

Evaluating the Adverse Action Provisions of the Fair Work Act: Equality Thwarted?

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I Introduction

In 2009, anti-discrimination lawyers were excited about the potential of the adverse action provisions in Pt 3-1 of the *Fair Work Act 2009* (Cth) (*FW Act*) to provide effective redress for discriminatory treatment on grounds such as race, sex and disability. The new provisions were enacted alongside existing anti-discrimination law, which by then had become very difficult for claimants to litigate. The new adverse action protections were seen as having the potential to take two important steps: first, to integrate employment discrimination claims into the labour law system, and secondly, to ensure more effective remedying of discriminatory harms that arise in work relations.

This chapter examines whether the potential of the new dual system of employment discrimination law in Australia has been realised. It draws on a larger project funded by the Australian Research Council.¹ The chapter begins by explaining the background to the research project, outlining various problems with enforcing employment discrimination claims in the anti-discrimination law system, then analysing developments under the Pt 3-1 provisions over the past five years. The analysis presented in the chapter draws on case law and interviews with advisors within the employment discrimination law system (including both anti-discrimination law and the Fair Work system) to inform and deepen the understanding and analysis of the development of this area of law, including shared assumptions regarding the boundaries and subject matter of labour law.²

1 Discovery Project DP110101076 (2011-2016, Chief Investigators Beth Gaze and Anna Chapman). For further information on the project, see <<http://law.unimelb.edu.au/centres/celrl/research/current-research-projects/reshaping-employment-discrimination-law-towards-substantive-equality-at-work>>.

2 We interviewed 56 advisors over 2014 and 2015 in Victoria, New South Wales and Queensland. This number included 31 solicitors (who advised claimants or respondents), 15 barristers and 10 officers of trade unions. Interviews were conducted in accordance with approval granted by the Melbourne Law School Human Ethics Advisory Group including under the condition of anonymity.

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