

Bringing the human right to non-discrimination into workplace law: towards substantive equality at work in Australia?

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The reshaping of Australian industrial law through the Fair Work Act 2009 (Cth) may have unexpectedly reshaped Australian anti-discrimination law as well, and increased the intermingling of industrial and human rights laws.

Until 2009, Australian anti-discrimination laws have been kept almost entirely separate from industrial laws, with different institutions for resolving disputes. The individualistic focus of Australian anti-discrimination law has been treated as outside the scope of industrial law with its basis in collective representation and negotiation. Complainant advocates have argued for reform of anti-discrimination law to shift it from a focus on compensating individual victims of discrimination after the event to more pro-actively challenging systemic discrimination in order to pursue substantive equality. Steps toward this goal would include regulatory enforcement powers exercised by empowered human rights agencies, power to hold inquiries into systemic discrimination, and resourcing for strategic enforcement of the law. However reform of anti-discrimination law has been slow. Although the current federal anti-discrimination law consolidation process provides an opportunity, the political context is not favourable to broad reform.

In this environment, the Fair Work Act broadened longstanding union anti-victimisation provisions by introducing a set of comprehensive prohibitions on 'adverse action.' These novel prohibitions go beyond industrial activity and workplace rights to allow employees to pursue a complaint of discrimination at work under industrial law processes, in much broader circumstances than previous industrial law permitted, and on a much wider range of attributes than federal anti-discrimination laws allow. Although the adverse action protections operate alongside anti-discrimination laws, they are in many ways a more attractive option for complaints of discrimination because they include a reverse onus of proof of the basis of action, speedier procedures, and the Fair Work Ombudsman which is a much better empowered regulatory agency than the Australian Human Rights Commission or state and territory human rights agencies.

The interpretation of the new discrimination concepts in the Fair Work Act is not clear. They are not defined in the Act, and nor are they tied to definitions or concepts of Australian discrimination legislation. Indications so far are that the courts will draw on the industrial law origins of the adverse action provisions to interpret them, but it is not clear how this approach could guide interpretation of the 'discrimination' provisions.

This paper will analyse developments in the law of adverse action to evaluate how the courts are responding to the challenge of drawing on two such diverse and potentially incompatible systems in giving effect to the Fair Work Act. If the courts can develop a way ahead for the integration of

human rights (as the right to non-discrimination) into Australia's workplace law system, they may set the scene for possible assimilation of these two very different traditions in the Australian context, and the possibility of developing an effective overall system of employment discrimination law focused on substantive equality and challenging systemic discrimination.