

INDIRECT DISCRIMINATION

WRITE: Indirect discrimination recognises that subjecting people with different attributes to the same treatment can affect some people more adversely than others (*Griggs v Duke Power Company*)

- E.g. subjecting everyone to stairs, someone in a wheelchair can't access the building
- Distinguish between treating people equally and treating them as equals.
- Treating equally: according people the same actual treatment (relevant to direct discrimination)
- Treating as equals – according people equal concern and respect; which may require differential treatment (relevant to indirect discrimination)

Griggs v Duke Power Co

- **Facts:** DPC had previously openly (only hired Black people for manual labour jobs) discriminated but after Civil Rights Act they ceased to overtly discriminate. Instead, for employment in the non-labour job the applicant was required to have graduated from high school and performed well on an intelligence test
- **Held:** the requirements discriminated against Black people. Fewer black people could satisfy these requirements. Their schools were inferior so more likely to drop out and less likely to do well in the test. Neither of these requirements had a relationship with successful performance in non-labour jobs. Before these requirements the White people in those jobs who couldn't satisfy the requirements were did fine in their roles

STEP 1: DOES THE COMPLAINANT HAVE STANDING?

STEP 1: Introduction

In order for [X], the complainant, to bring a claim of ID to the Australian Human Rights Commission [AHRC] and the Federal Magistrates Court [FMC], [X] must have standing to complain. As there has been a breach of direct discrimination of a relevant act, per s 46PO(1) AHRC, [X] may make an application to the Federal Magistrates Court.

- To make an application, [X] must be an 'affected person' per s 3 AHRC – in relation to a complaint, a person on whose behalf the complaint was lodged.

STEP 2: s 46P(2)(a), (b) OR (c)

The complaint was brought by [list who the complaint was brought by] per s 46P(2) [(a) or (b) or (c), see below], as [list reasons].

- (a) A complaint can be brought by a person aggrieved by the alleged unlawful discrimination EITHER on that person's own behalf OR on that person's own behalf and others who are also aggrieved [**NB** most likely indirect]
- (b) A complaint can be brought by two or more persons aggrieved by the alleged unlawful discrimination on their own behalf or on their own behalf and others who are also aggrieved
- (c) A complaint can be brought by a person or trade union on behalf of one or more other persons aggrieved by the alleged unlawful discrimination

STEP 3: Must be 'Person Aggrieved'

[X] must be an aggrieved person. The Act provides no guidance to determine a person aggrieved, therefore must look to the common law (CL).

- First: Choose whether complainant is a person, unincorporated association or corporation
- Second: Weigh up factors 'for' and 'against'
- **NB:** if more than one person → go through the test for each individual person

(1) Person Made Complaint:

- Per Beaumont and Foster JJ in *Cameron v HREOC*, a person aggrieved is determined objectively. [X] would be a person aggrieved by the alleged unlawful discrimination, if [X] has actually been aggrieved and affected to a greater extent or in a qualitatively different way than a member of the general public.

(2) Unincorporated association makes a complaint:

- When there is a complaint from an unincorporated association, [X], people who comprise it are the complainants. Therefore, [A, B and C] are the complainants. If those people are persons aggrieved the association that represents them is a person aggrieved (*Executive Council of Australian Jewry* per *Wilcox J*)
 - Necessary to "go behind the name and consider whether the juristic persons who constitute the unincorporated association are 'persons aggrieved' by the allegedly unlawful act" (*Wilcox J*)

- **Executive Council of Australian Jewry per Wilcox J:**
 - If the people who constitute the unincorporated association are ‘persons aggrieved’ by the allegedly unlawful act, the complaint will be competent, “because in law, although not in name, the complaint will have been made by ‘persons aggrieved’”.
 - If people of the organisation are themselves aggrieved – because in substance not form, the complainant will be a person aggrieved

(3) Corporation makes a complaint:

- When [X], a corporation, brings a claim of discrimination, per Mason J in *Koowarta*, a ‘person aggrieved’ is likely to include a ‘corporation’. Pursuant to the *Acts Interpretation Act [AIA]*, a reference in statute to a person includes a body corporate (Per Mason in *Koowarta*) and given that the purpose of the Convention on which the *AIA* was based on [to eliminate all forms of racial discrimination], there was a strong reasons for interpreting the word ‘person’ to include ‘corporations’ so to maximise the circumstances in which illegal discrimination can be challenged
- **NB:** body corporate must then show discrimination based on it possessing the protected attribute [difficult]

STEP 3.1: Factors pointing to an aggrieved person

- Not be construed too narrowly (French JJ)
- Not necessarily only people who are directly affected by unlawful discriminatory behaviour who may be persons aggrieved in the requisite sense, it is arguable that “derivative or relational interests will support the claim of a person to be ‘aggrieved’ for the purposes of the” Act (French JJ)
 - Relational interest can be sufficient where the relationship is sufficiently close (e.g. spouse, relative, dependent, close professional colleague – categories not closed)
- More than simply intellectual or emotional (Beaumont and Foster JJ):
 - E.g. assaulted [mention the specific acts that [X] deals with in a physical fashion], and the fact these acts are **only** occurring to [X]
 - Had an interest in the matter [intellectual/emotional]

STEP 3.3: Factors NOT pointing to an aggrieved person

- Not enough merely that [X] felt aggrieved
 - Merely felt aggrieved → subjective
- It would not be sufficient to qualify someone as an aggrieved person, if she was not actually affected by the alleged unlawful discrimination, but rather, had an interest in the matter that was merely intellectual or emotional (Beaumont and Foster JJ)

STEP 3.4: Conclude

- **SATISFIED:** In this case, [X] would positively suffice to be an aggrieved person because [list reasons]
- **NOT SATISFIED:** In this case, [X] would not be an aggrieved person because [list reasons]

STEP 4: Conclusion

- Therefore [X] would/would not have standing.

STEP 5: the AHRC process

- As [X] has standing to bring a claim of discrimination, [X] must first make a complaint to the Australian Human Rights Commission [AHRC].
- The commission has no ability to make binding orders as AHRC is not a Chapter 3 court, so cannot exercise judicial power in order to uphold the separation of powers doctrine (**Brandy**)
- Instead, the AHRC attempts to conciliate matters and if an agreement is reached, this is given legal effect in a contract between the parties.

STEP 5.1: The AHRC Process

- **S 11(1)(aa) AHRC** - a function of the Commission is to “inquire into and attempt to conciliate complaints of unlawful discrimination”.
- **S 46P(1)** - a “written complaint may be lodged with the Commission, alleging unlawful discrimination”
- **S 46PD** - if “a complaint is made to the Commission under section 46P, the Commission must refer the complaint to the President”.
- **S 46 PF(1)** - if a complaint is referred to the President under section 46PD, the President must inquire into the complaint and attempt to conciliate the complaint.
- **S 46PI (1)** - the President may serve written notice on a person he believes is capable of providing information or documents that are relevant to an inquiry initiated under section 46PF(1).

- **S 46 PJ(1)** - for the purposes of dealing with a complaint, the President may decide to hold a conference, to be presided over by him, or a person who has been appointed by him.
- **S 46PJ(3)** - if the President decides to hold such a conference he must, by notice in writing, direct each complainant and each respondent to attend the conference.
- **S 46PJ(4)** - the President may also require the attendance at the conference of any person who, in the opinion of the President, is likely to be able to provide information that is relevant to the inquiry, and any person whose presence at the conference is, in the opinion of the President likely to be conducive to the settlement of the matter.
- **S 46 PM** - a person who fails to provide information, or to produce a document, as is required by a notice served under section 46PI may be subject to sanctions. See also section 46PL.
 - At the conference, the person appointed will attempt to conciliate the dispute
- **S 46PH(1)(a)** – the President may terminate a complaint if he forms the view that the alleged unlawful discrimination is not in fact unlawful discrimination.
 - Would be an offence for a President to terminate unlawful discrimination if the President did not actually think there was unlawful discrimination
- **S 46PH(i)** – the President can terminate a complaint if he is satisfied that there is no reasonable prospect of the matter being satisfied by conciliation
- **S 46 PH(2)** - if the President decides to terminate a complaint, the President must notify the complainants in writing, and provide reasons for his decision

Step 5.2: Advantages of AHRC

- Complainant: saves cost and more timely than going to court
- Respondent: would not be subjected to future employers/employees knowing of the discriminatory act
 - Gives them an incentive to settle during the conciliation process – rather than settling in court
 - Can protect their reputation
 - Prospective employer may not know why a person left their job

STEP 5.3: Disadvantages of AHRC

- Complainant: if complainant knows from the outset they do not want to settle, they must at least start with this process of conciliation
- Respondent: can protect its reputation when it shouldn't be protected
 - Confidentiality agreements can be inserted into contracts so others don't know the place discriminates
 - Company has an unjust benefit for the confidentiality agreement
 - Prospective employees/current employees won't be aware discriminatory acts were/are occurring
 - Other employees who had been/will be discriminated against won't know of other employees who had brought successful claims [may not have the confidence to bring a claim to court]

STEP 5.4: Policy of AHRC

- The AHRC process does not go towards furthering the body of discrimination law
- Every claim of conciliation, settled by way of K does not go to court
 - If it does not go on to the courts, there is no judgement and therefore no elaboration of the law of anti-discrimination [no precedence]
 - Bodies of law are built up by people going to court

STEP 5.5: Conclude

- SUCCESSFUL: As [X] is successfully conciliated, the AHRC does not have the power to make any binding orders on parties
- NOT SUCCESSFUL: go to step 6

STEP 6: The Federal Magistrates' Court (FMC) Process

- **WRITE:** If AHRC is unsuccessful, per **s 46PO(1)**, [X] can make an application to the FMC alleging unlawful discrimination, if [X] is/are an affected person/s per **s 3**. Based on above analysis, [X] is an affected person:
 - Satisfy these questions:
 - 'On whose behalf' – aggrieved person
 - Was the complaint before the commission lodged on my behalf? Was the complaint properly lodged on my behalf?
 - An aggrieved person can lodge on their own behalf
 - Satisfy **s 3** and therefore satisfy **s 46PO(1)**
 - On whose behalf can a complaint properly be lodged before a commission?
 - Look to **ss 46P(2)(a), (b) and (c)**
 - Can only be brought by an aggrieved person
 - Look to CL to determine if someone is an aggrieved person

- To determine whether you have standing to bring a complaint to court, go backwards to go forwards
- **WRITE:** Per s 46PO(3), [X] must allege the same unlawful discrimination that was taken to the commission or must arise out of the same acts/omissions that were subject of the terminated complaint.

Principles of FMC:

- Per s 46PO(1), conciliation must be terminated by the President under s 46PE or s 46PH and the President must give notice in relation to the termination to a person under s 46PH(2)
- Will only be an affected person under s 3 if a complaint was lodged to the commission on their behalf – and a complaint can only be lodged to their commission on their behalf if they want to

Cameron v HREOC

- **Facts:** HREOC was predecessor of ARHC. Australian government awarded scholarships to Fijians to study in Australia. Half awarded to indigenous, half to non-indigenous. Claim that if scholarships were awarded on merit alone 60-70% would go towards non indigenous
 - HREOC declined to hear the claim as C was not a person aggrieved → It went to court
 - C pointed to matters indicating he was aggrieved. He had acted for people in proceedings in against the Fijian government in which racial discrimination was alleged and he had undertaken pro bono work on behalf of Fijians. When he was younger in Fiji he had received a scholarship which permitted him to undertake international study so he was aware of the privileges and duties associated with such an award
- **Held** – C was not a person aggrieved. Objective test is used. Person must actually be aggrieved, not just feel aggrieved. None of the matters resulted in him being a person aggrieved. At most his concern was intellectual or emotional
 - French J suggested that relational interest can be sufficient where the relationship is sufficiently close (such as spouse, relative, dependent, close professional colleague). The categories are not closed, just needs to be a sufficiently close relationship

Executive Council of Australian Jewry v Scully

- **Facts:** S distributed anti-emitic material in Tasmania. ECAJ sought redress under the RDA. S argued ECAJ was not a person aggrieved because not a natural person and did not have legal existence as a person
- **Held** – ECAJ was not a person in the eyes of the law so could not be a person aggrieved. It is necessary to go behind the nae and consider whether the juristic persons who constitute the unincorporated association are persons aggrieved. ECAJ was made up of Jewish community councils from across Australia.
 - Hobart Jewish Congregation represented Jews in Tassie, including in Launceston where the material was distributed. Distribution of the anti-Semitic material would affect Jews in Launceston in a manner different in kind from the manner non-Jewish people were affected. Hobart Jewish Congregation was part of ECAJ.
 - Therefore, members of the ECAJ were PAs by the alleged unlawful acts, by virtue of them representing Jewish People living in Launceston

Koowarta

- The complainant was an individual person but if the Aboriginal Land Fund (a corporation) had complained it probably would have had standing as a person aggrieved [See above for more detailed facts]

Brandy v HREOC

- **Facts:** HREOC found that B and his employer had discriminated against other employees under the RDA. HREOC made orders against B and his employer. These orders were registered in the Federal Court and could be enforced under the Federal Court of Australia Act with criminal sanctions for failure to comply
- **Held:** The orders were struck down. B successfully claimed that if HREOC orders were able to be enforced this meant HREOC was exercising judicial rather than administrative power. HREOC is not a chapter 3 court so this was a breach of the separation of powers

STEP 2: IS IT A STIPULATED ACTIVITY IN A STIPULATED SPHERE?

STEP 2.1: The Sex Discrimination Act

STEP 1: Does the act occur in one of the sphere's we've considered?

- Discrimination is only illegal in specific spheres

Employment

- **S 14:** It is unlawful to discriminate on the grounds of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities: