

# CONTENTS

<i>Acknowledgements</i>	x
<i>Abbreviations</i>	<i>xi</i>
<i>Table of cases</i>	<i>xiii</i>
<i>Table of statutes</i>	<i>xix</i>
<b>Introduction</b>	<b>1</b>
<b>PART 1 INTRODUCTION</b>	<b>7</b>
<b>1 Equality, discrimination and law</b>	<b>9</b>
<b>1.1</b> Introduction: Equality as a fundamental value	10
<b>1.2</b> Structure of this chapter	13
<b>1.3</b> Concepts of equality and discrimination, and the law	14
1.3.1 Equality	16
1.3.2 Discrimination	22
<b>1.4</b> Discrimination and law	26
<b>2 Historical background to anti-discrimination law</b>	<b>29</b>
<b>2.1</b> Introduction	30
<b>2.2</b> The United Nations and non-discrimination	30
<b>2.3</b> The second strand – the American civil rights movement	33
<b>2.4</b> Australian social context	34
<b>2.5</b> Development of legislation in Australia	36
<b>2.6</b> Australian constitutional context	38
2.6.1 Commonwealth power to adopt anti-discrimination laws	39
2.6.2 Section 109: Conflicts between Commonwealth and state laws	40
2.6.3 Other constitutional aspects: The limits of federal powers	43
<b>2.7</b> Development and reform of the law over time	45
<b>2.8</b> Conclusion	46
<b>3 Basic framework of legislation</b>	<b>47</b>
<b>3.1</b> Introduction	48
<b>3.2</b> Choices in designing legislation against discrimination	48
<b>3.3</b> Anti-discrimination laws	51
3.3.1 Prohibiting discrimination	51
3.3.2 Enforcement and remedies	56
<b>3.4</b> <i>Fair Work Act 2009</i> (Cth)	59
<b>3.5</b> Positive duties	61
<b>3.6</b> Human rights legislation	61
<b>3.7</b> Conclusion	63

<b>PART 2</b>	<b>ANTI-DISCRIMINATION LEGISLATION</b>	<b>65</b>
<b>4</b>	<b>The attributes</b>	<b>67</b>
4.1	Introduction	68
4.2	Structure and variation across legislation	68
4.3	Formulating and conceptualising attributes	70
4.3.1	Why these attributes?: Pragmatism and principle	71
4.3.2	Symmetrical or asymmetrical: Liberal or substantive equality	76
4.3.3	Terminology: Grounds, attributes, characteristics	78
4.3.4	Width of protection: The attribute as status, activity, manifestation	79
4.3.5	Multiple and intersectional discrimination	84
4.4	The attributes	85
4.4.1	Race and related attributes	86
4.4.2	Sex and related attributes	90
4.4.3	Disability	98
4.4.4	Other attributes	100
4.5	Conclusion: The way forward	102
<b>5</b>	<b>Prohibited conduct</b>	<b>104</b>
5.1	Introduction	105
5.2	Discrimination	105
5.2.1	Direct discrimination	108
5.2.2	Indirect discrimination	118
5.3	Reasonable adjustments	125
5.4	Disability standards and action plans	129
5.5	Harassment	131
5.6	Vilification	134
5.7	Associated prohibitions	137
5.7.1	Accessory liability	137
5.7.2	Advertising	138
5.7.3	Seeking information	139
5.7.4	Victimisation	140
5.8	Conclusion	141
<b>6</b>	<b>Areas</b>	<b>142</b>
6.1	Introduction	143
6.2	General scope of prohibition on discrimination	143
6.3	Specific areas in which discrimination is prohibited	145
6.3.1	Work	145
6.3.2	Education	151
6.3.3	Goods and services	152
6.3.4	Other areas	154

<b>6.4</b>	Harassment prohibitions and exceptions	154
<b>6.5</b>	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
<b>6.6</b>	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
<b>6.7</b>	Distinctive features of the <i>Racial Discrimination Act</i>	169
<b>6.8</b>	Conclusion	172
<b>7</b>	<b>Making rights effective: Institutions, procedures and remedies</b>	<b>173</b>
<b>7.1</b>	Introduction	174
<b>7.2</b>	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
<b>7.3</b>	Investigation and conciliation of complaints	183
7.3.1	Confidentiality of conciliation	186
7.3.2	After conciliation	187
<b>7.4</b>	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
<b>7.5</b>	Evaluating enforcement	199
<b>7.6</b>	Conclusion	200
<b>PART 3</b>	<b>ALTERNATIVE APPROACHES AND OPTIONS</b>	<b>201</b>
<b>8</b>	<b>Positive action</b>	<b>203</b>
<b>8.1</b>	Introduction: What is positive action?	204
<b>8.2</b>	When is positive action allowed?	207

8.2.1	Tests for special measures	209
8.2.2	Illustration using SDA	212
8.2.3	Distinctive approach of the RDA	214
<b>8.3</b>	When is positive action required?	218
8.3.1	<i>Workplace Gender Equality Act (WGE Act)</i>	219
8.3.2	Public service duties	223
<b>8.4</b>	Conclusion	224
<b>9</b>	<b>Employment discrimination and the <i>Fair Work Act</i></b>	<b>226</b>
<b>9.1</b>	Introduction	227
<b>9.2</b>	Background: <i>Fair Work Act</i> and general protections	227
<b>9.3</b>	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
<b>9.4</b>	Enforcement	244
9.4.1	Who can take enforcement action?	244
9.4.2	Dispute resolution processes	245
9.4.3	Sanctions	246
<b>9.5</b>	Interaction with awards/agreements	246
<b>9.6</b>	Conclusion	247
<b>10</b>	<b>Government action to advance equality: Human rights and positive measures</b>	<b>249</b>
<b>10.1</b>	Introduction	250
<b>10.2</b>	Protecting equality through bills of rights	250
<b>10.3</b>	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
<b>10.4</b>	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
<b>10.5</b>	Positive duties	266
<b>10.6</b>	Procurement – the executive power	268
<b>10.7</b>	Conclusion	270

<b>11</b>	<b>Equality rights into the future</b>	<b>271</b>
11.1	Introduction	272
11.2	What role can and should law play in promoting equality?	273
11.3	Alternative directions	278
11.3.1	Unified definition of discrimination	281
11.3.2	Duty to make reasonable adjustments	284
11.3.3	Shifting burden of proof	285
11.3.4	Enabling compliance: Codes of practice or guidelines	287
11.3.5	Costs	289
11.3.6	Expanding sanctions and public enforcement powers	289
11.4	Conclusion	294
	<i>Appendix</i>	295
	<i>Index</i>	328