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SUBMISSION

SENATE INQUIRY INTO THE EXPOSURE DRAFT OF THE *HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012* (CTH).

Background

Maurice Blackburn Lawyers practices in, inter alia, anti-discrimination law. We wish to make some brief observations and submissions about certain provisions of the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth). A failure to comment on any particular provision is not an endorsement of that provision.

Protected attributes

In Clause 17 of the exposure draft, "Medical history" is not defined. If multiple proceedings are to remain prohibited, and, specifically, if applicants are unable to plead Fair Work Act general protections claims in addition to or in the alternative to medical history discrimination claims, then medical history should be declined as including any claim, by the person with the attribute, for compensation or damages for personal injury suffered by that applicant.

As contended by the Law Council of Australia, further attributes such as irrelevant criminal record, domestic violence, and homelessness, should be considered for inclusion.

Indirect discrimination

We are cautious about any suggestion to move to a single definition of discrimination (which suggestion, we understand, has been made in previous public consultation about the consolidation of anti-discrimination laws). Moving to a single definition of discrimination may have unintended consequences. There should continue to be a basis to complain about conduct that does not appear prima facie discriminatory, but that has a discriminatory effect.

Preventing multiple proceedings

There are sound reasons to prevent complainants from pursuing multiple proceedings, especially multiple proceedings in different courts and tribunals. However, there may be circumstances where conduct can give

rise to both a general protections claim under the *Fair Work Act 2009* (Cth) and a complaint under the anti-discrimination legislation.

Complainants should not be deprived of a remedy because they have chosen one cause of action instead of the other, and courts should not be prevented from granting relief in relation to discriminatory conduct merely because of the form in which the complainant commenced proceedings.

Accordingly, for clause 90 and Part 4-3, Division 2 of the bill, the legislation should allow the applicant to plead contravention of the general protections and contravention of the anti-discrimination legislation in addition or in the alternative, provided both claims are brought in the same proceedings, and provided that the applicant has concluded the conciliation process in either of Fair Work Australia or the Australian Human Rights Commission.

The scope of the AHRC complaint

Clause 120(2), which requires that the application to the court has to be the same in substance as the complaint may lead to controversy of the kind considered in *CEPU v Active Tree Services Pty Ltd*¹ and *Shea v TruEnergy Services Pty Ltd (No 1)*,² in relation to the Fair Work Act. In other words, it could lead to procedural disputes about whether matters pursued in the course of the court proceedings fall within the scope of the complaint made, at first instance, to the Australian Human Rights Commission.

The clause should balance the need to make the matters the subject of the proceedings the same in substance as those set out in the complaint, with recognition of the informal and essentially preliminary character of the AHRC process (ie, consistent with the Federal Court decision in *Shea v TruEnergy Services Pty Ltd (No 1)*).

Onus of proof

As we understand clause 124, once a complainant has alleged the respondent has engaged or has threatened to engage in conduct, and has adduced evidence from which the a court could decide the reasons for the conduct include a discriminatory reason, it is for the respondent to prove the contrary. That is, the respondent has to prove that the discriminatory reason was not one of the reasons for the conduct concerned.

It is not clear from the explanatory memorandum why this provision has been drafted in terms slightly different to those in, and to impose a heavier requirement on complainants than, the equivalent provision of the Fair Work Act. Section 361 of the Fair Work Act provides:

“361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

¹ [2011] FMCA 535

² [2012] FCA 628

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.”

Clause 124 of the bill provides for a similar ‘reverse onus’ but includes an **additional** burden, on the complainant, of adducing evidence from which the court could decide that the conduct was taken for reasons including the proscribed (discriminatory) reason.

The draft explanatory memorandum gives an example of the operation of clause 124 as follows, at paragraph 464:

For example, a person claiming discrimination on the basis of their sexual orientation at work would need to show they are of the particular sexual orientation (or within the extended meaning e.g. they are assumed to be of that sexual orientation), that they were treated unfavourably and that it was connected with an area of public life. They would also need to show evidence from which it could be concluded that the unfavourable treatment was because of their sexual orientation (eg disparaging or offensive remarks by the respondent). The burden would then shift to the respondent to explain the real reasons for the treatment or otherwise justify the conduct.

In contrast, the courts have considered the operation of the ‘reverse onus’ predecessor provision of the current s 361 of the Fair Work Act as not requiring the applicant to adduce positive evidence from which the court could find the conduct was actuated by reasons including the proscribed reason.

The operation of the reverse onus was considered in *Galvin v Renito Pty Ltd*.³ In that case Ryan JR applied the reasoning of Moore J in *Stojanovic -v- The Commonwealth Club Ltd*⁴ to the operation of the then s 170CK of the Workplace Relations Act:

*“28 His Honor adopted a formulation of the onus on the employer approved by the High Court of Australia in *General Motors Holden Pty Ltd -v- Bowling*⁵ and expressed by Mason J when addressing s5(4) of the Conciliation and Arbitration Act 1904, an earlier predecessor s170DF and s170CK. At 617 Mason J referred to the onus on the employer of establishing affirmatively that it was not actuated by the reason alleged in that case in the charge laid under s5. He held that the consequence was that the employee, in order to succeed, was not bound to adduce evidence that the employer was actuated by that reason, a matter peculiarly within the knowledge of the employer. He found the employee was entitled to succeed if the evidence was consistent with the hypothesis that the employer was so actuated and that hypothesis was not displaced by the employer. He said:*

“To hold that, despite the subsection, there is some requirement that the prosecutor brings evidence of this fact is to make an implication which, in my view, is unwarranted and which is at variance with the plain purpose of the provision in throwing on to the defendant the onus of proving that which lies peculiarly within his own knowledge.”

In *Greater Dandenong City Council v Australian Municipal, Clerical and Services Union*,⁶ in dissent, Finkelstein J⁷ expressed the view that the presumption in the predecessor provision did not arise where there is sufficient

³[1999] FCA 1005

⁴(Industrial Relations Court of Australia, unreported, 8 December 1995)

⁵(1976) 12 ALR 605

⁶[2001] FCA 349 (4 April 2001)

evidence to enable the court to make a positive finding whether conduct has been carried out for the alleged reason or with the alleged intent. We respectfully observe that this seems consistent with the general approach to the 'reverse onus'. The 'reverse onus' is a presumption that arises if the claimant's evidence doesn't establish a positive case.

The current form of Clause 124 of the exposure draft of the bill, requiring the complainant to bring evidence from which the court could decide that the reasons for the conduct included the proscribed reason, is inconsistent with the reasoning referred to above. The Fair Work Act provision should be preferred because it "*throw[s] on to the defendant the onus of proving that which lies peculiarly within his own knowledge*". The alleged discriminator will usually be better placed to lead direct evidence about the reasons for the impugned conduct. Complainants are at a serious disadvantage when they have to prove the reason that someone else engaged in conduct. This is a significant imbalance between complainants and respondents.

Clause 124 should be altered so that it is consistent with the reverse onus (or, in other words, rebuttable presumption) formulation in the Fair Work Act.

Costs

We oppose the move to a no-costs jurisdiction because such a move would:

- reduce access to justice for complainants with meritorious cases, who would risk being left out-of-pocket despite making a successful claim;
- increase the incidence of complainants with meritorious cases representing themselves, to attempt to avoid the risk being left out-of-pocket despite making a successful claim, which increased incidence would cause delay and inconvenience in the courts.

The move is also unnecessary because:

- the court has a discretion as to costs, to be exercised judicially, and in deciding whether to order costs can take into account competing circumstances and considerations such as:
 - where there is a public interest element to the complaint;
 - where the applicant is unrepresented and not in a position to assess the risk of litigation;
 - that the unsuccessful party should not lose the benefit of their victory because of the burden of their own legal costs;
 - that litigants should not be discouraged from bringing meritorious claims and courts should be slow to award costs at an early stage; and
 - that unmeritorious claims and conduct which unnecessarily prolong proceedings should be discouraged;⁸

⁷ At paragraph 219

⁸ *Wiggins v Department of Defence Navy (No.3)* [2006] FMCA 970 at paragraph 35, applying *Fetherston v Peninsula Health (No. 2)* (2004) FCA 594, par 35

- if the risk of an adverse costs order was a substantial obstacle to litigation, and there were genuine public interest reasons to limit the parties' exposure to costs, both the Federal Magistrates Court Rules and the Federal Court Rules empower the court to limit, at the outset of the matter, the amount of costs that can ultimately be awarded;⁹ and
- the costs in Federal Magistrates' Court proceedings are arguably low (compared with solicitor client costs) in any event, because of the operation of the event-based scale in the Federal Magistrates' Court.¹⁰

Losing the fruits of successful litigation

As damages in discrimination and sexual harassment claims are traditionally low, moving to a no costs jurisdiction would render claims uneconomic for complainants, who would risk a likely outcome of being out of pocket even if successful. As has been recognised, without an award of costs, the unsuccessful party can lose the benefit of their victory because of the burden of their own legal costs.¹¹

Often courts award general damages for hurt and humiliation in successful anti-discrimination claims. The amounts concerned are generally low compared with the cost of litigating: see appendix 1 to this submission, which shows that with very few exceptions, general damages (that is, compensation for non-economic loss) range from \$500.00 to \$20,000.00.

In contrast, litigating in the Federal Magistrates Court or Federal Court can cost litigants tens or even hundreds of thousands of dollars in solicitor and client costs. In *Wiggins v Department of Defence Navy (No.3)*,¹² the Court observed that "[i]n this case it is clear that the applicant will have the benefit of the damages award of \$25,000. The hearing took place over a 10-day period with both parties represented by senior counsel and junior counsel." A ten day hearing involving senior and junior counsel would almost certainly have involved solicitor-client costs, for each party, of hundreds of thousands of dollars.¹³

In "Remedying Discrimination : The Limits of the Law and the Need for a Systemic Approach"¹⁴ the author notes that in the Victorian anti-discrimination jurisdiction, costs are generally not awarded, and goes on to cite some anecdotal examples of the problems this causes:

"A complainant barrister said that for those who are successful at hearing, their compensation awards dissolve in legal fees because VCAT is unwilling to award costs against the respondent. Another barrister provided an example of a complainant who was awarded \$2,500 in compensation and \$3,500 for costs because the respondent had unnecessarily prolonged the trial. The barrister said that since they received both amounts, the complainant 'broke even' because they then had enough money to cover their legal fees. A union advocate recalled representing a union member who had to settle their complaint for \$3,000 compensation because the union could not finance their members to take complaints to hearing, regardless of the complaint's merits. In this example, the union estimated that it would cost the complainant between \$15,000 and \$20,000 in legal

⁹ *Federal Court Rules 2011* (Cth), r 40.51 and *Federal Magistrates Court Rules 2001* (Cth), r 21.03

¹⁰ Schedule 1 to the *Federal Magistrates Court Rules 2001* (Cth)

¹¹ *Wiggins v Department of Defence Navy (No.3)*, pars 35 and 43

¹² [2006] FMCA 970

¹³ Recognising the applicant's degree of success, the Court reduced the costs awarded to her to fifty percent of the total costs, assessed against the court scale, and certified it had been reasonable for her to engage two advocates.

¹⁴ Allen, Dominique --- "Remedying Discrimination : The Limits of the Law and the Need for a Systemic Approach" [2010] UTasLawRw 5; (2010) 29(2) University of Tasmania Law Review 83

fees to take it further. The advocate advised the complainant that it was too risky for them to spend that amount of money with the possibility of ending up in debt at the conclusion of the hearing. A complainant barrister recalled instances of clients who had mortgaged their home or borrowed money to fund their case. The complainant's difficulty in recouping costs also affects the amount of pro bono work members of the legal profession do. Two complainant barristers said that they find it difficult to do as much pro bono work as they would like to on meritorious complaints; although they can do some work pro bono, they also need to be paid for some and they are unlikely to recoup their costs through the complainant's compensation award."

The Federal Magistrates Court has previously taken into account a low damages award in considering whether to order costs. For example, in *McMahon v Bowman*,¹⁵ the Court observed that "[t]he case was heard over two days and if no costs were awarded to the successful applicant the entire benefit of this judgment would be lost."¹⁶ A similar consideration was noted in *Wiggins v Department of Defence (Navy) (No 3)*, referred to above.

Discouraging meritorious claims

While some unions can assist with discrimination claims, it is less common for them to do so than it is for them to assist members with claims under the Fair Work Act. The *Fair Work (Registered Organisations) Act 2009* (Cth) provides for union officials to appear, as of right, in the courts in Fair Work Act matters. This goes some way to addressing the power imbalance in claims under the Fair Work Act, which makes a no-costs approach appropriate for that legislative scheme.

In contrast, discrimination claims tend to involve individual, natural person complainants seeking remedies against corporate, institutional, or even state respondents.

Because of the nature of discrimination claims, both in relation to the usual circumstances of having an individual claiming against a larger entity, and because discrimination is generally engaged in by member of a more powerful group or class as against a member of a less powerful group or class, the complainant tends to have less power than the respondent. Often a comparative power imbalance is the context in which unlawful discrimination occurs. In addition, corporate respondents generally have substantially greater financial means than individual complainants.

A complainant, already coming from a comparatively powerless situation, could be discouraged from proceeding with a complaint if they had to self-represent in order to get the fruits of the litigation, or if they had to face the real possibility of a pyrrhic victory where they claim a principled success but are ultimately left out-of-pocket on payment of their fees.

Social justice litigation and access to justice

Because of the nature of discrimination claims referred to above, involving power imbalances, discrimination claims are a legitimate focus for law firms' and barristers' pro bono and other social justice work. A possible means of improving access to justice is to allow lawyers to defray part of their costs through a costs order if successful. That provides an incentive for lawyers to pursue highly-meritorious claims in preference for those claims that may be less (but still) meritorious (ie merely arguable). If a firm or barrister can recover part of its costs through an order for costs, the matter concerned will still likely be a cost to the firm or barrister, but will be a lesser cost than undertaking the work wholly at no charge. The consequence will be that the firm can

¹⁵ [2000] FMCA 3

¹⁶ At paragraph 31

increase its pro bono productivity by running more matters at the same cost (assuming the matters are ultimately successful and costs orders are made).

Conclusion – costs

Having regard to the submissions above, the current arrangements in relation to costs should not be disturbed. That is, costs should ordinarily follow the event, subject to the Court's discretion, taking into account the factors set out above, and subject to any orders of the Court limiting (at the outset) or reducing (at the point of the costs order being made) the parties' costs exposure.

Maurice Blackburn Lawyers
21 December 2012

Appendix 1: damages in discrimination matters

The Australian Human Rights Commission publication “Federal Discrimination Law” lists the following examples of damages awards in discrimination cases.

Racial Discrimination Act

<i>Carr v Boree Aboriginal Corporation</i> [2003] FMCA 408	Total Damages: \$21,266.50: \$11,848.61 (economic loss), \$1,917.89 (interest), \$7,500.00 (non-economic loss)
<i>McMahon v Bowman</i> [2000] FMCA 3	\$1,500 (non-economic)
<i>Horman v Distribution Group</i> [2001] FMCA 52	\$12,500 (non-economic: including medication costs)
<i>San v Dirluck Pty Ltd</i> (2005) 222 ALR 91	\$2,000 (non-economic)
<i>Baird v Queensland (No 2)</i> [2006] FCAFC 198	Damages, including interest, awarded as follows: Baird: \$17,000, Creek: \$45,000, Tayley: \$37,000, Walker: \$45,000, Deeral: \$85,000, Gordon: \$19,800
<i>Gama v Qantas Airways Ltd (No 2)</i> [2006] FMCA 1767, upheld on appeal: <i>Qantas Airways Ltd v Gama</i> [2008] FCAFC 69	Total Damages: \$71,692: \$40,000 (non-economic loss), \$31,692 (medical expenses and interest)
<i>Silberberg v The Builders Collective of Australia Inc</i> [2007] FCA 1512	No damages awarded
<i>Campbell v Kirstenfeldt</i> [2008] FMCA 1356	Total damages: \$7,500 (non-economic)
<i>House v Queanbeyan Community Radio Station</i> [2008] FMCA 897	Total damages: \$6000 for each applicant (non-economic)
<i>Trapman v Sydney Water Corporation & Ors</i> [2011] FMCA 398	Total damages: \$5,000 (non-economic)

Sex Discrimination Act

<i>Font v Paspaley Pearls Pty Ltd</i> [2002] FMCA 142	Total Damages: \$17,500, \$7,500 (exemplary damages), \$10,000 (non-economic loss)
<i>Gulke v KC Canvas Pty Ltd</i> [2000] FCA 1415	Total Damages: \$10,000: \$7,000 (economic loss), \$3,000 (non-economic loss)
<i>Cooke v Plauen Holdings Pty Ltd</i> [2001] FMCA 91	\$750 (non-economic loss)
<i>Song v Ainsworth Game Technology Pty Ltd</i> [2002] FMCA 31	Total Damages: \$22,222 (approx): \$10,000 (non-economic loss), \$244.44 per week from 21 February 2001 until the date of judgment, less \$977.76 already paid (economic loss)
<i>Escobar v Rainbow Printing Pty Ltd (No 2)</i> [2002] FMCA 122	Total Damages: \$7,325.73: \$2,500 (non-economic loss), \$4,825.73 (economic loss)
<i>Mayer v Australian Nuclear Science & Technology Organisation</i> [2003] FMCA 209	Total Damages: \$39,294: \$30,695 (economic loss: includes salary, motor vehicle benefits and superannuation), \$5,000 (non-economic loss), \$3,599 (interest) (<i>minus an amount due for income tax, to be paid to the Australian Taxation Office</i>)
<i>Evans v National Crime Authority</i> [2003] FMCA 375, partially overturned on appeal: <i>Commonwealth</i>	Total Damages: \$41,488.57: \$12,000 (non-economic loss – reduced from \$25,000 on

v Evans [2004] FCA 654	appeal), \$7,493.84 (interest – subject to recalculation after appeal), \$21,994.73 (economic loss – not challenged on appeal)
Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd [2003] FMCA 160	\$10,000 plus interest (non-economic loss)
Kelly v TPG Internet Pty Ltd (2003) 176 FLR 214	\$7,500 (non-economic loss)
Gardner v All Australia Netball Association Ltd (2003) 197 ALR 28	\$6,750 (non-economic loss)
Ho v Regulator Australia Pty Ltd [2004] FMCA 62	\$1,000 (non-economic loss)
Howe v Qantas Airways Ltd (2004) 188 FLR 1; Howe v Qantas Airways Ltd (No 2) [2004] FMCA 934	Total Damages: \$27,753.85 (plus interest): \$3,000 (non-economic loss), \$24,753.85 (economic loss) plus interest
Dare v Hurley [2005] FMCA 844	Total Damages: \$12,005.51: \$3,000 (non-economic loss), \$9,005.51 (economic loss)
Fenton v Hair & Beauty Gallery Pty Ltd [2006] FMCA 3	Total Damages: \$1,338: \$500 (non-economic loss), \$838 (economic loss – including associated contractual claim)
Rankilor v Jerome Pty Ltd [2006] FMCA 922	\$2,000 (non-economic loss including out-of-pocket expenses)
Iliff v Sterling Commerce (Australia) Pty Ltd [2007] FMCA 1960, upheld on appeal: Sterling Commerce (Australia) Pty Ltd [2008] FCA 702	\$22, 211.54 (economic loss - plus interest ¹⁷ and less tax)
Poniatowska v Hickinbotham [2009] FCA 680	Total Damages: \$463,000: \$90,000 (non-economic loss), \$340,000 (economic loss), \$3,000 (future medical expenses), \$30,000 (interest)
Maxworthy v Shaw [2010] FMCA 1014	Total Damages: \$63,394.50: \$20,000 (non-economic DDA), \$5,000 (non-economic SDA), \$33,394.50 (economic loss), \$5,000 (interest)

Disability Discrimination Act

<i>Barghouthi v Transfield Pty Ltd</i> (2002) 122 FCR 19	One week's salary (economic loss)
<i>Haar v Maldon Nominees</i> (2000) 184 ALR 83	\$3,000 (non-economic loss)
<i>Travers v New South Wales</i> (2001) 163 FLR 99	\$6,250 (non-economic loss)
<i>McKenzie v Department of Urban Services</i> (2001) 163 FLR 133	Total Damages: \$39,000: \$15,000 (non-economic loss), \$24,000 (economic loss)
<i>Oberoi v Human Rights & Equal Opportunity Commission</i> [2001] FMCA 34	Total Damages: \$20,000: \$18,500 (non-economic loss), \$1,500 (economic loss)
<i>Sheehan v Tin Can Bay Country Club</i> [2002] FMCA 95	\$1,500 (non-economic loss)
<i>Randell v Consolidated Bearing Company (SA) Pty Ltd</i> [2002] FMCA 44	Total Damages: \$14,701: \$10,000 (non-economic loss), \$4,701 (economic loss)
<i>Forbes v Commonwealth</i> [2003] FMCA 140	No damages awarded
<i>McBride v Victoria (No 1)</i> [2003] FMCA 285	\$5,000 (non-economic loss)
<i>Bassanelli v QBE Insurance</i> [2003] FMCA 412, upheld on	Total Damages: \$5,543.70: \$5,000 (non-

¹⁷ See *Iliff v Sterling Commerce (Australia) Pty Ltd (No 2)* [2008] FMCA 38.

appeal <i>QBE Travel Insurance v Bassanelli</i> (2004) 137 FCR 88	economic loss), \$543.70 (interest)
<i>Darlington v CASCO Australia Pty Ltd</i> [2002] FMCA 176	\$1,140 (economic loss – plus interest to be calculated at 9.5%)
<i>Clarke v Catholic Education Office</i> (2003) 202 ALR 340, upheld on appeal <i>Catholic Education Office v Clarke</i> [2004] FCAFC 197	Total Damages: \$26,000: \$20,000 (non-economic loss), \$6,000 (interest)
<i>Power v Aboriginal Hostels Ltd</i> [2004] FMCA 452	Total Damages: \$15,000: \$10,000 (non-economic loss), \$5,000 (economic loss)
<i>Trindall v NSW Commissioner of Police</i> [2005] FMCA 2	Total Damages: \$18,160 (approx) + interest: \$10,000 (non-economic loss), \$480 per month during the period of discrimination (economic loss) + interest
<i>Hurst & Devlin v Education Queensland</i> [2005] FCA 405	Total Damages: \$64,000: \$40,000 (economic loss), \$20,000 (non-economic loss), \$4,000 (interest)
<i>Drury v Andreco Hurl Refractory Services Pty Ltd (No 4)</i> [2005] FMCA 1226	\$5,000 (non-economic loss), Damages for economic loss to be agreed
<i>Wiggins v Department of Defence – Navy</i> (2006) 200 FLR 438; modified in <i>Wiggins v Department of Defence - Navy (No 3)</i> [2006] FMCA 970	\$25,000 (non-economic loss)
<i>Vickers v The Ambulance Service of NSW</i> [2006] FMCA 1232	\$5,000 (non-economic loss) NB – This was the amount sought by the applicant, although the Court indicated that it would have ordered a higher amount.
<i>Hurst v Queensland</i> (2006) 151 FCR 562	No damages awarded ¹⁸
<i>Rawcliffe v Northern Sydney Central Coast Area Health Service</i> [2007] FMCA 931	\$15,000 (non-economic loss)
<i>Forest v Queensland Health</i> (2007) 161 FCR 152, overturned on appeal in <i>Queensland (Queensland Health) v Forest</i> [2008] FCAFC 96,	\$8,000 (non-economic loss – plus interest calculated at 5% per annum)
<i>Gordon v Commonwealth</i> [2008] FCA 603	Total damages: \$121,762: \$71,279 (economic loss), \$20,000 (non-economic loss), \$30,465 (interest)
<i>Maxworthy v Shaw</i> [2010] FMCA 1014	Total Damages: \$63,394.50: \$20,000 (non-economic loss DDA); \$5,000 (non-economic loss SDA); \$33,394.50 (economic loss); \$5,000 (interest)

¹⁸ Affirmed in *Hurst v Queensland (No 2)* [2006] FCAFC 151.