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REGULATOR TARGETS RACIAL DISCRIMINATION OF FOREIGN WORKERS

Workplace discrimination has been prohibited in Australia for over forty years. Until recently, it was the sole concern of anti-discrimination law; industrial relations law only prohibited dismissal on the basis of an irrelevant attribute, like sex and race. The *Fair Work Act 2009* (Cth) ('FW Act') extended industrial relations law to other forms of discrimination, like demotion, and gave the Fair Work Ombudsman ('FWO') the power to enforce the law, something the agencies established under anti-discrimination laws have never been able to do.

The FWO was quite active in this area initially but then it shifted its focus to other breaches of the FW Act. Recently it successfully litigated a claim of discrimination on the basis of race and national extraction, which was also the first successful racial discrimination claim brought under the FW Act. In *Fair Work Ombudsman v Yenida Pty Ltd* ('Yenida'¹) the court found that a hotel had discriminated against two overseas workers by paying them less and treating less favourably than the Australian employees. This note compares the enforcement of workplace discrimination claims in anti-discrimination law with industrial relations law and shows that having a statutory agency with a range of powers available to enforce the law has the potential to change the landscape of workplace discrimination in Australia. The final part examines the *Yenida* case.

I - ENFORCING DISCRIMINATION CLAIMS IN ANTI-DISCRIMINATION LAW

The federal government passed Australia's first anti-discrimination law, the *Racial Discrimination Act* (Cth), in 1975. Shortly after, the states and territories began enacting laws prohibiting sex discrimination. Other attributes followed. Workplace discrimination is now prohibited on the basis of a range of attributes across the country.² The laws are very similar, particularly in how they are enforced. They rely on the individual who has experienced discrimination to lodge a claim at the equal opportunity agency in their jurisdiction or at the federal Australian Human Rights Commission. There is no right to access court directly except in Victoria.³ Provided the claim has substance and is within the agency's jurisdiction, it will attempt to resolve it using alternative dispute resolution ('ADR'), which is a confidential process. Most claims are settled or withdrawn. Few proceed to hearing at a civil tribunal or, for federal claims, at the federal courts. If they reach court, claims are subject to ADR a second time and many will settle. The courts hear very few claims each year. The reasons for this include the financial, psychological and emotional costs of litigation, the employee is satisfied with the settlement, and the time lapse between the discriminatory event and

1 [2017] FCCA 2299.

2 See further N. Rees, S. Rice, D. Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 2018).

3 *Equal Opportunity Act 2010* (Vic) Part 8.

the anticipated court hearing date. Another factor influencing settlement is that damages awards in discrimination claims have tended to be low.⁴

Unlike many other countries, there is no scope for the equal opportunity agencies to enforce the law either by providing financial assistance to an employee or by taking the claim on their behalf. Because of their role in the receiving complaints and providing ADR services, it was thought that there would be a conflict of interest if the equal opportunity agencies were given an enforcement role, so their primary function is to handle complaints and provide ADR. They are also responsible for educating the community about the law and encouraging compliance.

II - ENFORCING DISCRIMINATION CLAIMS UNDER THE FAIR WORK ACT

The introduction of the FW Act changed this landscape by extending the prohibition of discrimination beyond dismissal and establishing a body charged with enforcing the law.

Section 351 of the FW Act prohibits an employer from taking 'adverse action' against an employee because of an attribute that they possess such as their race, sex, age or disability. The unlawful behaviour, the 'adverse action', is defined as dismissing the employee, injuring the employee in their employment, altering the employee's position to their prejudice, and discriminating against the employee. Threatening or organising such action is prohibited.⁵ Both employees and prospective employees are protected.⁶ Once there has been allegation that s 351 has been breached, the onus of proof shifts to the employer to rebut the presumption.⁷

The FW Act does not rely on an individual for enforcement. Unions can bring claims on behalf of their members. Most significantly, the federal statutory agency, the FWO, has the power to investigate breaches of the Act and enforce compliance.⁸ Fair Work Inspectors can conduct an investigation into an alleged breach and if they reasonably believe the Act has been contravened, the FWO may accept enforceable undertakings from the employer.⁹ For example, a retailer agreed to complete training, place a notice about its unlawful conduct in a newspaper and display it in its workplace after an investigation revealed it had discriminated against a pregnant employee by reducing her working hours and giving new employees work in preference to her. The employer also agreed to compensate the

4 See further D. Allen, "Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria", *Griffith Law Review*, 2009, vol.18, 778.

5 Section 342.

6 FW Act s 351.

7 FW Act s 361.

8 Section 539.

9 FW Act s 715.

employee and issue her with a written apology.¹⁰ If the employer is not willing to comply voluntarily, the FWO can litigate and seek compensation for the affected employee and a civil penalty of up to 60 penalty units per breach for individuals (currently AUD\$12,600) and five times that amount for a body corporate.¹¹

III - FAIR WORK OMBUDSMAN V YENIDA PTY LTD

The *Yenida* case brought together two of the FWO's current priority areas for compliance activities – migrant workers and the hospitality industry. The FWO has found its caseload is overrepresented by visa holders and that many are young hospitality workers.¹² The hospitality industry accounts for almost one third of the FWO's litigation work, despite hospitality workers constituting a very small part of the Australian labour market.¹³ Audits of businesses operating in this industry have often led the FWO to take action to recoup unpaid wages. Indeed, underpayments were one aspect of the *Yenida* case¹⁴ but it was how the employer treated two foreign workers in comparison to its Australian employees that were in dispute.

The case concerned a hotel in regional Tasmania, which was owned by Yenida and managed by one of its directors, Mr Chang. Mr Loh was employed as a chef and his wife, Ms Low, worked as a kitchen hand. They were both Malaysian nationals of Chinese extraction. The couple had relocated from Malaysia after Mr Loh answered a job ad that Mr Chang placed in a Malaysian newspaper. The couple lived on site and worked at the hotel for almost seven years. Mr Chang sponsored Mr Loh's working visa. Ms Low's visa was dependent upon her husband's.

The FWO alleged that Yenida and Mr Chang discriminated against the couple on the basis of their race and national extraction. Mr Loh was required to work six days per week, he did not receive a day off in lieu of working on a public holiday, and regardless of how many hours he worked, he was paid a flat salary. The Australian born chef, however, worked less hours which were spread over five days per week. Like her husband, Ms Low's weekly wage did not vary with her working hours.

'Discriminates' is not defined in the FW Act. It has been held to mean to treat less favourably.¹⁵ In *Yenida* Baker J found that the employer treated Mr Loh less favourably when it failed to pay him penalty rates and did not require him to record his working hours on a timesheet,¹⁶ and that it discriminated against Ms Low by paying her a fixed weekly wage that did not vary according to the number of hours she worked.¹⁷

10 Enforceable Undertaking Shawna Pty Ltd (29 January 2013) available at <https://www.fairwork.gov.au/ArticleDocuments/721/Redacted-Shawna-EU-English.pdf.aspx> (accessed 10 August 2018).

11 FW Act ss 539 Item 11, 546.

12 FWO, *Annual Report 2016-17*, (2017) 18-19.

13 Ibid 20-21. See also Michael Bailey, 'Fair Work Ombudsman wins first racial discrimination case', *Australian Financial Review*, 27 May 2018.

14 The FWO alleged that the hotel underpaid 15 employees and failed to maintain records, which the employer admitted to by the time the claim reached the court. All of those employees were Australian nationals and of Caucasian descent: *Yenida* [11].

15 *Hodkinson v Commonwealth* (2011) 248 FLR 409.

16 *Yenida* [219].

17 *Yenida* [243].

Neither 'race' or 'national extraction' are defined in the FW Act. Baker J adopted the ordinary meaning of both as set out in the dictionary¹⁸ and found that the couple's race was Chinese and their national extraction was Malaysian. Mr Chang was unable to show that the couple's race and/or national extraction were not a substantial and operative reason why he treated them less favourably. Baker J found that he recruited Mr Loh because he knew it was likely that a Malaysian would accept working six days a week because that is common in Malaysia.¹⁹

Not only did Baker J find that the employer acted unlawfully, she found that Mr Chang was involved in all of the contraventions. Mr Chang had sold the hotel by the time the case was heard because it was not very profitable. When the penalties decision was heard in early 2018, Mr Chang said he had had to borrow money to repay his former employees' wages and claimed he had no capacity to pay any penalties.²⁰ However, in determining the appropriate penalty, Baker J said more weight was to be given to deterrence than to the employer's capacity to pay.²¹ Her Honour imposed penalties on both Yenida and Mr Chang in respect of the breaches of s 351. While those amounts were quite small, penalties were also imposed in respect of most of the other contraventions of the FW Act (namely, underpaying the other employees). Those penalties totalled \$176,005 for Yenida and \$35,099 for Mr Chang, in addition to \$52,017.74 in unpaid wages.²²

Conclusion

As the FWO's first foray into enforcing racial discrimination laws, there is no doubt that *Yenida* was a success. As the FWO's the first discrimination case in three years, *Yenida* also brought the spotlight back to the issue, rather than leaving enforcement to individual employees. It is important for the FWO to maintain its profile in this area for two reasons. First, the body of case law about s 351 is underdeveloped, so it would be beneficial to all employees for the FWO to strategically pursue cases and develop the jurisprudence. Second, the FWO is the only agency with the ability to enforce anti-discrimination laws so it must continue to encourage compliance by conducting investigations and pursuing litigation where necessary. In saying that, though, there is a balance to be struck between encouraging compliance through court action and acting in the shadow of litigation. In a recent underpayments case, the court was quite critical of the FWO's strategy of pursuing litigation against a restaurant. In imposing the minimum penalty, McNab J took into account the "significant negative publicity" the restaurant and his businesses had experienced as a result of the FWO's enforcement action and said it was an instance in which enforceable undertakings could have been considered instead.²³ Selecting the most appropriate course of action will vary according to the nature of the breach.

¹⁸ *Yenida* [248]-[261].

¹⁹ *Yenida* [328].

²⁰ *Fair Work Ombudsman v Yenida Pty Ltd* [2018] FCCA 1342, [104]-[111].

²¹ *Ibid.* [126].

²² *Yenida* [6], [11], [15].

²³ *Fair Work Ombudsman v The Meatball And Wine Bar Pty Ltd* [2018] FCCA 2288.