Submission to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

This submission has been prepared by the following members of the Centre for Employment and Labour Relations Law, at the University of Melbourne:

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This submission is made to the Australian Law Reform Commission (ALRC) inquiry into Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (Inquiry). It has been prepared in response to the ALRC's Interim Report released in August 2015 (Interim Report). Specifically, it responds to the ALRC's invitation to provide feedback on specific chapters of the Interim Report.

This submission responds to Chapter 11: Burden of Proof and, in particular, those parts that relate to the *Fair Work Act* 2009 (Cth) (FW Act) and anti-discrimination laws.[1] The aspects of the Interim Report on which we provide comment are those in which we have particular expertise.

The submission draws on several years of research into the operation of the General Protections framework, both in terms of case decisions and also how the law operates in practice. This research, which commenced in 2011 and is ongoing, is funded by the Australian Research Council. Further information on this project is available from: http://www.law.unimelb.edu.au/celrl/research/current-research-projects/reshaping-employment-discrimination-law-towards-substantive-equality-at-work

The material in the submission regarding anti-discrimination laws also draws on the long-standing research interests of Professor Gaze and Associate Professor Chapman in equality and anti-discrimination laws. For a list of their publications in this field, see: http://www.law.unimelb.edu.au/melbourne-law-school/community/our-staff/staff-profile/username/Beth%20Gaze/Pub/1 and http://www.law.unimelb.edu.au/melbourne-law-school/community/our-staff/staff-profile/username/Anna%20Chapman

At the outset we wish to commend the evidence-based approach taken by the ALRC in the Interim Report.

In our view, the reverse onus of proof under FW Act s 361 should be maintained. In the absence of the reverse onus of proof, it would be extremely difficult, if not impossible, for claimants to establish that a respondent employer acted for an unlawful reason.

Furthermore, the reverse onus of proof has long been an important feature of protections with respect to freedom of association and unlawful termination under legislation preceding the FW Act.[2]

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[1] Paragraphs [11.95-11.02]

[2] Love, K., Chapman, A. and Gaze. B. 'The reverse onus of proof then and now: the Barclay case and the history of the Fair Work Act's union victimisation and freedom of association provisions' (2014) 37 *University of NSW Law Journal* 471-506.

The reverse onus of proof under section 361 of the FW Act has recently been considered by the Draft Report prepared by the Productivity Commission as part of its inquiry into the Workplace Relations System.

The Productivity Commission did recommend that the FW Act be amended to formally align the discovery processes used in general protections proceedings with those provided in the Federal Court's Rules and Practice Note 5 CM5.[3] It did not, however, recommend that the onus of proof on the respondent under FW Act s 361(1) be reversed or reformed.[4]

We note for completeness that the burden of proof on respondents to indirect discrimination claims, arising under some anti-discrimination laws, to show that the requirement or condition that has differential impact is reasonable does not constitute a genuine reverse onus of proof. Rather, it defines a defence to a claim of indirect discrimination.[5] This defence allows the respondent to show that there were good reasons for adopting the requirement or condition that is challenged as discriminatory, and that they outweigh the damage caused by its discriminatory effect.

In our view, in this context, it is appropriate for the respondent to have the onus of demonstrating that a condition, requirement or practice which it has imposed, or proposes to impose, on a claimant was reasonable. Again, it would be difficult, if not impossible, for a claimant to access information or evidence to demonstrate that a respondent's actions were not reasonable in the circumstances.

[3] Productivity Commission, above n 2, 262.
[4] *Productivity Commission, Workplace Relations Framework, Draft Report,* August 2015, 260-262.
[5] *Sex Discrimination Act* 1984 (Cth) s 7C; *Disability Discrimination Act* 1992 (Cth) ss 6(4), 30; *Age Discrimination Act* 2004 (Cth) s 15.