THE UNIVERSITY OF
MELBOURNE

Fair Work Commission

Future Directions Project

23 December 2013

Submission on the Draft General Protections Benchbook

We write in relation to the *Draft for Public Consultation* of the *Benchbook: General Protections*. We congratulate the Fair Work Commission on this initiative of releasing a Benchbook to assist parties, and their advisers, in understanding the General Protections in Part 3-1 of the Fair Work Act 2009 (Cth).

We note that it appears that the Benchbook is intended to be accessible to lay people, including unrepresented litigants, in the same way as the Unfair Dismissal Benchbook, as a response to the increasing numbers of unrepresented parties engaging in disputes under these provisions (Breaking Down the Barriers to Justice (2013) at 5-6, and Final Progress Report on Stage 1 of Future Directions, 2.

While we regard the development of the Benchbook as a very worthy and useful step, we have one serious concern in the way that the draft Benchbook presents information. We are particularly concerned with its comments on the meaning of several key phrases in Part 3-1, and notably "discriminates between" (and "discriminates against") in s 342(1), at p 40. The Act does not itself define these terms, and their meaning has not, to date, been resolved in any authoritative manner.

Our concern is that the Benchbook presents several statements relating to the meaning of 'discriminating between' (on p 40) as settled or uncontentious, when that is not an accurate representation of the current position, and further, that it presents inconsistent statements without noting the inconsistency.

For example, on p 40 the Benchbook states that "[d]iscrimination between employees involves an employer *deliberately* treating an employee, or a group of employees, less favourably [than] its other employees." This may be an accurate statement of principle from the decision in *Hodkinson v Commonwealth*, but that case is merely a Federal Magistrates Court decision, and does not settle conclusively the meaning of the phrase used in s 342(1) of the *Fair Work Act*. The same could be said for the statements attributed to *Ramos v Good Samaritan* (at footnotes 57 and 60). These statements do not represent the law on these points; rather, they are merely single decisions of Federal Magistrates Courts. According to the authorities on precedent, the ratio decidendi in *Hodkinson* and *Ramos* is not binding, but is merely persuasive in later Federal Circuit Court decisions. Cook, Creyke, Geddes & Hamer, in *Laying Down the Law* (8th ed.) at 163, state that Federal Magistrates are bound only by decisions of the High Court, and of the Full Court of the Federal Court and the Family Court. According to *NAAT v Minister for Immigration, Multicultural and Indigenous Affairs* (2002)

170 FLR 477, [2002] FMCA 136, Federal Magistrates – like Federal Court judges - are not bound by a decision of a single judge of the Federal Court sitting in the first instance. It was held in that case that:

> "The tradition of comity would encourage a Federal Magistrate Court to follow the decisions of a single judge of the Federal Court except in a situation where the Federal Magistrate believed and was able to demonstrate that the original judgment was wrong. Where there are several judgments of single judges of the Federal Court which are in opposition to one another the Federal Magistrate, like a Federal Court judge, has the option of choosing which one of the conflicting judgments he or she prefers".

Propositions that are inconsistent with each other are listed on p 40 without comment. For example, after quoting the comment that 'the element of intent is central to establishing discrimination' in paragraph 3, the next paragraph notes that discrimination in this context may encompass indirect discrimination (see footnote 58 referring to *Klein*). As indirect discrimination is non-intentional, this is inconsistent with the proposition above it. At present there is no authoritative determination of whether either of these propositions is correct.

In our view, all the text under the heading "What is discriminating between …" on p 40 should be revised to ensure that readers are aware that there remains much uncertainty in the meaning of the phrases used in s 342(1) of the *Fair Work Act*. Certainly some Federal Magistrates have expressed views that intention or deliberateness are relevant, as is the concept of less favourable treatment, but these are not authoritative interpretations of s 342(1). Similarly the sentence attached to footnote 125 (on p 65) ought to be amended.

Finally, the example given on p 66 of *Sharma*'s case as an example of a failure to show that race was the basis of actions could be misleading if it is taken to suggest that a claim of adverse action under the *Fair Work Act* cannot succeed unless the person claiming can establish that race was the basis of the adverse action they experienced. It could be amended to note that the *Racial Discrimination Act* does not have a shared onus provision like that in s. 361 of the Fair Work Act.

Yours sincerely

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