Act 1984*;

and includes any conduct that is an offence under:

- (ca) Division 2 of Part 5 of the *Age Discrimination Act 2004* (other than section 52); or
- (d) Division 4 of Part 2 of the *Disability Discrimination Act 1992*; or
- (e) subsection 27(2) of the *Racial Discrimination Act 1975*; or
- (f) section 94 of the *Sex Discrimination Act 1984*.

The particular grounds of unlawful discrimination under the RDA, SDA, DDA and ADA can be summarised as follows:

- race, colour, descent or national or ethnic origin;
- sex;
- marital status;
- pregnancy or potential pregnancy;
- family responsibilities;
- disability;
- people with disabilities in possession of palliative or therapeutic devices or auxiliary aids;
- people with disabilities accompanied by an interpreter, reader, assistant or carer;
- a person with a disability accompanied by a guide dog or an 'assistance animal'; and
- age.

Also falling within the definition of 'unlawful discrimination' is:

- offensive behaviour based on racial hatred;
- sexual harassment; and
- harassment of people with disabilities.

It is not an offence, in itself, to engage in conduct which constitutes unlawful discrimination.³ Federal discrimination laws do, however, provide for a number of

³ See RDA s 26; SDA s 85; DDA s 41; ADA s 49.

specific offences⁴ and these are noted in each of the relevant chapters of this publication. It can be noted that conduct constituting some such offences is also included in the definition of ‘unlawful discrimination’: see the definition in s 3 of the HREOC Act, set out above.⁵

The regime for resolving complaints of unlawful discrimination under the HREOC Act before HREOC, the Federal Court and FMC is set out in Chapter 7.

1.3.2 Distinguishing ‘unlawful discrimination’ from ‘ILO 111 discrimination’ and ‘human rights’ under the HREOC Act

The focus of this publication is ‘unlawful discrimination’ and it does not consider in any detail HREOC’s functions in relation to ‘discrimination’ or ‘human rights’: concepts which have a distinct meaning under the HREOC Act. A brief summary of those functions is, however, provided below.

(a) ‘ILO 111 discrimination’

Independent of the ‘unlawful discrimination’ jurisdiction under the HREOC Act are HREOC’s functions in relation to ‘discrimination’ and ‘equal opportunity in employment’. These functions give effect to Australia’s obligations under the *International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation*⁶ (‘ILO 111’).

To clearly distinguish ‘unlawful discrimination’ from HREOC’s functions in relation to ‘discrimination’, the latter may be referred to as ‘ILO 111 discrimination’ (although such term does not appear in the HREOC Act).

Section 3 of the HREOC Act defines ‘discrimination’ as meaning (except in Part IIB of the HREOC Act which relates to ‘unlawful discrimination’):

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
- (b) any other distinction, exclusion or preference that:
 - (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

⁴ See RDA Part IV; SDA Part IV; DDA Division 4; ADA Part 5.

⁵ Because of the inclusion in the definition of ‘unlawful discrimination’ of conduct that is an offence, complaints in relation to such conduct may be made to HREOC. Note, however, that any criminal investigation and/or prosecution of such an offence is a matter for the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

⁶ *Convention Concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

- (c) in respect of a particular job based on the inherent requirements of the job; or
- (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

The *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) declare the following to be additional grounds of ‘discrimination’: age; medical record; criminal record; impairment; marital status; mental, intellectual or psychiatric disability; nationality; physical disability; sexual preference and trade union activity.⁷

It can be seen, therefore, that the range of grounds to which ILO 111 discrimination applies is broader than the range of grounds covered by unlawful discrimination: notably, ILO 111 discrimination includes the grounds of religion, political opinion, criminal record, nationality, sexual preference and trade union activity.

On the other hand, ILO 111 discrimination is limited in its application to ‘employment or occupation’, while unlawful discrimination operates in a wide range of areas of public life (in employment, education, accommodation, the provision of goods and services etc).⁸

Despite these differences, there is clearly overlap between the concepts of ILO 111 discrimination and unlawful discrimination. It is important to clearly differentiate the two as there are distinct legal regimes for the resolution of complaints of ILO 111 discrimination and unlawful discrimination. Notably, remedies are available from the Federal Court and FMC in unlawful discrimination matters: such remedies are *not* available for ILO 111 discrimination matters.

Part II Division 4 of the HREOC Act provides for a range of functions to be exercised by HREOC in relation to equal opportunity in employment and ILO 111 discrimination, including the function of inquiring into acts or practices that may constitute such discrimination.⁹ HREOC has the function of endeavouring, where appropriate, to effect a settlement of a matter which gives rise to an inquiry. If settlement is not achieved and HREOC is of the view that the act or practice constitutes ILO 111 discrimination, HREOC is to report to the Minister in relation to the inquiry.¹⁰

HREOC is empowered to make recommendations, including for payment of compensation, where it makes a finding of ILO 111 discrimination.¹¹ These recommendations are not, however, enforceable.

⁷ Regulation 4.

⁸ See RDA pt II; SDA pt II; DDA pt 2; ADA pt 4.

⁹ See HREOC Act ss 31(b), 32(1).

¹⁰ HREOC Act s 31(b)(ii). For more information in relation to the procedures surrounding complaints of ILO 111 discrimination under the HREOC Act, including HREOC’s reports to the Minister in the exercise of these functions, see HREOC’s website: <http://www.humanrights.gov.au/legal/HREOCA_reports/index.html>.

¹¹ HREOC Act s 35(2).

(b) 'Human rights'

HREOC also has functions in relation to 'human rights', including inquiring into complaints alleging that an act or practice done by or on behalf of the Commonwealth¹² is inconsistent with, or contrary to, any human right.¹³ 'Human rights', as defined by the HREOC Act,¹⁴ means those rights recognised in the *International Covenant on Civil and Political Rights*¹⁵ ('ICCPR'), the *Convention on the Rights of the Child*¹⁶ ('the CRC'), the *Declaration on the Rights of the Child*,¹⁷ the *Declaration on the Rights of Mentally Retarded Persons*,¹⁸ the *Declaration on the Rights of Disabled Persons*¹⁹ and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.²⁰

As with HREOC's functions in relation to ILO 111 discrimination, HREOC reports to the Minister in relation to such inquiries where they are not settled by conciliation and where HREOC is of the opinion at the act or practice is inconsistent with or contrary to any human right.²¹

HREOC has the power to make recommendations²² in the event that it finds a breach of human rights, including for the payment of compensation,²³ but these recommendations are not enforceable.

1.4 The Brandy Decision and HREOC's Former Hearing Function

The current regime for dealing with unlawful discrimination complaints has been in operation since 13 April 2000.²⁴

Prior to this, hearings were conducted in the first instance by HREOC.

1.4.1 The scheme prior to 1995

Between 1992 and 1995, HREOC had functions under the RDA, SDA and DDA with the following general features:

¹² Section 3 of the HREOC Act defines 'act' and 'practice' to mean those acts and practices done: (a) by or on behalf of the Commonwealth or an authority of the Commonwealth; (b) under an enactment; (c) wholly within a Territory; or (d) partly within a Territory, to the extent to which the act was done within a Territory.

¹³ See HREOC Act ss 11(1)(f), 20(1).

¹⁴ See HREOC Act s 3.

¹⁵ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 except article 41 which entered into force 28 March 1979), Schedule 2 to the HREOC Act.

¹⁶ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), declared to be an international instrument relating to human rights and freedoms for the purposes of the HREOC Act on 22 December 1992.

¹⁷ GA Res 1386 (XIV), UNGAOR, 14th sess, UN Doc A/4354 (1959) Schedule 3 to the HREOC Act.

¹⁸ GA Res 2856 (XXVI), UN GOAR, 26th sess, UN Doc A/ 8429 (1971), Schedule 4 to the HREOC Act.

¹⁹ GA Res 3447 (XXX), UN GAOR, 30th sess, UN Doc A/10034 (1975) Schedule 5 to the HREOC Act.

²⁰ GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (1981), declared to be an international instrument relating to human rights and freedoms for the purposes of the HREOC Act on 8 February 1993.

²¹ HREOC Act s 11(1)(f)(ii). As is the case with ILO 111 discrimination, there is also overlap between the concepts of human rights and unlawful discrimination. Notably, one of the basic human rights recognised in both the ICCPR (articles 2(1) and 26) and the CRC (article 2) is the right to non-discrimination.

²² HREOC's reports to the Minister in the exercise of this function can be found at:

<http://www.humanrights.gov.au/legal/HREOCA_reports/index.html>.

²³ HREOC Act s 29(2).

²⁴ *Human Rights Legislation Amendment Act (No 1) 1999* (Cth).

- The Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner investigated and attempted to conciliate complaints of unlawful discrimination under the RDA, SDA and DDA.
- Where the relevant Commissioner determined that the investigation into the complaint would not continue because, for example, the alleged act the subject of the complaint was not unlawful, the complaint was out of time or lacking in substance, the complainant could request an internal review of the Commissioner's decision by the President.
- Where the complaint was not resolved by conciliation and the Commissioner was of the view that it should be referred for a hearing, the hearing was conducted by HREOC and the complaint either dismissed or substantiated.
- Where a complaint was substantiated, HREOC registered its determination with the Federal Court registry. Upon registration, the determination was to have effect as if it were an order of the Federal Court.

1.4.2 Brandy v HREOC

In *Brandy v Human Rights and Equal Opportunity Commission*²⁵ ('*Brandy*'), the High Court held that the scheme for registration of HREOC decisions was unconstitutional as its effect was to vest judicial power in HREOC contrary to Chapter III of the *Constitution*.

The parliament responded to *Brandy* by enacting the *Human Rights Legislation Amendment Act 1995* (Cth) which repealed the registration and enforcement provisions of the RDA, SDA and DDA. Under this new regime, complaints were still the subject of hearings before HREOC and, where successful, HREOC made a determination (itself unenforceable). If a complainant sought to enforce a determination they had to seek a hearing 'de novo' by the Federal Court after which the Court could make enforceable orders if the complaint was upheld.

The obvious disadvantage of this regime was that a complainant potentially had to litigate their matter twice to get an enforceable remedy.

1.4.3 Human Rights Legislation Amendment Act (No 1) 1999 (Cth)

The *Human Rights Legislation Amendment Act (No 1) (1999)* was the parliament's ultimate response to the situation created by *Brandy*.

This Act amended the HREOC Act, RDA, SDA and DDA so as to implement the following significant changes to the functions of HREOC and the federal unlawful discrimination regime:

- the complaint handling provisions in the RDA, SDA and DDA were repealed and replaced with a uniform scheme in the HREOC Act;

²⁵ (1995) 183 CLR 245.

- responsibility for the investigation and conciliation of complaints was removed from the Race Discrimination Commissioner, Sex Discrimination Commissioner and Disability Discrimination Commissioner and vested in the President;
- the right to an internal review by the President of matters terminated by reason of, for example, being out of time or lacking in substance, was removed;
- HREOC's hearing function into complaints of unlawful discrimination under the RDA, SDA and DDA was repealed and provision made for complainants to commence proceedings in relation to their complaint before the Federal Court or FMC in the event that it was not conciliated when before HREOC for investigation; and
- the Race Discrimination Commissioner, Sex Discrimination Commissioner, Disability Discrimination Commissioner, Human Rights Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner were given an amicus curiae function in relation to proceedings arising out of a complaint before the Federal Court or the FMC.