# CONTENTS

<table>
<thead>
<tr>
<th>Acknowledgements</th>
<th>x</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abbreviations</td>
<td>xi</td>
</tr>
<tr>
<td>Table of cases</td>
<td>xiii</td>
</tr>
<tr>
<td>Table of statutes</td>
<td>xix</td>
</tr>
</tbody>
</table>

## Introduction

<table>
<thead>
<tr>
<th>PART 1</th>
<th>INTRODUCTION</th>
<th>7</th>
</tr>
</thead>
</table>

### 1 Equality, discrimination and law

<table>
<thead>
<tr>
<th>1.1</th>
<th>Introduction: Equality as a fundamental value</th>
<th>10</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.2</td>
<td>Structure of this chapter</td>
<td>13</td>
</tr>
<tr>
<td>1.3</td>
<td>Concepts of equality and discrimination, and the law</td>
<td>14</td>
</tr>
<tr>
<td>1.3.1</td>
<td>Equality</td>
<td>16</td>
</tr>
<tr>
<td>1.3.2</td>
<td>Discrimination</td>
<td>22</td>
</tr>
<tr>
<td>1.4</td>
<td>Discrimination and law</td>
<td>26</td>
</tr>
</tbody>
</table>

### 2 Historical background to anti-discrimination law

<table>
<thead>
<tr>
<th>2.1</th>
<th>Introduction</th>
<th>30</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.2</td>
<td>The United Nations and non-discrimination</td>
<td>30</td>
</tr>
<tr>
<td>2.3</td>
<td>The second strand – the American civil rights movement</td>
<td>33</td>
</tr>
<tr>
<td>2.4</td>
<td>Australian social context</td>
<td>34</td>
</tr>
<tr>
<td>2.5</td>
<td>Development of legislation in Australia</td>
<td>36</td>
</tr>
<tr>
<td>2.6</td>
<td>Australian constitutional context</td>
<td>38</td>
</tr>
<tr>
<td>2.6.1</td>
<td>Commonwealth power to adopt anti-discrimination laws</td>
<td>39</td>
</tr>
<tr>
<td>2.6.2</td>
<td>Section 109: Conflicts between Commonwealth and state laws</td>
<td>40</td>
</tr>
<tr>
<td>2.6.3</td>
<td>Other constitutional aspects: The limits of federal powers</td>
<td>43</td>
</tr>
<tr>
<td>2.7</td>
<td>Development and reform of the law over time</td>
<td>45</td>
</tr>
<tr>
<td>2.8</td>
<td>Conclusion</td>
<td>46</td>
</tr>
</tbody>
</table>

### 3 Basic framework of legislation

<table>
<thead>
<tr>
<th>3.1</th>
<th>Introduction</th>
<th>48</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.2</td>
<td>Choices in designing legislation against discrimination</td>
<td>48</td>
</tr>
<tr>
<td>3.3</td>
<td>Anti-discrimination laws</td>
<td>51</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Prohibiting discrimination</td>
<td>51</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Enforcement and remedies</td>
<td>56</td>
</tr>
<tr>
<td>3.4</td>
<td>Fair Work Act 2009 (Cth)</td>
<td>59</td>
</tr>
<tr>
<td>3.5</td>
<td>Positive duties</td>
<td>61</td>
</tr>
<tr>
<td>3.6</td>
<td>Human rights legislation</td>
<td>61</td>
</tr>
<tr>
<td>3.7</td>
<td>Conclusion</td>
<td>63</td>
</tr>
</tbody>
</table>
## TABLE OF CONTENTS

**PART 2 ANTI-DISCRIMINATION LEGISLATION**

### 4 The attributes

- 4.1 Introduction
- 4.2 Structure and variation across legislation
- 4.3 Formulating and conceptualising attributes
  - 4.3.1 Why these attributes?: Pragmatism and principle
  - 4.3.2 Symmetrical or asymmetrical: Liberal or substantive equality
  - 4.3.3 Terminology: Grounds, attributes, characteristics
  - 4.3.4 Width of protection: The attribute as status, activity, manifestation
  - 4.3.5 Multiple and intersectional discrimination
- 4.4 The attributes
  - 4.4.1 Race and related attributes
  - 4.4.2 Sex and related attributes
  - 4.4.3 Disability
  - 4.4.4 Other attributes
- 4.5 Conclusion: The way forward

### 5 Prohibited conduct

- 5.1 Introduction
- 5.2 Discrimination
  - 5.2.1 Direct discrimination
  - 5.2.2 Indirect discrimination
- 5.3 Reasonable adjustments
- 5.4 Disability standards and action plans
- 5.5 Harassment
- 5.6 Vilification
- 5.7 Associated prohibitions
  - 5.7.1 Accessory liability
  - 5.7.2 Advertising
  - 5.7.3 Seeking information
  - 5.7.4 Victimisation
- 5.8 Conclusion

### 6 Areas

- 6.1 Introduction
- 6.2 General scope of prohibition on discrimination
- 6.3 Specific areas in which discrimination is prohibited
  - 6.3.1 Work
  - 6.3.2 Education
  - 6.3.3 Goods and services
  - 6.3.4 Other areas
6.4 Harassment prohibitions and exceptions 154
6.5 Common exceptions and defences 155
   6.5.1 Reasonableness 156
   6.5.2 Special measures 156
   6.5.3 Statutory authority 157
   6.5.4 Religious beliefs 157
   6.5.5 Unjustifiable hardship 160
   6.5.6 Work exceptions 161
   6.5.7 Other categories of exceptions 163
   6.5.8 Temporary exemptions 164
6.6 Types of liability 165
   6.6.1 Personal liability 165
   6.6.2 Vicarious or attributed liability 166
   6.6.3 All reasonable steps defence 167
6.7 Distinctive features of the Racial Discrimination Act 169
6.8 Conclusion 172

7 Making rights effective: Institutions, procedures and remedies 173
   7.1 Introduction 174
   7.2 Processes and institutions of enforcement 175
      7.2.1 Making a complaint 178
      7.2.2 Time limits 179
      7.2.3 Choosing which avenue to pursue 180
   7.3 Investigation and conciliation of complaints 183
      7.3.1 Confidentiality of conciliation 186
      7.3.2 After conciliation 187
   7.4 Adjudication 188
      7.4.1 Applying to a court or tribunal 188
      7.4.2 Interim orders and interlocutory proceedings 190
      7.4.3 Mediation 190
      7.4.4 Procedure and evidence at adjudication 191
      7.4.5 Proof 191
      7.4.6 Access to legal representation and the role of agencies 193
      7.4.7 Remedies 194
      7.4.8 Costs and the risks of litigation 196
   7.5 Evaluating enforcement 199
   7.6 Conclusion 200

PART 3 ALTERNATIVE APPROACHES AND OPTIONS 201

8 Positive action 203
   8.1 Introduction: What is positive action? 204
   8.2 When is positive action allowed? 207
# Table of Contents

8.2.1 Tests for special measures 209
8.2.2 Illustration using SDA 212
8.2.3 Distinctive approach of the RDA 214

8.3 When is positive action required? 218
  8.3.1 *Workplace Gender Equality Act (WGE Act)* 219
  8.3.2 Public service duties 223

8.4 Conclusion 224

9 Employment discrimination and the *Fair Work Act* 226
  9.1 Introduction 227
  9.2 Background: *Fair Work Act* and general protections 227
  9.3 Section 351: ‘Discrimination’ 230
    9.3.1 Which employees are covered? 231
    9.3.2 Attributes 231
    9.3.3 What is prohibited by s 351? 232
    9.3.4 Exceptions to s 351(1) 241
    9.3.5 Exercising a workplace right 243

  9.4 Enforcement 244
    9.4.1 Who can take enforcement action? 244
    9.4.2 Dispute resolution processes 245
    9.4.3 Sanctions 246

  9.5 Interaction with awards/agreements 246
  9.6 Conclusion 247

10 Government action to advance equality: Human rights and positive measures 249
  10.1 Introduction 250
  10.2 Protecting equality through bills of rights 250
  10.3 Constitutional context 251
    10.3.1 Constitutional bills of rights 252
    10.3.2 Constitutional or statutory bills of rights 254
    10.3.3 Constitutional rights protection in Australia 255
    10.3.4 Australia's lack of constitutional protection against discrimination 256

  10.4 Statutory bills of rights and equality protection 257
    10.4.1 The rights protected and their limits 258
    10.4.2 Parliament – making legislation 261
    10.4.3 The courts – interpreting legislation 261
    10.4.4 The Executive – obligations on public authorities 263
    10.4.5 Bringing an action to protect Charter rights 264
    10.4.6 The limits of statutory protection of human rights 266

  10.5 Positive duties 266
  10.6 Procurement – the executive power 268
  10.7 Conclusion 270
# 11 Equality rights into the future

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>11.1 Introduction</td>
<td>272</td>
</tr>
<tr>
<td>11.2 What role can and should law play in promoting equality?</td>
<td>273</td>
</tr>
<tr>
<td>11.3 Alternative directions</td>
<td>278</td>
</tr>
<tr>
<td>11.3.1 Unified definition of discrimination</td>
<td>281</td>
</tr>
<tr>
<td>11.3.2 Duty to make reasonable adjustments</td>
<td>284</td>
</tr>
<tr>
<td>11.3.3 Shifting burden of proof</td>
<td>285</td>
</tr>
<tr>
<td>11.3.4 Enabling compliance: Codes of practice or guidelines</td>
<td>287</td>
</tr>
<tr>
<td>11.3.5 Costs</td>
<td>289</td>
</tr>
<tr>
<td>11.3.6 Expanding sanctions and public enforcement powers</td>
<td>289</td>
</tr>
<tr>
<td>11.4 Conclusion</td>
<td>294</td>
</tr>
</tbody>
</table>

**Appendix**

**Index**

295

328